Humanitarian Intervention at a Crossroads

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HUMANITARIAN INTERVENTION AT A CROSSROADS

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  and 2000, Delegation of the United States to the United Nations Commission for
  Human Rights. The author wishes to thank James Crawford, Georges Abi-Saab, Pauline
  Dessler, and Henry H. Perras, Jr. for comments on an earlier draft. Valuable
  research assistance was provided by Jon Neuleib, Barbara Rutz, and Nancy Tikalski.
  The views expressed herein are solely the author's.

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I am free, shielded from your severities, yet who am I? ... I haven't killed anyone? Not yet to be sure! But have I not let deserving creatures die? Maybe. And maybe I am ready to do so again.

Albert Camus

INTRODUCTION

The 1999 NATO bombing of Yugoslavia was not a typical armed confrontation, and it has raised a challenging set of legal issues. On the day that Operation Allied Force bombing began, NATO Secretary-General Javier Solana claimed the moral high ground when he stated that the goal of the bombing was to "stop further humanitarian catastrophe." Yet unlike the Gulf War,

1. ALBERT CAMUS, THE FALL 95 (Justin O'Brien trans., Alfred A. Knopf, Inc. 1971) (1956). This novel centers on a prominent lawyer whose smug, self-assured world is shattered when he declines to save a drowning woman.


Solana also made the following points concerning the objectives and justifications for the operation:

[W]e are determined to continue until we have achieved our objectives: to
which also involved the use of force on behalf of fundamental principles, the NATO bombing was not authorized by the United Nations Security Council, leaving its legal basis unclear. From the beginning, the NATO Secretary-General was careful to avoid explicitly invoking a right of humanitarian intervention as the legal justification for the mission, and officials in the United States and other NATO countries followed suit. At the same time, NATO leaders made it clear that the moral and political justification for the mission was humanitarian, and no alternative legal justification has been offered so far. Not surprisingly,

halt the violence and to stop further humanitarian catastrophe. Let me emphasise once again that we have no quarrel with the people of Yugoslavia. Our actions are directed against the repressive policies of the Yugoslav government, which is refusing to respect civilized norms of behaviour in this Europe at the end of the 20th century. The responsibility for the current crisis rests with President Milosevic. It is up to him to comply with the demands of the international community.

Id.

3. During the March 25 news conference, the Secretary-General stated:

[T]he NATO countries think that this action is perfectly legitimate and it is within the logic of the UN Security Council and therefore that is why we are engaged in this operation in order not to wage war against anybody but to try to stop the war and to guarantee that peace is a reality for a country that has been suffering from war for many, many years.

Id.

4. At the Berlin Summit of the European Union, only days after the NATO bombing had begun, European leaders defended it in moral, humanitarian, and political terms:

[T]he Prime Minister [Tony Blair] said the Western alliance was taking action "for one very simple reason—to damage Serb forces sufficiently to prevent Milosevic from continuing to perpetuate his vile oppression against innocent Albanian civilians" . . . Gerhard Schroder, the German Chancellor and first German leader to authorise military action since 1945, went on national television saying NATO stood ready “to defend the common, basic values of freedom, democracy and human rights. We cannot allow these values to be trampled under foot less than an hour’s flight from us. . . . Our determination to end the killing in Kosovo is beyond doubt.” The French President, Jacques Chirac, said the air attacks were launched to defend “peace on our soil, peace in Europe.”


5. As he argued before the U.N. General Assembly that the NATO bombing was appropriate, President Clinton seemed rather apologetic in noting that “[i]n the real world, principles often collide and tough choices must be made.” President William Jefferson Clinton, Speech to the 54th United Nations General Assembly (Sept. 21, 1999), in FED. NEWS SERV., Sept. 21, 1999, available in LEXIS, News Library, Fed-
commentators have raised questions concerning the legality of humanitarian intervention despite NATO's careful attempts to skirt the issue.

This Essay argues that, under an appropriate and narrowly defined set of circumstances, acts of forcible humanitarian intervention can indeed be legal, even without the authorization of the Security Council. The principal focus, however, is on the task facing the United States and NATO now that they have invoked this controversial doctrine. Those who rely upon the right of humanitarian intervention have a responsibility to define its legal parameters. Indeed, when a vague doctrine can be invoked by states to justify the use of force, it offers them a license that is subject to abuse. This justification for the use of force is inherently threatening to other states, particularly when those states claiming this license are the most powerful states in the international community. Without clear legal standards to limit it, the practice of humanitarian intervention threatens to undermine the friendly relations among states and could have an adverse impact upon international peace and security.

This Essay uses the term "humanitarian intervention" narrowly to refer to forcible action by a state on the territory of

eral News Service File. He went on to state:

Even in Kosovo, NATO's actions followed a clear consensus, expressed in several Security Council resolutions, that the atrocities committed by Serb forces were unacceptable, that the international community had a compelling interest in seeing them end. Had we chosen to do nothing in the face of this brutality, I do not believe we would have strengthened the United Nations. Instead, we would have risked discrediting everything it stands for. By acting as we did, we helped to vindicate the principles and purposes of the U.N. Charter, to give the U.N. the opportunity it now has to play the central role in shaping Kosovo's future. . . . The outcome in Kosovo is hopeful.

Id.

6. Although the NATO countries have been reluctant to invoke humanitarian intervention as a legal justification for their intervention, they have invoked the doctrine in their political rhetoric. See, e.g., infra notes 23-28 and accompanying text (discussing the "Clinton Doctrine").

7. Ian Brownlie defined "humanitarian intervention" as the "Threat or use of armed force by a state, a belligerent community, or an international organization, with the object of protecting human rights. It must be emphasized that this usage begs the question of legality and stresses function or objective." Ian Brownlie, Humanitarian Intervention, in LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John Norton Moore ed., 1974) [hereinafter LAW AND CIVIL WAR].
another to protect individuals from continuing grave violations of fundamental human rights.\textsuperscript{8} Cases in which the Security Council or local government authorizes the use of force are excluded from this definition because their legality can be established independently of any right of humanitarian intervention.\textsuperscript{9} In most scenarios of humanitarian intervention,\textsuperscript{10} the territorial state’s government either is directly responsible for the violations or has acquiesced in them.\textsuperscript{11}

Although NATO has relied, at least implicitly, upon a right of humanitarian intervention, serious doubts remain regarding both the status of this right under international law and the conditions that would necessarily have to limit it. This confusion stems from the tension between two key aspects of the post-World War II international legal order.

A strict prohibition on the use of force was incorporated into Article 2(4) of the U.N. Charter\textsuperscript{12} as the cornerstone of its strategy

\textsuperscript{8} Fernando Tesón defines humanitarian intervention as “the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.” FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 5 (2d ed. 1997). This definition incorporates much of his test for determining when humanitarian intervention is legal. See id.

\textsuperscript{9} Arend and Beck endorse similar criteria, excluding from the scope of humanitarian intervention any action authorized by the Security Council as well as any action taken pursuant to the invitation of the territorial state. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 128-29 (1993).

\textsuperscript{10} An exception would exist where a weak or nonexistent national government, not complicit in the violations, was unable to stop the violations and yet would not request any outside assistance.

\textsuperscript{11} David Scheffer identifies a classical definition of humanitarian intervention, although he does not endorse it:

The classical definition of “humanitarian intervention” is limited to those instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces.


\textsuperscript{12} “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N.
for promoting order and peace in the international system. The Charter recognizes only two exceptions to this prohibition. The first is that force may be used in self-defense. The second exception applies only when a decision of the Security Council authorizes the use of force to protect or maintain international peace and security. The prohibition, like other parts of the Charter, reinforces the sovereign rights of the state. The Charter also affirms that the United Nations itself lacks the authority to intervene in the domestic jurisdiction of its members. These provisions support the view that state sovereignty should preclude any intrusive international action for the protection of human rights.

On the other hand, the Charter also heralds the emergence of a new international law of human rights that fundamentally challenges the traditional concept of sovereignty. The Charter

CHA 13. Yoram Dinstein takes note of this overall strategy when he stresses that Article 2(4) of the Charter must be read in conjunction with Article 2(3), which prescribes that "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 85-86 (1994).
15. Chapter VII of the Charter states that, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.
16. See, e.g., U.N. CHARTER art. 2, para. 1 (stating that "[t]he Organization is based on the principle of the sovereign equality of all its Members").
17. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. U.N. CHARTER art. 2, para. 7.
18. Michael Reisman argues that international human rights norms are "constitutive norms" in that they imply a radical and qualitative change in international law as a whole. Thus, he sees the need for a process that might be referred to as the "updating contemporization" or actualization of international norms in light of human rights norms. W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT'L L. 866, 873 (1990). He also asserts that "[p]recisely because the human rights norms are constitutive, other norms must be reinterpreted in their light." Id.
states that promoting and encouraging respect for human rights is one of the basic purposes of the United Nations.\textsuperscript{19} Based on this language, human rights have become a matter of international concern and not merely a question within the domestic jurisdiction of states. The concept of an international law of human rights derogates from the absolute concept of state sovereignty and marks a radical departure from the traditional "state-centric" view of international law.\textsuperscript{20}

When the Security Council fails to act to stop a continuing humanitarian crisis, these two basic pillars of the post-World War II legal order come into dramatic conflict.\textsuperscript{21} Humanitarian

\textsuperscript{19} See U.N. CHARTER preamble; id. art. 1, para. 3; id. art. 55.

\textsuperscript{20} The development of international law is still deeply constrained by its "state-centric" origins:

According to the prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states... This is one important sense in which international law is centered on states, or "state-centric." In addition, international law was traditionally thought to create rights and obligations only for states. According to this view international law was a law by and for states, in which the rights of individuals had no place.

An important step beyond state-centrism is implicit in the idea of an international law of human rights, since the rights concerned are those of individuals, or groups of individuals rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty, while traditional "state-centric" approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion. This traditional concept of international law is inherently inadequate to the task of protecting the human rights and fundamental freedoms which the UN system is pledged to promote.


\textsuperscript{21} U.N. Secretary-General Kofi Annan has defined the dilemma of humanitarian intervention in the following terms:

The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority.

It has cast in stark relief the dilemma of so-called "humanitarian intervention." On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in
intervention may be the only way to protect innocent civilian victims from genocide and ethnic cleansing, but recognition of such a right threatens to disable the basic peace strategy of the Charter by undermining the prohibition on the use of force.22 The question of whether forcible humanitarian intervention can ever be considered legal without the authorization of the Security Council therefore remains, and the debate on this issue continues. Regardless of the status of humanitarian intervention under current law, the use of force to assist the Kosovar Albanians has reopened consideration of this issue.

The United States and NATO may not have explicitly claimed a right of humanitarian intervention, but in bombing Yugoslavia they have exercised a prerogative that seems both radical and unprincipled to many outside observers.23 They can and should remedy this situation by clarifying the limits to the right of humanitarian intervention, which they have effectively claimed. Military action to aid the Kosovar Albanians was the right thing to do, but it is unacceptable that no clear legal justification for that operation has been offered.

NATO countries, which generally base their governments upon respect for the rule of law, have in the past been instrumental in clarifying the rules of international law governing war and the use of force.24 They should follow that example now by

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the case of Kosovo can be viewed only as a tragedy.


22. In commenting on this issue, Louis Henkin has noted:

Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other. Human rights, I believe, will have to be vindicated, and other injustices remedied, by other, peaceful means, not by opening the door to aggression and destroying the principal advance in international law, the outlawing of war and the prohibition of force.


23. Speaking about how much of the rest of the world reacted to the Kosovo mission, one commentator noted: “For the millions, or billions, who directly or indirectly witnessed the Kosovo campaign, it provided a terrifying display of what seemed unaccountable power in the service not of humanity, but merely of the United States and its allies.” William Pfaff, *Luck Enabled NATO to Win Its Anti-heroic War*, INT'L HERALD TRIB., July 8, 1999, at 8, available in 1999 WL 5112407.

24. *See infra* notes 93-135 and accompanying text.
leading efforts to codify the law of humanitarian intervention as it is emerging at the dawn of the twenty-first century.

