
The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm

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Abstract

NATO's action within the