I. INTERNATIONAL LAW DOCTRINES

A. Emerging Outlines of the Clinton Doctrine

The first basic statement of the policy sometimes referred to as the “Clinton Doctrine” came in a speech President Clinton gave to K.F.O.R. troops in Macedonia in June 1999. In this speech, President Clinton noted:

So the whole credibility of the principle on which we have stood our ground and fought in this region for years and years now—that here, just like in America, just like in Great Britain, people who come from different racial and ethnic and religious backgrounds can live together and work together and do better together if they simply respect each other’s God-given dignity—and we don’t want our children to grow up in a 21st century world where innocent civilians can be hauled off to the slaughter, where children can die en masse, where young boys of military age can be burned alive, where young girls can be raped en masse just to intimidate their families—we don’t want our kids to grow up in a world like that . . .

. . . .

It is not free of danger, it will not be free of difficulty. There will be some days you wish you were somewhere else. But never forget if we can do this here, and if we can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it’s within our power to stop it, we will stop it.25

The President later confirmed that, in his view, a new “Clinton Doctrine” was emerging.26 The scope and applicability

26. President Clinton seemed to confirm that there was a “Clinton Doctrine” when asked directly about the matter by Wolf Blitzer of CNN:

Q: Mr. President, some of your aides are now talking about a Clinton
of the doctrine clearly needs further elucidation, but some of the general outlines have begun to emerge. National Security Advisor Sandy Berger has identified three criteria for the application of this new policy: first, there must be genocide or ethnic cleansing; second, the United States must have the capacity to act; and third, the United States must have a national interest at stake. Despite the sweeping language of the President's initial statement, it is clear that the United States is not committing itself to intervene in every situation. At best, humani-

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doctrine in foreign policy in the aftermath of this war against Yugoslavia.
Is there, in your mind, a Clinton doctrine?
THE PRESIDENT: Well, I think there's an important principle here that I hope will be now upheld in the future and not just by the United States, not just by NATO, but also by the leading countries of the world, through the United Nations. And that is that while there may well be a great deal of ethnic and religious conflict in the world—some of it might break out into wars—that whether within or beyond the borders of a country, if the world community has the power to stop it, we ought to stop genocide and ethnic cleansing. People ought—in innocent civilians ought not to be subject to slaughter because of their religious or ethnic or racial or tribal heritage.

That is what we did, but took too long in doing, in Bosnia. That is what we did, and are doing, in Kosovo. That is, frankly, what we failed to do in Rwanda, where so many died so quickly—and what I hope very much we'll be able to do in Africa, if it ever happens there again.

*Interview with Wolf Blitzer of Cable News Network's "Late Edition" in Cologne, 35 Weekly Comp. Pres. Doc. 1143, 1146 (June 20, 1999).*

27. When National Security Advisor Sandy Berger was asked if there is a Clinton Doctrine, he replied:

> I instinctively resist doctrine, but I think it is a principle that we have established in Kosovo: There are some activities that governments engage in, such as genocide or ethnic cleansing, that we cannot ignore. That doesn't necessarily mean we have a military response in every situation. We have to have the capacity to act, as the president has indicated.

In Kosovo, we had a national interest as well: 1.6 million refugees awash in Southeastern Europe is inherently unstable. There's no question in my mind that it would have destabilized Albania, Macedonia, perhaps Hungary, and we would have had a wider war in Europe. We would have been faced with a bigger mess that we would have had to deal with later this year or next year. Where there is genocide or ethnic cleansing, where we have the capacity to act as we did here with NATO, where we have a national interest, I believe we should act.

*Doyle McManus, Samuel Berger: In a Domestic President's Foreign Service, a Middleman Emerges, LA. Times, July 25, 1999, at M3.*

28. In his address to the United Nations a few months after the NATO bombing, President Clinton stressed that states would evaluate their own national interests in
tarian intervention will remain an extraordinary practice to be used only in special cases.

B. Foreign Policy Doctrines and International Law

The Kosovo bombing has raised not only an issue of U.S. foreign policy, but also a very fundamental issue of public international law. The viability of the Clinton Doctrine as a long-term U.S. policy may be largely determined by domestic political considerations in this country, but the rules of international law governing humanitarian intervention cannot be determined unilaterally by the United States or even by all the NATO states together. That being said, the United States can and should take the lead in clarifying this area of law for the future.

The idea of a “Clinton Doctrine” can best be appreciated in the context of the many foreign policy doctrines that preceded it. The best known of all U.S. foreign policy doctrines is the Monroe Doctrine. In 1823, U.S. President James Monroe declared to the European powers that the United States would treat any

deciding when and where to intervene. Specifically, President Clinton commented:

[T]he way the international community responds will depend upon the capacity of countries to act and on their perception of their national interests. NATO acted in Kosovo, for example, to stop a vicious campaign of ethnic cleansing in a place where we had important interests at stake and the ability to act collectively. The same consideration brought Nigerian troops and their partners to Sierra Leone and Australians and others to East Timor. That is proper so long as we work together, support each other, and do not abdicate our collective responsibility.

I know that some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world. We cannot do everything everywhere.

Clinton, supra note 5.

29. It remains to be seen whether NATO's Kosovo policy and President Clinton's words will achieve lasting status even as political doctrine. Public opinion in the United States will be a major factor because a politically unpopular doctrine will not be sustainable. In this sense, the results of the next presidential election will be quite important. If the next U.S. President endorses a version of this doctrine, it will have a much stronger chance of becoming established. The doctrine, however, may be finished if the next President rejects it. See, e.g., Francine Kiefer, Clinton Doctrine: Is It Substance or Spin?, CHRISTIAN SCI. MONITOR, June 28, 1999, § USA, at 2. Kiefer asks rhetorically, “does this post-cold-war tenet have staying power? Will it influence future leaders? Or is it, as former Clinton Chief of staff Leon Panetta worries, just another ‘message of the day’ churned out by the White House spin machine?” Id.
reextension of European colonial power into the Americas as a threat to the interests of the United States. This doctrine was articulated as a statement of U.S. interests and policy and did not purport to represent a statement of international law, but it served to shield the newly independent Latin American states from European interference. The Monroe Doctrine has developed into a cornerstone of U.S. foreign policy. Almost a century later, President Theodore Roosevelt's "corollary" to the Monroe Doctrine claimed for the United States the right to intervene in the internal affairs of Latin American states. Political doctrines come and go, and they can serve to promote international law, as did the Truman Doctrine, or to undermine it, as did the

30. In the words of President Monroe:
   With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.


32. See id. at 26.

33. President Truman launched the Truman Doctrine in 1947 when he spoke of the need to aid free peoples resisting communist subversion:
   At the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one.

   One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression.

   The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms.

   I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.
Roosevelt corollary. Depending upon how clearly and honestly it is defined, a Clinton Doctrine of humanitarian intervention might fall into either category.

The counterintervention policy, sometimes referred to as the "Reagan Doctrine," stopped far short of armed humanitarian intervention, although it too was based on claims of moral legitimacy.\textsuperscript{34} Supporters of the Reagan Doctrine were careful to distinguish it from the discredited Brezhnev Doctrine.\textsuperscript{35} Nonethe-

I believe that we must assist free peoples to work out their own destinies in their own way.

I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.

The world is not static, and the status quo is not sacred. But we cannot allow changes in the status quo in violation of the Charter of the United Nations by such methods as coercion, or by such subterfuges as political infiltration. In helping free and independent nations to maintain their freedom, the United States will be giving effect to the principles of the Charter of the United Nations....

The seeds of totalitarian regimes are nurtured by misery and want. They spread and grow in the evil soil of poverty and strife. They reach their full growth when the hope of a people for a better life has died.

We must keep that hope alive.

The free peoples of the world look to us for support in maintaining their freedoms.

If we falter in our leadership, we may endanger the peace of the world—and we shall surely endanger the welfare of this Nation.

President Harry S. Truman, Special Message to the Congress on Greece and Turkey: The Truman Doctrine, PUB. PAPERS 176, 178-80 (1963).

34. Jeane Kirkpatrick has described this doctrine as follows:
The Reagan Doctrine, as we understand it, is above all concerned with the moral legitimacy of U.S. support—including military support—for insurgencies under certain circumstances: where there are indigenous opponents to a government that is maintained by force, rather than popular consent; where such a government depends on arms supplied by the Soviet Union, the Soviet bloc, or other foreign sources; and where the people are denied a choice regarding their affiliations and future. The Reagan Doctrine supports the traditional American doctrine that armed revolt is justified as a last resort where rights of citizens are systematically violated. This view is, of course, stated clearly in the Declaration of Independence, which insists that legitimate government depends on the consent of the governed.


35. Kirkpatrick and Gerson further noted:
less, the legitimacy of the Reagan Doctrine was questioned often, especially after the International Court of Justice (ICJ) condemned U.S. support of the Nicaraguan Contras in the Nicaragua decision. In that decision, the ICJ concluded, on the basis of customary international law, that United States military and paramilitary activities in support of the Contras constituted an illegal intervention, an illegal use of force, and a violation of Nicaragua's territorial sovereignty. Presidents generally formu-

The charge that the Reagan Doctrine comes close to being interchangeable with the Soviet doctrine of national liberation is baseless. The latter countenances expansion of Soviet power. The Reagan Doctrine permits assistance in self-defense. The Brezhnev Doctrine preserves foreign influence. The Reagan Doctrine restores self-government. It countenances counter-intervention, not intervention. The Reagan Doctrine is not a "roll-back," but it is a cousin to that idea.

Id. at 31.

36. Louis Henkin made the following critical observations:

Whatever its domestic appeal, the "Reagan policy" as commonly understood, is untenable in law, and the United States cannot lawfully pursue it. It may be permissible to intervene by limited force strictly for the purpose of protecting and liberating hostages when the territorial state is unable or unwilling to protect or liberate them; it is not permissible to overthrow a government to that end—as Vietnam did in Cambodia, and the United States in Grenada. . . . It is not permissible under the Charter to use force to impose or secure democracy; nor does the Charter contain a Monroe Doctrine exception that would permit the United States to use force to keep the Western Hemisphere free of communism. In the Nicaragua case, the International Court of Justice rejected the "Reagan policy," as it had the Brezhnev Doctrine.


37. Jurisdictional limitations precluded the ICJ from applying the U.N. Charter and other multilateral treaties. The ICJ therefore based its entire decision upon the application of customary international law. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 (June 27). Some commentators strongly criticized this jurisdictional aspect of the decision. For example, John Norton Moore commented:

The majority of the Court was also wrong in assuming jurisdiction in this case. Once the majority admitted that the U.S. multilateral treaty reservation was applicable, as it did, the ineluctable conclusion was that the Court had no jurisdiction. The majority's subsequent effort to exercise jurisdiction in the face of such a manifest absence of jurisdiction is a classic example of excès de pouvoir, depriving the opinion of any legal effect.


38. See Military and Paramilitary Activities, 1986 I.C.J. at 146-47.
late foreign policy doctrines based upon considerations of the national interest, but when these doctrines involve the use of force, issues of international law are also relevant.

II. HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW

Debating the legality of humanitarian intervention is difficult because to do so involves setting priorities between different rules and principles of international law. The conflict between the values of state sovereignty and human rights is a familiar one, but any discussion of humanitarian intervention must also try to reconcile two types of human rights: those of the victims one might hope to protect through intervention on the one hand, and the collective human right of self-determination, which is a corollary of the principle of nonintervention, on the other. When a state asserts its right to be free from foreign intervention, it may claim, at least in part, to be asserting the collective right of its people to determine their own political destiny.

A. The Case for a Limited Right of Humanitarian Intervention

The argument for humanitarian intervention assumes that, at least in appropriate cases, the protection of human rights is a higher priority than the defense of national sovereignty from armed intrusion. It follows that when the human rights situation is serious enough, the proportionate use of armed force to remedy this problem should be legal. Article 2(4) of the U.N. Charter prohibits the use of force only "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." It therefore can be argued that the Charter allows the use of force to halt massive violations of human rights, as long as the prohibited purposes listed are not also involved. This approach is particularly attractive from the humanitarian perspective insofar as it might help to remedy the inability of international

40. U.N. Charter art. 2, para. 4.
41. Dinstein notes that "[t]here is admittedly strong doctrinal support" for this approach. Dinstein, supra note 13, at 89.
law and institutions to take action against even the most serious international crimes, such as genocide.

The rules prohibiting genocide and crimes against humanity are peremptory norms from which, in theory at least, no derogation is permitted.\(^{42}\) What then is to be done when widespread violations occur and the territorial state is either unwilling or unable to prevent them? If diplomatic initiatives fail, military intervention may be the only way to prevent the continuing slaughter of innocents.

There is some authority for the view that customary international law had recognized a right of humanitarian intervention before the U.N. Charter.\(^{43}\) If so, why should the Charter, which was supposed to be a step forward for human rights, be allowed to reduce the options available for the vindication of those rights? Under the Charter, armed action to protect human rights could be authorized by decision of the Security Council.\(^{44}\) This theoretical possibility, however, is not enough to fulfill the promise of international human rights. From the humanitarian perspective, the critical issue is whether the Charter regime provides an adequate Security Council response to critical humanitarian situations.

The view that the Charter provides an adequate response suffers from a “credibility gap”\(^{45}\) because the Charter has failed to deliver on its promise\(^{46}\) to provide a multilateral solution to

\(^{42}\) These prohibitions may have achieved the status of \textit{jus cogens}, that is, the most peremptory norms of international law from which no derogation is permitted. See \textit{Ian Brownlie, Principles of Public International Law} 515 (6th ed. 1998).

\(^{43}\) Tesón concludes “that there is considerable authority for the proposition that the right of humanitarian intervention was a rule of customary [international] law prior to the adoption of the United Nations Charter.” \textit{Tesón, supra} note 8, at 155; \textit{see also Ian Brownlie, International Law and the Use of Force by States} 338 (1963) (“By the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention . . . existed.”).

\(^{44}\) The Security Council can authorize the use of force if it deems this necessary to maintain or restore international peace and security. See U.N. \textit{CHARTER} arts. 39-42.


\(^{46}\) U.N. Secretary-General Kofi Annan has criticized the Security Council’s failure
serious international problems.\textsuperscript{47} One author, who concedes that the Charter was intended to prohibit humanitarian intervention, has argued that the failure of the Charter regime to operate in practice now justifies a "realistic" interpretation recognizing humanitarian intervention as an exception to the prohibition on the use of force.\textsuperscript{48}

\section*{B. The Case Against Humanitarian Intervention}

The legal case against recognition of even a conditional legal right of humanitarian intervention is easily made. It begins with

to uphold its responsibilities under the U.N. Charter and lamented a possible loss of the United Nation's credibility. He has stated:

[In cases where forceful intervention does become necessary, the Security Council—the body charged with authorising the use of force under international law—must be able to rise to the challenge. The choice must not be between council unity and inaction in the face of genocide—as in the case of Rwanda—and council division, but regional action, as in the case of Kosovo. In both cases, the UN should have been able to find common ground in upholding the principles of the charter, and acting in defence of our common humanity.

As important as the council's enforcement power is its deterrent power, and unless it is able to assert itself collectively where the cause is just and the means available, its credibility in the eyes of the world may well suffer. If states bent on criminal behaviour know that frontiers are not an absolute defence—that the council will take action to halt the gravest crimes against humanity—then they will not embark on such a course assuming they can get away with it. The charter requires the council to be the defender of the "common interest." Unless it is seen to be so—in an era of human rights, interdependence and globalisation—there is a danger that others will seek to take its place.

Annan, \textit{supra} note 21, at 50.

\textsuperscript{47} As Wolfgang Friedmann put it, "the inability of the UN, as at present organised, to act swiftly has handed the power of decision back to the national states." \textsc{Wolfgang Friedmann}, \textsc{The Changing Structure of International Law} 259 (1964).

\textsuperscript{48} The argument against a right of humanitarian intervention is based primarily on an absolute interpretation of the article 2(4) prohibition on the use of force and the fear of abusive invocation of the doctrine. The reality of current state practice, however, has rendered the absolute prohibition of the Charter meaningless. Thus, there exists a compelling need for a contemporary and realistic interpretation of article 2(4) based on state practice that recognizes an exception to the Charter prohibition when force is required to prevent mass slaughter.

the principle of nonintervention, which generally bars forcible intervention by one state upon the territory of another. The right of self-defense and, occasionally, the right of reprisal have been recognized as exceptions to this prohibition, but claims to a right of humanitarian intervention have never achieved the same degree of acceptance by the international community.

The U.N. Charter codifies a new and stricter regime limiting the use of force. It prohibits the threat or use of force against the territorial integrity or political independence of states and recognizes only the two exceptions discussed above. The Charter does not recognize any right to use force to protect human rights, except insofar as this may be decided upon and authorized by the Security Council. Regional action is no exception to this rule. Article 53(1) of the Charter specifically provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." Even the right of reprisal, which had achieved general acceptance prior to the creation of the United Nations, has only a doubtful status under the Charter regime.

Then there is the problem of authorizing a multilateral humanitarian action. The U.N. Charter is based on a universal vision shared by its founders: a vision of a peaceful and stable

49. As Brownlie notes, "a state using force on the territory of another, without the license of the effective government, has a burden of justification to discharge, since it is presumptively a tresspasser." Brownlie, supra note 7, at 221.
50. The International Court of Justice has condemned intervention in the following terms:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. . . . Between independent States, respect for territorial sovereignty is an essential foundation of international relations.

51. See U.N. CHARTER art. 2, para. 4.
52. See supra text accompanying notes 14-15.
53. "[I]t is extremely doubtful if this form of intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in the United Nations Charter." BROWNLE, supra note 43, at 342 (footnote omitted).
54. U.N. CHARTER art. 53, para. 1.
55. See infra notes 170-80 and accompanying text.
world that they hoped to achieve. The basic peace strategy of the Charter was to prohibit the use of force by states and to entrust responsibility for international peace and security to the Security Council.\textsuperscript{56} Unfortunately, the Security Council can fulfill this responsibility only when there is a consensus for action among its permanent members.

Many commentators and states have rejected the idea that international law permits humanitarian intervention without the authorization of the Security Council.\textsuperscript{57} As recently as 1986, an official policy statement of the British Foreign Office found little evidence of state practice supporting a right of humanitarian intervention and strong reasons to reject any move towards recognition of such a right. The British Foreign Office stated:

\[T\]he overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation. . . . In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.\textsuperscript{58}

\textsuperscript{56} In commenting on the basic strategy of the U.N. Charter, Oscar Schachter has noted:

\begin{quote}
When the United Nations (UN) Charter was adopted, it was generally considered to have outlawed war. States accepted the obligation to settle all disputes by peaceful means and to refrain from the use or threat of use of force in their international relations. . . . These provisions were seen by most observers as the heart of the Charter and the most important principles of contemporary international law.
\end{quote}


\textsuperscript{57} For example, Ian Brownlie has noted, "[i]t is clear to the present writer that a jurist asserting a right of forcible humanitarian intervention has a very heavy burden of proof. Few writers familiar with the modern materials of state practice and legal opinion on the use of force would support such a view." Brownlie, \textit{supra} note 7, at 218.

\textsuperscript{58} \textit{United Kingdom Foreign Policy Document No. 148}, 57 BRITISH Y.B. INT'L L.
Many small, militarily weak, nondemocratic or nonwestern states are concerned that they might be potential targets of humanitarian intervention. These states tend to believe that their sovereignty depends upon a strict interpretation of Article 2(4), which precludes any possibility of humanitarian intervention without the authorization of the Security Council.\(^59\) Humanitarian intervention is controversial not only due to doubts about its legality, but also because there are usually so many unanswered questions concerning the popular will of the local people, the level of atrocities that warrant intervention, and the possible ulterior motives of the intervening state.\(^60\) Reisman notes that “[t]he most satisfactory solution to this problem is the creation of centralized institutions, equipped with decision-making authority and the capacity to make it effective.”\(^61\) Although new and improved international institutions may not be on the horizon,\(^62\) the Security Council has at times acted more assertively and effectively since the end of the Cold War.\(^63\)

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614, 619 (1986) [hereinafter Foreign Policy Document No. 148].

59. As Schachter notes:
   Many governments attach importance to the principle that any forcible incursion into the territory of another State is a derogation of that State’s territorial sovereignty and political independence, irrespective of the motive for such intervention or its long-term consequences. Accordingly, they tend to hold to the sweeping prohibition of Article 2(4) against the use or threat of force except where self-defense or Security Council enforcement action is involved.


60. See Foreign Policy Document No. 148, supra note 58, at 618-19; Reisman, supra note 18, at 875.

61. Reisman, supra note 18, at 875.


63. Mary Ellen O’Connell argues that the Security Council has already ended its experiment with humanitarian intervention:
   For a short while, from 1991 until 1994, it appeared that a majority of Security Council members had re-interpreted the Charter’s order of priorities. To some, it seemed that the Council had placed such values as human rights, self-determination, and even democracy above the value of
C. Legal Justifications Given in Practice for Forcible Acts of Humanitarian Intervention

Since the U.N. Charter entered into force, there have been several cases in which armed intervention has been used for arguably humanitarian purposes. The intervening power has not relied legally upon a right of humanitarian intervention in any of these cases. Rather, in most such cases, the intervening state invoked the right of self-defense and claimed that it provided the legal authority for the state's actions. Louis Henkin cites the Israeli raid on Entebbe airport in Uganda as the "paradigmatic" case of humanitarian intervention. In the context of that incident, however, the Israeli government avoided reliance upon this doctrine, arguing instead that the military operation to protect Israeli nationals was justified as an act of self-defense. Given the general doubts regarding the legality of humanitarian intervention, a state's use of force to protect its own nationals has been easier to justify as an exercise of the peace through respect for State autonomy. A careful examination does not support the conclusion that the Security Council accomplished a real reordering. However, to the extent that Security Council members may have moved away from the traditional interpretation of the Charter, they have now returned. The experiment with re-ordering priorities has ended. Peace through respect for State autonomy has again, for better or worse, returned as the primary value.


64. Several such cases are catalogued in AREND & BECK, supra note 9, at 114-28, and TÉSÓN, supra note 8, at 155-200.

65. As one study of this state practice explains:

To be sure, when taking up arms, intervening states have often denounced large-scale violations of human rights in their target states: for example in East Pakistan, Kampuchea, Uganda, and Grenada. Nevertheless, they have almost invariably taken care not to submit explicit "humanitarian intervention" justifications for their recourses to armed force.

AREND & BECK, supra note 9, at 129.

66. Henkin, supra note 36, at 41.

right of self-defense.\textsuperscript{68} Even in the rare cases of military intervention to protect the human rights of nonnationals, such as the Indian invasion of East Pakistan in 1971\textsuperscript{69} and Tanzania’s invasion of Uganda in 1979,\textsuperscript{70} the intervening states preferred to rely upon the more established right of self-defense.\textsuperscript{71}

When the United States, United Kingdom, and France established “no-fly” zones in northern and southern Iraq, they claimed that the action was for the humanitarian purpose of protecting the Kurdish and the Shiite minorities from repression; the doctrine of humanitarian intervention, however, was never invoked

\textsuperscript{68} The late Wolfgang Friedmann wrote of “[t]he conditions under which a state may be entitled, as an aspect of self-defense, to intervene in another state, in order to protect its nationals from injury . . . .” Wolfgang Friedmann, \textit{United States Policy and the Crisis of International Law}, 59 AM. J. INT’L L. 857, 867 n.10 (1965). More recently, Oscar Schachter noted:

Reliance on self-defence as a legal ground for protecting nationals in emergency situations of peril probably reflects a reluctance to rely solely on the argument of humanitarian intervention as an exception to Article 2(4) or on the related point that such intervention is not ‘against the territorial integrity or political independence’ of the territorial State and that it is not inconsistent with the Charter.

Schachter, \textit{supra} note 59, at 148.

\textsuperscript{69} Fernando Tesón sees the Indian intervention in East Pakistan as a good example of humanitarian intervention. He argues that “[h]umanitarian intervention is the best interpretation we can provide for the Bangladesh war. That reading puts the incident in its best light under both principles of international law and elementary moral commitments to human dignity.” \textit{TESÓN, supra} note 8, at 208. His claim that “India did articulate humanitarian reasons as justification for her military action” focuses only on India’s statement of its \textit{motive} for intervention. \textit{Id.} at 207. He cites no evidence that India invoked humanitarian intervention as a \textit{legal} justification. \textit{See id.}

\textsuperscript{70} Thousands of Tanzanian troops invaded Uganda in 1979. This invasion markedly improved the human rights situation in Uganda. This was accomplished, however, by completely replacing the unspeakably brutal regime of Idi Amin. This broader political objective would be difficult to justify under a right of humanitarian intervention. For more discussion of the need to avoid pretextual interventions, see infra notes 162-67 and accompanying text.

\textsuperscript{71} According to the British Foreign Office:

The two most discussed instances of alleged humanitarian intervention since 1945 are the Indian invasion of Bangladesh in 1971 and Tanzania’s “humanitarian” invasion of Uganda in 1979. But, although both did result in unquestionable benefits . . . [India and Tanzania] were reluctant to use humanitarian ends to justify their invasion of a neighbour’s territory. Both preferred to quote the right to self-defence under Article 51.

\textit{Foreign Policy Document No. 148, supra} note 58, at 619.
as a legal justification. Instead, these three permanent members of the Security Council argued that the action was legally justified because it was taken pursuant to Security Council Resolution 688. This resolution condemns Iraqi repression as a threat to international peace and security, but no Security Council resolution ever mentions the “no-fly” zones, and none authorizes the use of force that those zones entail.

Resolution 688 merely appeals to all member states and humanitarian organizations to contribute to humanitarian relief efforts. It certainly does not amount to a Security Council authorization of forcible humanitarian intervention. Nonetheless, some find an authorization of the use of force in even this weak language, and key members of the Security Council have treated it as such. Nine years later, allied patrols are still destroying Iraqi fixed-wing planes flying in these zones, as well as Iraqi radar installations that threaten allied planes within the zones. It strains credibility to argue that this continuing use of force is justified by Resolution 688. Instead, the United States, British, and French governments might have been better served by invoking the concept of humanitarian intervention.


73. The resolution uses strong language in stating that the Security Council, “condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region.” Id. operative ¶ 1, at 560.

74. The closest Resolution 688 comes to authorizing any action by the allied powers to aid the Kurds is when it “[a]ppeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.” Id. operative ¶ 6, at 580 (emphasis omitted).

75. David Scheffer is among those who argue that Resolution 688 established “a right to interfere on Iraqi territory for humanitarian purposes.” David J. Scheffer, Use of Force After the Cold War: Panama, Iraq, and the New World Order, in RIGHT V. MIGHT, supra note 34, at 145.

76. Soon after the resolution was adopted, British Prime Minister John Major publicly expressed his humanitarian concern about the treatment of Iraqi Kurds. See Craig R. Whitney, When Empires Fall, Not Everyone Emerges with a State of His Own, N.Y. TIMES, Apr. 14, 1991, at E22. Following his lead, the United States and France joined the United Kingdom in establishing “safe haven” zones of refuge for the Kurds in northern Iraq. See id.


78. David Scheffer has recognized that “[i]ndeed the intervention was the right ac-
The NATO countries have avoided specifics as to the legal justification for the bombing on behalf of Kosovar Albanians, but what little they have said is consistent with the cases discussed immediately above in which other doctrines were invoked. Following the pattern of interventions such as those in East Pakistan, the rescue at Entebbe airport, and Tanzania’s action to remove Idi Amin from power in Uganda, statements by some NATO leaders seem to suggest that the operation might be justified as a form of extended self-defense. NATO Secretary-General Solana’s suggestion that the NATO action was legal because it was “within the logic of the U.N. Security Council attempts, as in the case of the Iraqi “no-fly” zones, to claim a multilateral authorization by the Security Council where none actually existed.

What does this confusing body of state practice tell us about the law of humanitarian intervention? Cross-cutting conclusions can be drawn. This practice strongly suggests that no formal right of humanitarian intervention has been recognized in the Charter era. If states believed that international law recognized such a right, surely they would have invoked it in at least one of the cases referred to above. Conversely, the frequent practice of what might be classified as humanitarian intervention, even in the absence of a recognized right to do so, suggests the need for a single legal doctrine that could distinguish between the best, and the worst, cases of forcible humanitarian intervention.

D. Should a Constitutional Theory of Interpretation Apply?

One possible way to reconcile a right of humanitarian intervention with the terms of the Charter is through a dynamic “constitutional” approach to its interpretation. The U.N. Charter

tion but for the wrong reason. The Bush administration would have been more honest if it had invoked the broad view of humanitarian intervention—controversial though it may be . . . .” Scheffer, supra note 75, at 146-47.

79. When Gerhard Schroder, the German chancellor, says NATO is ready “to defend the common, basic values of freedom, democracy and human rights” and French President Jaques Chirac describes the operation as one to defend “peace on our soil, peace in Europe,” they seem to be claiming implicitly that the bombing was an action taken in self-defense. Castle & Brown, supra note 4, at 2.

is sometimes said to have a constitutional character, recognized by Judge Alvarez's opinion in the Admission case. That opinion refers to the U.N. Charter as "the constitution of the United Nations" and as "the constitutional Charter." In one notable passage, Judge Alvarez asserted:

The preparatory work on the constitution of the United Nations Organization is of but little value. Moreover, the fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.

As this passage demonstrates, Judge Alvarez argued that, in appropriate cases, the United Nations should be independent and dynamic enough to transcend the original intention of the states that founded it. Presumably, he considered this characteristic to be exclusive to treaties constituting international institutions. His opinion makes no secret of his desire to see the court become involved in the progressive development of international law, and in many ways it goes well beyond generally accepted doctrines. Nonetheless, the argument that constitutive treaties should be interpreted in a somewhat special manner is difficult to dismiss.

Judge Alvarez cited and built upon the U.S. Supreme Court's well-known formulation of this idea in the 1920 case, Missouri v. Holland. In Holland, Justice Holmes observed that "when we

82. Id. at 68.
83. See id. at 67.
84. Judge Alvarez concluded that "the Constitutional Charter cannot be interpreted according to strictly legal criterion; another and broader criterion must be employed and room left, if need be, for political considerations." Id. at 70; see also id. at 69 (stating that "the traditionally juridical and individualistic conception of law is being progressively superseded" by a international law that is not only juridical but also "political, economic, social and psychological"). Judge Alvarez refers to this new law as the "law of social interdependence," and this reference bears more than a passing resemblance to the late Wolfgang Friedmann's "international law of co-operation." FRIEDMANN, supra note 47, at 61-64.
85. 252 U.S. 416 (1920).
are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.\textsuperscript{86}

Inis Claude, Jr., in his discussion of the constitutional problems of the United Nations, also focused on the need for constitutions to develop and evolve in response to new realities. Making careful use of the analogy between the U.S. Constitution and the U.N. Charter, he concluded that "even though the problem of constitutional relationships starts as a problem of interpretation, it ends as a problem of development."\textsuperscript{87} He continued by noting that:

Sound constitutional interpretation, in international organization as in national government, balances insistence upon the legally formulated consensus of the past, awareness of the political configuration of the present, and consciousness of the community's requirements and demands for the future. This is not an easy stunt to perform in the United States, and it is immensely more difficult in the United Nations.\textsuperscript{88}

To some who reject the application of constitutional concepts to intergovernmental organizations (IGOs), it is the claim of "flexibility" that is the most objectionable part of that approach. The late Soviet jurist, G.I. Tunkin, for example, saw the constitutional theory in political terms:

The basic idea of this theory, which is oriented toward American and English constitutional practice, is that the charters of international organizations as constitutions are "flexible" documents from whose provisions one may digress in practice, and this digression will not be a violation, but a modification of these charters. . . .

. . . There is no doubt whatever that the constitutional theory is worked out and propagandized strenuously in the West be-

\textsuperscript{86} Id. at 433.
\textsuperscript{88} Id. at 167-68.
cause it is aimed at justifying the numerous violations of the charters of general international organizations, and above all of the United Nations, which did and do occur under the pressure of the imperialist powers. Herein is the political significance of this theory.  

Tunkin's viewpoint reflects both Soviet ideology and Soviet resentment of the methods by which the U.N. Security Council circumvented the Soviet veto during the Korean crisis. More generally, it reflects the skepticism still shared by many states concerning loose constitutional interpretation of the U.N. Charter. Regardless of the approach taken in interpreting the Charter, the NATO countries need to clarify their views on the law of humanitarian intervention as it applies to actions such as Operation Allied Force.

III. THE NEED TO CLARIFY THE APPLICABLE INTERNATIONAL LAW

A. The Danger of Invoking a Vague Doctrine Permitting the Use of Force

As the preeminent global military power with the capacity to veto any decision of the Security Council, the United States could reject all legal restraints upon the use of force. To do so, however, would not be in the interest of the United States.  

90. Indeed, Louis Henkin has argued:
   I dismiss extreme hypothetical options for the United States. In theory, the United States could decide that the law of the Charter has been a mistake; that it is not viable; that one cannot subject the decisions of governments on national security and vital interests to restraints by legal norms; that it is undesirable—indeed, dangerous—to pretend that there is law when in fact there is none. Or the United States might decide that if the law on the use of force is not as it wishes it to be, it would prefer no law on the subject. Or it might decide that the USSR has not in fact been restrained by law and that it is therefore not in U.S. interests to be so restrained.

Whatever some hard-nosed editorial writers may say, scuttling the law of the Charter is not a viable policy for any U.S. government. Even if the United States were persuaded that the law is wholly futile and
Certainly, the United States and its allies, as wealthy and powerful states, have a lot to lose from instability and chaos in the international system. Notwithstanding this fact, they have implicitly endorsed a radical new doctrine of humanitarian intervention by deciding to use armed force to assist the Albanian Kosovars. Applying a loose, flexible standard to the right of humanitarian intervention might seem desirable from the humanitarian perspective because this could make it easier for nations to act against violations of fundamental human rights around the world. It would also be a double-edged sword. Indeed, the danger that states might abuse a right of humanitarian intervention is the strongest argument against too flexible a rule. 91

Any doctrine that opens the door to legally sanctioned military intervention on the territory of a state and against its government has the potential to destabilize the entire international system. A U.S. leadership role in clarifying and codifying the legal rules applicable to such acts of intervention would serve the interests of the United States in at least two ways. First, it would help to avoid the possibility that a vague and opportunistic policy of humanitarian intervention could easily be turned against the interests of the United States in the future. 92

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deceptive, it would not be in U.S. interests to scrap it and, with it, the fruits of the Second World War and the hopes, aspirations, and efforts of half a century. Rejecting the Charter in effect would reject Nuremberg, undermine our national justification in history, and reestablish Adolf Hitler as no worse than anyone else. Such a move would be condemned by the whole world. It would serve no good for the United States.

Henkin, supra note 36, at 57-58 (footnotes omitted).

91. "F]lexibility is not necessarily desirable with regard to unilateral humanitarian intervention because the primary concern is not the inability to act but rather the fear of pretextual intervention." Michael L. Burton, Note, Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention, 85 Geo. L.J. 417, 420 (1996).

92. Burton's analysis suggests an objective, rather than subjective, approach for formulating this policy:

Providing an objective standard against which to measure the legitimacy of a given intervention would deter would-be aggressors and minimize abuse in two respects. First, codification would impede states' ability to assert humanitarian rationales for illegitimate intervention. Unlike a subjective approach that judges the legitimacy of each case in an ad hoc manner, codification enhances the international community's ability to discern abuse, thereby making it more difficult for an intervening state
though armed intervention on the territory of the United States may be unlikely for the moment, the United States could potentially suffer from the adverse effects of unprincipled acts of intervention in other countries. Second, giving definition to a realistic and modern standard of humanitarian intervention would help to promote trust, friendly relations, and a more secure future for all states. As a country dedicated to the rule of law, it is also important for the United States to establish the legitimacy of its actions in Kosovo. This will be difficult, if not impossible, until the United States government endorses a clear formulation defining, and thereby limiting, the right of humanitarian intervention.

B. Historical Precedents: The U.S. Contribution to Codifying the Laws of War and Peace

An examination of the nineteenth-century diplomatic practice of the United States supports the view that this country should lead the way in the codification of the laws of war and peace. Both the Caroline incident\textsuperscript{93} and the Alabama Claims arbitration\textsuperscript{94} are cases in which the United States and the United Kingdom resolved disputes involving issues of sovereignty, national honor, and war by formulating a mutually agreeable codification of the applicable rules of international law. The Lieber Code, formulated unilaterally by the U.S. Army in 1853, was the first codification of the principles that ultimately became the foundation of the law of armed conflict.

1. The Caroline Incident

The Caroline incident occurred in the winter of 1837 in the midst of a crisis in Anglo-American relations. Despite numerous attempts to settle the matter via treaties, joint commissions, and arbitration,\textsuperscript{95} there was still a lingering disagreement between

\begin{footnotes}{93} See infra notes 95-115 and accompanying text.\end{footnotes}{94} See infra notes 116-24 and accompanying text.\end{footnotes}{95} These were established pursuant to the 1783 Jay Treaty and the 1814 Treaty
the United States and the United Kingdom concerning the northern boundary of the United States. Tensions persisted along the border even in places where the boundary was undisputed. A band of insurgents opposed to the British government in Canada had been using a ship known as the Caroline to move men and supplies from the American side of the Niagara river to an island they had occupied within British territory. British forces attacked the Caroline one evening as it was moored for the night on the U.S. side of the river. Several American citizens were injured and one was killed before the attacking British force captured and destroyed the ship.

The United States government protested that the United Kingdom had illegally used force against the territory and citizens of the United States. When the British finally acknowledged the attack, however, they argued that it had been justified as a legitimate act of self-defense. The United States strongly disagreed.

The issue could not have been any more sensitive, more closely linked to national security, or more tied to the sovereign dignity of the states concerned. Furthermore, it is clear that both the United States and the United Kingdom considered resolution of the dis-

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96. William I, the king of the Netherlands, and the mutually agreed arbitrator, ruled as a matter of law in 1831 that the existing treaties between the parties were insufficient to resolve their border dispute. He then asked the two countries to compromise. The idea of compromise was flatly rejected by the state of Maine and the U.S. Senate. Secretary of State Daniel Webster was so troubled by the political impasse over this issue that he used federal funds to finance a propaganda campaign in Maine to drum up support for territorial compromise. Even then, that policy was controversial. See 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843, at 29-30 (Kenneth E. Shewmaker et al. eds., U. Press of New Eng. 1983) (1848) [hereinafter DIPLOMATIC PAPERS].

97. See id. at 30-31.
98. See id. at 31.
99. See id.
100. See id.
101. See id. at 32.
102. See id.
pute to be of the highest importance. In an attempt to resolve the dispute, the United States and Britain engaged in a long exchange of diplomatic correspondence. Much of this correspondence is memorialized in the *Diplomatic Papers* of Daniel Webster, who sent letters by or on behalf of the U.S. secretary of state on this issue. The *Diplomatic Papers* also include responses received from the British foreign secretary's office. These letters set out each government's version of the facts surrounding the *Caroline* incident and also include very specific formulations by each government concerning the standards of international law limiting recourse to the right to use armed force in self-defense.

The two governments did not reach agreement as to all the facts of the incident, and as a result they disagreed as to whether Britain had violated international law. They did reach agreement, however, as to the applicable international legal standard. The diplomatic correspondence through which they reached this agreement constituted the first real codification of the international law of self-defense.

The two governments agreed that "[r]espect for the inviolable character of the territory of independent nations is the most essential foundation of civilization." They were also in agreement that nations had a right of self-defense, and that the exercise of this right could, in appropriate cases, constitute a special

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103. *See id.* at 33-36 (reprinting letters by Daniel Webster, U.S. Secretary of State, and Edward Kent, British Foreign Secretary, that emphatically note the importance of resolving the *Caroline* dispute).
104. *See id.* at 33-38 (reprinting the correspondence).
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.*
109. *See id.*
110. Letter from Lord Ashburton, British Minister, to Daniel Webster, U.S. Secretary of State (July 28, 1942), in *DIPLOMATIC PAPERS*, supra note 96, at 651-52. Lord Ashburton stated further:

It is useless to strengthen a principle so generally acknowledged by any appeal to authorities on international law, and you may be assured, Sir, that Her Majesty's Government set the highest possible value on this principle, and are sensible of their duty to support it by their conduct and example for the maintenance of peace and order in the world. . . .

*Id.*
exception to the general rule of territorial inviolability.\footnote{111} It fell to the United States, as the aggrieved party, to stress the limits applicable to the self-defense exception invoked by the United Kingdom. It was in this context that Daniel Webster offered a formulation of the law of self-defense that the United Kingdom and the world ultimately accepted:

It is admitted that a just right of self-defence always attaches to Nations, as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts, within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground of justification.

\ldots

\ldots Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show \ldots a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada,—even supposing the necessity of the moment authorized them to enter the territories of the United States at all,—did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.\footnote{112}

Ultimately, the two governments resolved the diplomatic dispute by adopting the legal standard set out above,\footnote{113} even

\footnote{111} In his letter to Daniel Webster, Lord Ashburton further recognized: "Self' defence is the first law of our nature and it must be recognised by every code which professes to regulate the condition and relations of man. Upon this modification, if I may so call it, of the great general principle, we seem also to be agreed \ldots." \textit{Id.} at 652.

\footnote{112} Letter from Daniel Webster, U.S. Secretary of State, to Henry Stephen Fox, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), in \textit{Diplomatic Papers, supra} note 96, at 58, 62, 67.

\footnote{113} Daniel Webster noted this agreement in his reply to Lord Ashburton:

The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent States is the most essential foundation of civilization. And while it is admitted, on both
though they agreed to disagree as to the application of the law to the facts of the case.\textsuperscript{114} The effect of this exchange of letters has been profoundly significant; the formulation "has ever since been accepted as the classic formulation of the right of self-defense."\textsuperscript{115} Indeed, this case provides an outstanding example of the positive role traditionally played by the United States government in codifying the law of war and peace.

2. \textit{The Alabama Claims Arbitration}

The second illustrative case occurred three decades after the \textit{Caroline} incident. Despite its declared neutrality with regard to the Civil War, the United Kingdom allowed British ports to be used to outfit ships of the Confederate Navy. The most notorious

\begin{quote}
Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Minister (Aug. 6, 1842), in DIPLOMATIC PAPERS, supra note 96, at 669.
\end{quote}

\textsuperscript{114} Daniel Webster memorialized this agreement to disagree in the following manner:

Understanding these principles alike, the difference between the two Governments is only whether the facts in the case of the "Caroline" make out a case of such necessity for the purpose of self-defence. Seeing that the transaction is not recent, having happened in the time of one of his predecessors; seeing that your Lordship, in the name of your Government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing that it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your Government considers that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time, the President is content to receive these acknowledgements and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two Governments.

\textit{Id.} at 669-70.

\textsuperscript{115} \textsc{Friedmann}, supra note 47, at 256.
example was the Confederate ship known as the Alabama, which reportedly sank more than sixty Union ships before it was finally destroyed.116 After the Union won the Civil War, the U.S. government understandably was anxious to hold the United Kingdom accountable for what was widely perceived to be a very serious violation of the international law of war and peace. More surprising is the fact that the United Kingdom was willing both to endorse a clear codification of the law applicable to the duties of a neutral power towards belligerents and to submit the Alabama claims to binding international arbitration. The 1871 Treaty of Washington between the United States and the United Kingdom did exactly this.117

The sole purpose of the treaty was to settle, via international arbitration, all U.S. claims against the United Kingdom based on British support for the Alabama and other Confederate ships. The treaty established a five-person Tribunal of Arbitration with arbitrators named by the United States, the United Kingdom, Italy, Switzerland, and Brazil.118 The treaty also set out a clear codification of the international law governing the duties of neutral states in wartime.119

118. The 1871 Treaty of Washington provided:

Now, in order to remove and adjust all complaints and claims on the part of The United States, and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the Alabama claims, shall be referred to a Tribunal of Arbitration to be composed of 5 Arbitrators to be appointed in the following manner, that is to say: one shall be named by Her Britannic Majesty; one shall be named by the President of The United States; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.

1871 Treaty of Washington, supra note 117, at 147 (Article I).
119. The following codification of law was set out in Article VI of the 1871 Treaty of Washington:

In deciding the matters submitted to the Arbitrators they shall be gov-
In their decision with regard to the Alabama, the arbitrators concluded that two of the three agreed rules had been violated and, with regard to the ship Florida, that all three of the rules had been violated.\textsuperscript{120} The arbitrators awarded the United States the then-staggering equivalent of $15,500,000 in gold.\textsuperscript{121} The British government could not have been too surprised by this verdict because it surely knew that it had violated the rules of neutrality as formulated and agreed to in the Treaty of Washington. For instance, one unusual clause of the treaty sets out the nuanced position of the United Kingdom on the issue of the applicable law:

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at

\begin{quote}

\textit{\textbf{RULES}}

A neutral Government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

\textit{Id.} at 149 (Article IV).

\textit{DECISION AND AWARD} 'Made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the 8th of May, 1871, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.' 1 \textit{JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY} 653, 656-57 (Wash., D.C., Gov't Printing Office 1898) (emphasis omitted).

\textit{See id.} at 658-59.

\end{quote}
the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules. 122

By its own terms, the Treaty of Washington's codification of the duties of a neutral state under international law set out rules to be observed in the future, as well as a standard to be applied to the past conduct of the United Kingdom. 123 In this sense, it was intended to be semi-legislative, as evidenced by the treaty language stating that, "the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers and to invite them to accede to them." 124

3. The U.S. Role in Codification of the Laws of War

From the very beginning, the United States has played a crucial role in the codification and development of international humanitarian law. 125 The Lieber Code, issued in 1863 as Instructions for the Government of Armies of the United States in the Field, 126 was the first official attempt to codify the laws and customs of war. Other countries adopted it almost immediately, and it has influenced all subsequent developments in this area of international law. 127 Theodor Meron attributes the tremen-

122. 1871 Treaty of Washington, supra note 117, at 149 (Article IV).
123. See id.
124. See id.
127. The impact of the Lieber Code was both immediate and profound:

The Lieber Code projected its influence far beyond the ranks of the United States Army. In 1868 an international commission meeting in St. Petersburg, Russia, applied the code's principle of military necessity to
dous impact of the Lieber Code to a combination of the Code’s high quality and timing, as well as to its foundation of broad humanitarian principles. Like the rules codified by the United States in the Caroline incident and prior to the Alabama Claims arbitration, the Lieber Code was a very conscientious attempt at codification of universally applicable neutral principles. It was not a political formulation designed primarily to promote the self-interest of a single state.

Although it is the thesis of this Essay that the United States should lead international efforts to codify the international law of humanitarian intervention, there are reasons to hope that other nations will participate. Because NATO as a whole approved the bombing of Yugoslavia, all of the NATO member countries share responsibility for clarifying the international law of humanitarian intervention. The United States bore the brunt of the military burden in that bombing mission, and it is the country most likely to lead missions of humanitarian intervention in the foreseeable future. Awareness of this special role could motivate U.S. policymakers to propose standards of humanitarian intervention designed to leave the U.S. military maximum leeway. This tendency could be counterbalanced if

ban the use of small-caliber explosive bullets because they would cause “unnecessary suffering.” In 1870 the Prussian Government adapted the code as guidance for its army during the Franco-Prussian War. The code also formed the basis of the Brussels Declaration of 1874, which in turn influenced the Hague Regulations on the Laws and Customs of War on Land of 1899 and 1907, the foundation of the law of land warfare for the entire twentieth century.


128. Indeed Meron argues: “Both the Code’s high quality and its timing, written when no other significant compilations of laws and customs of war were available, can explain its tremendous impact on the codification of international humanitarian law.” Meron, supra note 125, at 278.

129. Meron further noted: “Rather than any one technical or detailed rule, the Lieber Code’s foundation in broad humanitarian principles explains its tremendous impact both on later multilateral treaties codifying the law of war and on the development of customary law.” Id. at 274.

130. This special role was stressed during the negotiation of the statute for a permanent International Criminal Court (ICC). Ambassador David Scheffer, the Clinton Administration’s special envoy dealing with war crimes, summed up the unique con-
the NATO allies of the United States, some of whom have already stressed the need for codification, play a prominent role in that effort.

Some of the best United States codification efforts were made in conjunction with other western powers. Both the Caroline incident and the Alabama Claims arbitration required the United States to formulate its view of international law in the context of a legal dispute with the United Kingdom. Each country was concerned of the United States:

[T]he reality is that the United States is a global military power and presence . . . . Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal [for an ICC statute] does not limit the capacity of our armed forces to legitimately operate internationally . . . that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.


According to recent reports, France played a key role in moderating the drift towards more aggressive bombing of civilian targets during the NATO mission. As Dana Priest of the Washington Post reported:

One of the myths of the war is that the leaders of NATO’s 19 member countries ran the air campaign by committee. But that is not the way the decision-making looked to the alliance’s generals and political leaders. Inside the alliance, it was clear that the important choices—such as whether to bomb targets that had a largely civilian character—were made by the leaders of three countries: the United States, Britain and France. And only one of them, France, regularly played the skeptic.

Dana Priest, Bombing by Committee; France Balked at NATO Targets, WASH. POST, Sept. 20, 1999, at A1.

A brief Reuters wire report summarized the following concerns expressed by the Italian Foreign Minister:

U.S. intervention in Kosovo compensated for Europe’s lack of political and military power, but NATO’s action there raised questions about international legality, the Italian foreign minister, Lamberto Dini, remarked here Monday. . . . Mr. Dini stressed that while the war had been fought for a just cause, the NATO action raised questions about how to ensure international legality in the future, questions that Italy will put to the United Nations next month. . . . [B]y intervening in the Balkans, NATO had overridden the old diplomatic principle that sovereignty came first, but a new code of practice and political discipline had yet to be established.

obliged to make its legal case in terms acceptable to a formidable rival. Even the Lieber Code, which the United States formulated unilaterally, was in a sense a product of both the United States and Europe. The Code built upon insights from philosophers of the European Enlightenment, such as Rousseau, and upon the European-born Lieber’s experience as a combatant in the Napoleonic wars.

No state can make its law binding upon the others, and this fact complicates the task of codifying the law of humanitarian intervention. The examples of the Caroline incident and the Alabama Claims arbitration, however, demonstrate how good faith efforts at codification can come to be accepted as setting the standard for all states. These two codification efforts were successful because they were fair and balanced, which made them acceptable to the international community as a whole.

If the United States and its allies want other states to accept and acknowledge a right of humanitarian intervention, they must formulate a standard that is practical and true to principle.\textsuperscript{133} This should be done soon before others abuse this putative right and offer a more troubling model of how it should work. The formulation must be sufficiently definite to provide a workable legal standard and not merely a statement of political doctrine.\textsuperscript{134} Indeed, as the International Court of Justice has observed, a rule or standard can gain status as part of customary international law only if it is “of a fundamentally norm-creating character.”\textsuperscript{135}


\textsuperscript{134} “[W]ith respect to the terrible uses of force, it is important that, as far as possible, rules not be subject to concealment and distortion of facts and circumstances and to self-serving characterizations.” Henkin, supra note 36, at 65.

\textsuperscript{135} North Sea Continental Shelf, 1969 I.C.J. 3, 41-42 (Feb. 20).
IV. THE ELEMENTS OF A LEGAL STANDARD FOR HUMANITARIAN INTERVENTION

The specific conditions applicable to legal acts of humanitarian intervention and the duties and responsibilities of the intervening state have never been clarified. One aim of this Essay is to identify some of the relevant principles. A few of these are specifically required to address the unique problems raised by humanitarian intervention, while others are derived from the general practice of states regarding the use of force. Taken together, these principles must reconcile the shared global interests in stability, territorial integrity, and sovereignty with the occasional need for intervention to prevent the most egregious violations of fundamental human rights.

When the nation-state system emerged three hundred and fifty years ago, the principle of state sovereignty was at its core. Implicit in that sovereignty was the obligation of each state to refrain from armed military intervention on the territory of other states. From the start, this obligation was subject to critical exceptions, including the right of self-defense, the right of reprisal, and situations of declared war. The exception most universally accepted is the right of self-defense, which is subject to its own conditions. It therefore seems logical to assume that a right of humanitarian intervention, were it to be recognized, would at a minimum be subject, mutatis mutandis, to the general conditions applicable to the right of self-defense. Thus, the conditions of necessity and proportionality, which limit the right of self-defense under customary international law, must also limit the right of humanitarian intervention under international law. These principles have been most clearly defined in cases of

138. See id.
139. "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law." On the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8).
self-defense or in the exercise of the right of reprisal, and they must be adapted when applied to humanitarian intervention.

The U.N. Charter imposes a number of additional conditions upon the exercise of the right of self-defense. These include the requirement of a prior armed attack,\textsuperscript{140} the extinction of that right once the Security Council has taken measures to maintain international peace and security,\textsuperscript{141} and the requirement that states report all acts of self-defense to the Security Council.\textsuperscript{142} Some of these additional requirements may also be applicable to the right of humanitarian intervention.

A. The Role of the Security Council

The U.N. Charter designates the Security Council as the body with primary responsibility for the maintenance of international peace and security,\textsuperscript{143} and therefore no discussion of humanitarian intervention can be complete without considering the essential role of this body. To the extent that the U.N. Charter anticipates the need for humanitarian intervention, the matter falls within the scope of the Security Council's powers under Chapter VII of the Charter.\textsuperscript{144} If the Security Council determines that acts of

\begin{footnotesize}
\begin{itemize}
\item 140. See U.N. CHARTER art. 51.
\item 141. See id.
\item 142. The Charter's definition of the right to self-defense states: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
\item 143. Article 24(1) of the Charter provides that, "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Id. art. 24, para. 1.
\item 144. See id. art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41
\end{itemize}
\end{footnotesize}
genocide, crimes against humanity, or other massive violations of human rights constitute a threat to international peace and security, it has the power to authorize an armed response. The right of the Security Council to make this decision is rarely disputed, although opinions vary about whether any particular situation truly constitutes a threat to international peace and security. However, the issue of whether humanitarian intervention can ever be legal without the authorization of the Security Council is hotly disputed.

Certainly it would be preferable if the Security Council could take full responsibility for humanitarian intervention whenever it might be necessary. Unfortunately, states wielding the veto privilege sometimes make it impossible for the Security Council to act, even in cases of serious and widespread abuses. Kosovo was one such case. The 1994 genocide in Rwanda involved even more serious abuses, but in that case the Security Council as a whole lacked the political will to act. The failure of the Security Council to act in egregious cases such as these is the strongest argument for a doctrine of humanitarian intervention. It demonstrates the clear need for some alternative legal basis that could justify action to prevent widespread and serious violations of the most fundamental human rights.

Any of the Security Council’s five permanent members may veto decisions of the Security Council. Until the end of the Cold War in the early 1990s, this veto power usually was sufficient to eliminate the possibility of Security Council-sanctioned use of force, whether for humanitarian intervention or for any other purpose. The Security Council has reached a consensus on

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42, to maintain or restore international peace and security.

145. See id. art. 42 (providing that action may be taken “by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).


149. See U.N. CHARTER art. 27, para. 3.
a response to massive human rights violations on a number of occasions over the past decade, but it could not agree on an effective strategy to protect the Albanian Kosovars. Despite the evidence of Serbian atrocities in Kosovo and the failure of all diplomatic efforts to provide a solution, Russia opposed any move by the Security Council to intervene militarily. When the Council is paralyzed in this way, it leaves the international community in a difficult position.

The entire thrust of the international law of human rights as it has developed over the past fifty years is to guarantee to individuals the fundamental human rights that were being violated systematically in Kosovo before the NATO intervention. The 1948 Genocide Convention recognizes that racial, religious, or ethnic groups, such as the Albanian Kosovars, have a right not to be victimized by those who would deliberately eliminate the group in whole or in part. The inability of the Security Council

151. See Jim Hoagland, Kosovo in Limbo, WASH. POST, Nov. 4, 1999, at A35.
154. The Genocide Convention defines the crime of genocide as follows:
Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.
to act in Kosovo left even that minimal promise unfulfilled. The Genocide Convention obligates signatory parties to "prevent and punish" genocide.\textsuperscript{155} Thus, even if the Security Council fails to act, those parties are still subject to this general obligation. The need to permit humanitarian action in extreme emergencies and the role of the Security Council must therefore be reconciled.

As the discussion above illustrates, it is both anachronistic and inadequate to maintain, even today, that the Security Council veto trumps any possibility of intervention on behalf of human rights. On the other hand, it would be dangerous and destabilizing for states to claim the right to intervene militarily on the territory of other states without first bringing the matter before the Security Council as the competent body.\textsuperscript{156} Either direct Security Council authorization for humanitarian intervention or the failure of the Security Council to act upon reliable reports of widespread atrocities should be a minimum legal requirement for any armed humanitarian intervention.

B. The Requirements of Necessity and Legitimate Purpose

1. A Humanitarian Necessity Must Be Present

In the course of his correspondence with the United Kingdom regarding the 1837\textit{ Caroline} incident, Daniel Webster developed the requirement of necessity, applicable to the right of self-defense under international law.\textsuperscript{157} The two countries ultimately agreed to the following standard: "Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show . . . a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."\textsuperscript{158}
The *Caroline* standard of necessity applies only when the security of a state is at issue.\(^{159}\) As such, it cannot apply to humanitarian intervention without some adaptation. However, the need to prevent serious, widespread violations of human rights in another state may be perceived as creating a similarly instant and overwhelming necessity for action.

Defining necessity for purposes of humanitarian intervention essentially is a matter of drawing the line between those human rights violations serious enough to justify a response compromising state sovereignty and those that fall below this threshold. Just as people can disagree about the relative importance of human rights on the one hand and peace and stability in the international system on the other, people might likewise disagree as to the necessity of humanitarian intervention in any given case. At a minimum, however, the human rights concerns involved would need to be quite serious and widespread in order to approach this critical threshold.

2. *Pretexual Interventions Must Not Fall Within the Right*

Perhaps the most compelling argument against recognizing a right of humanitarian intervention is that it might be used as a pretext for military intervention actually motivated by other, less noble, objectives.\(^{160}\) If international law is to recognize the right of humanitarian intervention, it must incorporate appropriate standards to prevent pretexual abuse.\(^{161}\) The basic requirement of necessity, as discussed above, is a beginning. For

\(^{159}\) See id.

\(^{160}\) As R.J. Vincent notes:

On policy, those who argue against the righteousness of humanitarian intervention are inclined to observe that it is a doctrine used by the great against the small, that it smacks of imperialism, that it disguises ignoble motives (or, conversely, that it expects too high a standard of behaviour), that it might encourage counter-intervention, and that it is in general heedless of consequences.


\(^{161}\) See Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 122 (1992-93) (defining "pretextual intervention" as "a nation's use of military force in a different state for the nation's own gain, not for the protection of human rights").
that test to be met, there must at least be some compelling humanitarian objective.\textsuperscript{162} Even if the requirement of necessity is met, what begins as a case of humanitarian intervention could become something entirely different if the intervening power abuses the advantage it has gained from intervening. Indeed, even Louis Henkin, who concludes that states have accepted a limited right of humanitarian intervention, stresses that this does not include the right "to topple a government or occupy its territory even if that were necessary to terminate atrocities ..."\textsuperscript{163}

The practice of humanitarian intervention also threatens to exacerbate inequality in the international system because the stronger states are in a position to intervene on the territory of relatively weaker states. These stronger states may hope to gain territorial, military, political, or economic advantages while claiming to act in the name of principle. Any legal definition of humanitarian intervention must somehow address these concerns.\textsuperscript{164}

Even in the best case scenario of humanitarian intervention, an alternative interest, beyond purely humanitarian considerations, is likely to exist. U.S. officials have been careful to stress that it will be the policy of the United States to undertake humanitarian intervention only when it is in its national interest. This proposition is consistent with the widely held view that states should always act in their self-interest.\textsuperscript{165} The motives of the intervening state are likely to be mixed, even in the best of cases, and this is why the eventual legal standard must incorporate safeguards against abuse.

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162. See supra notes 159-161 and accompanying text.
163. Henkin, supra note 36, at 42 (footnotes omitted). Henkin notes further that, "Entebbe was acceptable, but the occupation of Cambodia by Vietnam was not. The U.S. invasion and occupation of Grenada, even if in fact designed to protect the lives of U.S. nationals, also was widely challenged." Id. (footnotes omitted).
165. See MORGENTHAU & THOMPSON, supra note 31, at 5, 10-11, 13 (arguing that the only rational foreign policy for a state is one that maximizes the state's power).
C. The Requirement of Proportionality

In addition to defining "necessity," the exchange of letters in the Caroline incident also clarified that a requirement of proportionality applies to the right to use force in self-defense. A similar requirement necessarily must limit any right of humanitarian intervention under international law.

The issue of proportionality as a limit upon the use of force in international law has not been adjudicated often, but the arbitrators in the Naulilaa Arbitration considered it carefully. The Naulilaa Arbitration concerned armed exchanges in southern Africa during the period from 1914 to 1915. When a German official and two German officers were killed at the Naulilaa outpost in Portuguese-ruled Angola, German troops, following orders from the governor of German-ruled Southwest Africa, retaliated by attacking and destroying several Portuguese outposts. Germany claimed that the doctrine of reprisal justified its actions. The arbitrators concluded, on three separate grounds, that the German response could not be justified as a lawful act of reprisal. They found no prior illegal act committed by Portugal that would justify acts of reprisal, no formal request by the Germans to achieve satisfaction of its claims by legal means, and an unacceptable lack of proportion between the

166. In one of his correspondences in the Caroline incident, Daniel Webster wrote: It will be for [the British Government] to show, also, that the local authorities of Canada,—even supposing the necessity of the moment authorized them to enter the territories of the United States at all,—did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. Letter from Daniel Webster to Henry Stephen Fox, supra note 112, at 67.

167. Although Louis Henkin expresses skepticism concerning humanitarian intervention as a "formal" exception to Article 2(4) of the U.N. Charter, he concludes that "the legal community has widely accepted that the Charter does not prohibit humanitarian intervention by use of force strictly limited to what is necessary to save lives." Henkin, supra note 36, at 41.


169. See id. at 1014.

170. See id.

171. Reprisals are acts that would normally be illegal, but that may be legal as a proportionate and necessary response to a prior illegal act. See id. at 1026.

172. See id. at 1028.
alleged offense and the many brutal acts committed in response.\textsuperscript{173}

In discussing the issue of proportionality, the three Swiss arbitrators began by endorsing a definition of “reprisal” that directly incorporated the proportionality requirement.\textsuperscript{174} They observed that the “modern,” circa 1928, tendency among publicists was to omit this requirement as an element of reprisal.\textsuperscript{175} Speaking of general international law at the end of the first World War, they concluded that it “certainly tends to limit the notion of legitimate reprisal and to prohibit excesses.”\textsuperscript{176}

The \textit{Naulilaa} decision noted that even the Germans conceded that a proportionality requirement applied to acts of reprisals.\textsuperscript{177} The decision suggested, however, that proportionality is a matter of general international law transcending the issue of reprisals. At one point the arbitrators observed that, “even if we were to admit that the law of nations does not require that the reprisal must correspond approximately to the offense, one would have to consider as excessive and therefore illicit, any reprisals out of all proportion to the acts which motivated them.”\textsuperscript{178}

Whether we include the proportionality requirement as part of the definition of humanitarian intervention or apply it as a general principle of law governing the use of force, there can be little doubt that it must apply to humanitarian intervention as well as to the law of self-defense and reprisal.

\textsuperscript{173} Specifically, the arbitrators made the following finding: The arbitrators therefore conclude that the German acts of aggression of October, November and December 1914, at the border with Angola, cannot be considered to be legitimate reprisals for the incident at Naulilaa or for earlier acts of the Portuguese authorities, this due to the lack of a sufficient cause, of a prior attempt to achieve legal satisfaction (“sommation”), and of an acceptable proportion between the alleged offense and the reprisals carried out.

\textit{Id.} (author's own translation from French).

\textsuperscript{174} \textit{See id.} at 1026.

\textsuperscript{175} \textit{See id.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} “He who uses reprisals, does naught but to respond to an act contrary to the law of nations by another act, thus it is evident that the harm caused by the second must be proportionate to the harm caused by the first.” \textit{Id.} at 1028 n.1 (quoting the German response).

\textsuperscript{178} \textit{Id.} at 1028.
D. The Duty to Respect International Humanitarian Law and International Human Rights

Even if it can be established both that humanitarian intervention can be legal without Security Council authorization, and that the human rights situation in Kosovo was an event that rendered armed intervention appropriate, the question still remains as to whether the mission was carried out in a legal manner. The answer to this question depends, in part, upon the amount of force used and its relationship to the evils that the intervention sought to remedy. This is the issue of proportionality discussed above.179

Compliance by the intervenor with international humanitarian law is a separate issue. All states are bound to respect international human rights and international humanitarian law, and states invoking the right of humanitarian intervention are no exception. Indeed, it could be argued that a state that elects to use force to protect human rights should be held to an especially high humanitarian standard during the course of that operation.180 The principal issue of international humanitarian law raised by the recent NATO military action against Yugoslavia concerns collateral damage to civilians and their interests.

International humanitarian law has been evolving for over a century, and only a few of its relevant details can be mentioned here. First, it bans vicious acts, such as intentionally directing attacks against civilians or civilian personnel,181 and attacking or bombarding towns, villages, dwellings, or buildings that are undefended and are not military objectives.182 Second, and more fundamentally, international humanitarian law requires states to recognize a distinction between civilians and military targets and to use weapons capable of distinguishing between them.183

179. See supra notes 168-78 and accompanying text.
180. Cf. infra text accompanying notes 197-98 (discussing the intervenor's responsibility not to make the situation worse).
181. See ROME STATUTE, supra note 62, art. 8(2)(b)(2) (codifying this rule).
182. See Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 25, 205 Consol. T.S. 277.
183. According to the International Court of Justice:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection
This second principle has an American pedigree because, like much of international humanitarian law, it can be traced back to the 1863 Lieber Code.\footnote{184} Perhaps the clearest expression of this principle is found in Protocol Additional I to the 1949 Geneva Conventions, which provides that, "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."\footnote{185}

U.S. officials have suggested repeatedly that the foregoing formulation reflects customary international law binding upon the United States.\footnote{186} Although the applicability of these prin-

of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

On the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8).

184. The Lieber Code formulated the principle of distinction in the following terms: Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

Lieber Code, supra note 126, art. 22, at 7 (emphases added).


186. The United States is not a party to Protocol I, but Horace Robertson, Jr. has noted:

A number of statements, both official and unofficial, by spokesmen for the United States Departments of State and Defense, spoken primarily in the context of an examination of Additional Protocol I and the U.S. decision not to ratify it, have suggested that the U.S. regards the principles of distinction and the military objective, as articulated in the Protocol, as customary international law.

Horace B. Robertson, Jr., The Principle of the Military Objective in the Law of
ciples is undisputed, their application hinges upon the highly contentious question of what constitutes a legitimate “military objective.” Protocol I defines the military objective in very narrow terms, stating that such objectives must, by their “nature, location, purpose or use,” make an effective contribution to military action, and that their total or partial destruction, capture or neutralization must, in the prevailing circumstances, offer a definite military advantage.\(^{187}\) The military manuals of many states incorporate this very standard, providing persuasive evidence that it also is generally applicable as part of customary international law.\(^{188}\) This standard suggests that indeed there is an issue as to whether the NATO bombing of Yugoslavia was consistent with international humanitarian law.\(^{189}\)

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\textit{Armed Conflict, in} THE LAW OF MILITARY OPERATIONS 197, 204 (Michael N. Schmitt ed., 1998).

187. Protocol I, \textit{supra} note 185, art. 52. The following complete definition of military objective is set out in Protocol I:

\textit{Article 52.-General protection of civilian objects}

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, \textit{military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.}

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

\textit{Id.} (emphases added).

188. For a detailed discussion of this issue, see Robertson, \textit{supra} note 186, at 204-07 (citing the inclusion of Additional Protocol I in the military manuals of Germany, Australia, Canada, and the United States).

189. As one commentator has noted:

By the end of the air campaign, Serb authorities reported at least 2,000 civilian deaths, with many thousands more injured. That is greater than the number of Albanians killed in Kosovo in the months preceding the air war. Serb forces committed many more murders under cover of the air campaign, perhaps over 9,000. But deaths attributable to NATO bombing are at least as many as the initial killing NATO intervened to stop. It is hard to dismiss demands for international scrutiny of NATO tactics as a mere propaganda ploy.

\textit{Jeremy Rabkin, A New World Order: The Clinton Doctrine Could Be Turned Against
The Statute of the International Criminal Court formulates these same principles in a slightly different form. It defines as a crime the intentional launch of any attack with the knowledge that the attack will cause collateral damage to civilians or civilian objects that clearly would be excessive.190 The standard of what is excessive is to be determined in relation to the concrete and direct overall military advantage anticipated.191

Applying this standard to the recent NATO bombing mission raises many questions. For example, the command decision to restrict the intervention in Yugoslavia to high-altitude bombing must surely have raised the risk of collateral damage to civilians. The issue is whether that additional risk was “excessive” in relation to the military objective of minimizing NATO losses. The issue is a difficult one, as evidenced by disagreements among the NATO allies regarding the selection of appropriate military targets within Serbia.192

A workable standard of humanitarian intervention for the future would ideally be built around even more specific rules in this area. Indeed, when a state elects to intervene abroad for humanitarian purposes, it should be held to a higher standard regarding the risk of collateral damage to civilians. By the same token, U.N. forces should also be held to a higher standard.

Oddly enough, the applicability of international humanitarian law to U.N. military operations was at one time considered to be a gray area of the law. U.N. Secretary-General Kofi Annan recently resolved doubts on this issue by issuing guidelines requiring all U.N. troops to respect the rules established under the basic instruments of international humanitarian law.193 The idea

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190. The Rome Statute defines the following crime as one subject to prosecution: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

191. See id.

192. According to reports in the Washington Post, even the NATO allies disagreed about the appropriate line between military and civilian targets during the bombing mission. See Priest, supra note 131, at A1.

193. According to the guidelines established by U.N. Secretary-General Kofi Annan,
that U.N. military forces could operate outside the reach of international humanitarian law was based on the argument that the United Nations itself is not party to any of the basic treaties that establish international humanitarian law.\textsuperscript{194} This rather implausible argument ignored the fact that the fundamental rules of international humanitarian law are also binding as customary international law. It is true that the United Nations is not a state, but as the Secretary-General has now recognized, it would be completely unacceptable for U.N. military forces to violate fundamental principles of international humanitarian law. Thus, if anything, it seems logical to hold both the United Nations, and any state claiming an extraordinary right to use force for humanitarian intervention, to a higher standard.

\textbf{E. The Duty Not to Make the Humanitarian Situation Worse than It Otherwise Would Have Been}

Doubts about the net effect of humanitarian intervention form one of the principal objections to the idea that it ought to be tolerated legally.\textsuperscript{195} To be viable, the legal standards of humanitarian intervention must address this concern by holding the intervening state responsible for not making the situation worse than it would have been. Indeed, the statute of the International Court of Justice authorizes the International Court of Justice to consider general principles of law as a possible source of law.\textsuperscript{196} Consideration of the legal principles applied by states to the

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as of August 12, 1999, U.N. "[m]ilitary operations shall be directed only against combatants and military objectives," any attacks that could result in 'indiscriminate' damage to civilians are prohibited, and "[t]he right of the U.N. force to choose methods and means of combat is not unlimited." Farhan Haq, U.N. to Adhere to Geneva Conventions, INTER PRESS SERV., Aug. 10, 1999, available in LEXIS, News Library, INPRES File.


195. R.J. Vincent notes that "we may expect among its members two general attitudes towards the question of intervention . . . . The first is one of doubt about the motives of interveners. The second is one of skepticism about any good outcome of intervention." VINCENT, supra note 39, at 114.

196. See Statute of the International Court of Justice, art. 38, para. 1(c) (visited Apr. 2, 2000) <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (identifying "the general principles of law recognized by civilized nations" as a source of international law).
issue of aid to those in peril suggests that a state that elects to intervene forcibly for humanitarian purposes has a duty not to make the situation worse than it would have been without its intercession.

In their internal law, states take two different approaches to the responsibilities of the bystander witnessing an individual in distress. In many civil law countries, such as Germany\(^\text{197}\) or France,\(^\text{198}\) the bystander has a duty to intervene and to assist if he can do so without undue risk to himself or third parties. In such cases, a failure to provide assistance is a punishable criminal act.\(^\text{199}\) States, however, are under no such legal duty with regard to humanitarian intervention. Under the common law rule, as applied in the United States, a bystander has no duty to provide aid.\(^\text{200}\) Once a bystander \textit{elects} to become involved, however, he can be civilly liable if he makes the situation worse.\(^\text{201}\)

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197. According to the Penal Code of the Federal Republic of Germany:

\textit{Whoever fails to render assistance in case of accident, common danger or emergency, although such assistance was needed and could have been expected from him under the circumstances, especially since he could have rendered it without placing himself in significant danger and without violating any important duties, shall be punished by up to one year's imprisonment or by fine.}

\textbf{THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY} § 323(c), at 231 (Joseph J. Darby trans., The American Series of Foreign Penal Codes No. 28, 1987).


199. The French Penal Code provides for a sentence of up to 5 years imprisonment for such a failure to provide assistance. \textit{See id.}

200. The Supreme Court of Arizona succinctly articulated this common law principle:

\textit{Since nonfeasance was not actionable except in certain special relationships, the common law generally refused to impose a duty upon one person to give aid to another, no matter how serious the peril to the other and no matter how trifling the burden of coming to the rescue. Thus, [a] defendant might with impunity sit on the wharf, smoke his cigarette and refuse to throw his rope to a person drowning just below.}

\textit{La Raia v. Arizona, 722 P.2d 286, 289 (Ariz. 1986).} Prosser and Keeton articulated this same principle the following way:

\textit{Because of this reluctance to countenance “nonfeasance” as a basis of liability, the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.}


201. \textit{See La Raia, 722 P.2d at 290 n.4 (“Even where the defendant is not re-}
The latter rule roughly corresponds to the situation of a state electing, on its own authorization, to undertake forcible humanitarian intervention on the territory of another state. Such a state is not under a duty to intervene, but once it has affirmatively acted to do so, it must accept added legal responsibilities. Some variant of this rule should apply to humanitarian intervention. It is undoubtedly true that imposing such a responsibility "operates as a real, and serious, deterrent to the giving of needed aid." Such a deterrent would be needed, however, to minimize the potentially destabilizing effects of recognizing a right of humanitarian intervention.

F. Responsibility for Reconstruction

Since shortly after the bombing of Yugoslavia began, NATO leaders acknowledged that the military mission needed to be supplemented with a program of aid and long-term investment in the region. Political as well as economic reconstruction will

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sponsible for plaintiff's peril, when he assumes to act affirmatively . . . he assumes a duty of reasonable care."), PROSSER & KEETON, supra note 200, at 378 ("If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse.").

202. When the Security Council has authorized the use of force under Chapter VII of the U.N. Charter, a different standard should apply. States using force pursuant to Security Council authorization should not bear responsibility for the risk of intervening in the first place.

203. PROSSER & KEETON, supra note 200, at 378.

204. In a press conference held at the end of the NATO bombing campaign, British Prime Minister Tony Blair used language suggesting NATO's moral, if not legal responsibility for reconstruction:

We acknowledge our responsibility in relation to reconstruction. . . . Now, we said all the way through that we would help them to reconstruct the Balkans, to make the Balkans a place of peace and security within Europe in the future, not a region that's based on ethnic conflict. Our job is to make sure that the promises that we made to them during the course of the conflict we now honor post-conflict.

Remarks Prior to Discussions with Prime Minister Tony Blair of the United Kingdom and an Exchange with Reporters in Cologne, 35 WEEKLY COMP. PRES. DOC. 1132, 1134 (June 18, 1999).

205. At the same press conference, President Clinton endorsed reconstruction of the Balkans by stating that "we have to give them a different tomorrow to work for. We have to not only rebuild Kosovo, we've got to rebuild southeastern Europe in a way that gives them the incentive to work together and to accommodate their differences."
be sorely needed for years to come. Of course, by recognizing the need for political and economic reconstruction, these officials did not mean to suggest that humanitarian intervention entails a legal responsibility for reconstruction, and there is little legal basis for arguing that it does. The case for this aid has been made in terms of the national interest of the intervening NATO countries rather than in terms of legal obligation, but it is clear that the NATO countries have assumed an expensive, long-term commitment to the former Yugoslavia.206

The future standard of humanitarian intervention might maintain that such a responsibility exists from the start of any humanitarian intervention.207 This standard would be consistent with the general principle that any state invoking the right of humanitarian intervention accepts additional responsibilities as well as the obligation not to make things worse. It would also discourage abuse of the right of humanitarian intervention.

The policy of refusing to provide aid for Serbia until Slobodan Milosevic has been removed from power208 raises yet another set

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Id. at 1133. This language is clearly political, building upon the idea that NATO will be acting in its own interest in reconstructing the Balkans.

206. "[P]ursuing a casualty-free war in order to sustain popular opinion still can produce a heavy butcher's bill, and . . . military intervention, even for humanitarian purposes, carries its own logic of long-term and expensive commitment." Robert E. Hunter, Kosovo Has Changed the Rules of the Game; Europe: War Put NATO in the Thick of the Balkans for the Long Term and Also Put Limits on the Alliance’s Future Sphere of Action, L.A. TIMES, July 7, 1999, at B7.

207. Kofi Annan argues that the entire international community must be committed to reconstruction:

[When fighting stops, the international commitment to peace must be just as strong as was the commitment to war. In this situation, too, consistency is essential. Just as our commitment to humanitarian action must be universal if it is to be legitimate, so our commitment to peace cannot end as soon as there is a ceasefire. The aftermath of war requires no less skill, no less sacrifice, no fewer resources than the war itself, if lasting peace is to be secured.

Annan, supra note 21, at 50.

208. President Clinton described the U.S. policy on conditioning aid to Yugoslavia in the following terms:

At his news conference Friday, Clinton also said Belgrade will get no aid to repair NATO bomb damage if Milosevic’s fellow Serbs continue to endorse his effort to drive the ethnic Albanian majority out of Kosovo, a province of Serbia. “I wouldn’t give them one red cent for reconstruction,” he declared.
of legal issues. This policy attempts to influence the Yugoslav political process and might itself be seen as a form of illegal intervention. On the other hand, the logic of humanitarian intervention might apply to justify the economic measures maintained against the Milosevic regime. If forcible humanitarian intervention in Kosovo was justified, does this necessarily mean that economic coercion against all of Yugoslavia is now justified, even if necessary to remove the leaders responsible for the humanitarian catastrophe? Ultimately, the law of humanitarian intervention should develop answers to these difficult issues as well as to others relating to the need for reconstruction.

CONCLUSION

The legal regime applicable to humanitarian intervention is desperately in need of clarification. The NATO operation on behalf of the Kosovar Albanians seems to represent a prima facie violation of the U.N. Charter's rules on the use of force. Yet, there are compelling moral, historical, and policy arguments for the proposition that humanitarian intervention, subject to the proper conditions, should be a special exception to those rules.

The Serbs are "going to have to come to grips with what Mr. Milosevic ordered in Kosovo" and "they're going to have to get out of denial."

"And then, they're going to have to decide whether they support his leadership or not, whether they think it's OK that all those tens of thousands of people were killed. And all those hundreds of thousands of people were run out of their homes and all those little girls were raped and all those little boys were murdered," Clinton snapped.

"They're going to have to decide if they think that is OK."


209. There is some disagreement as to whether purely economic acts can constitute illegal intervention. For a discussion of these issues, see Bartram S. Brown, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY 59-86 (1992).

210. See id. at 81-82.

211. Although he favors Security Council action, Kofi Annan endorses the idea that a new international norm of humanitarian intervention is developing and that this is indeed a good thing:

This developing international norm in favour of intervention to protect
It is far from clear that there was anything illegal about NATO's Kosovo mission. Because of the underdeveloped state of the law, however, it is also far from clear that the operation was conducted in an entirely legal manner. This situation of legal indeterminacy is troubling, destabilizing, and ultimately inimical to U.S. interests. Even some NATO countries feel sufficiently threatened by the "hegemony of a hyperpower" to have called for strengthened international norms as a check upon U.S. power. This reaction has not been limited to any one NATO country and has been exacerbated by the impressive display of U.S. military power in the course of the NATO mission.

As the world's last remaining superpower, it is inevitable that the United States will face some resentment from other states.

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civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community. In some quarters it will arouse distrust, skepticism, even hostility. But I believe on balance we should welcome it. Why? Because, despite all the difficulties of putting it into practice, it does show that humankind today is less willing than in the past to tolerate suffering in its midst, and more willing to do something about it.

Annan, supra note 21, at 50.

212. French Foreign Minister Hubert Vedrine described the United States as a "hyperpower"... "a country that is dominant or predominant in all categories." To Paris, U.S. Looks Like a 'Hyperpower', INT'L HERALD TRIB., Feb. 5, 1999, at 5, available in LEXIS, News Library, IHT File. He suggested that this domination could best be resisted "[t]hrough steady and persevering work in favor of real multilateralism against unilaterism, for balanced multipolarism against unipolarism, for cultural diversity against uniformity." Id.


214. The Prime Minister of Italy, Lamberto Dini, recently expressed his concern that the precedent of Kosovo could strengthen U.S. hegemony:

[In referring to NATO's decision to unleash war in Kosovo against Yugoslavia without the approval of the United Nations, Italian foreign minister Lamberto Dini said Monday that NATO's self-investiture during the war could not become a rule for the future. Speaking at a meeting on friendship among the peoples held in Italy's resort town of Rimini, Dini said, "the U.S. itself should be more clear of what it can and cannot do." He said the defense of a right should be separated from "hegemonic aspirations" in the future . . .


215. Indeed, a recent international reporter commented: "A great deal of lingering
The lack of a clear legal standard limiting military intervention in the future, however, can only add fuel to the fire. By moving with its allies to formulate a principled codification of the law of humanitarian intervention, the United States could allay fears of "hyperpower hegemony," gain renewed respect for dedication to the rule of law, 216 and, most importantly, give hope of deliverance to those in danger of extermination by a genocidal government or faction.


216. In agreeing to a future international standard, the United States and its NATO allies need not accept any additional legal responsibility for the Kosovo bombing. Following the example of the United Kingdom in the Alabama case, they could acknowledge the need for a future standard and then agree to one without conceding its retroactive applicability. See supra note 122 and accompanying text.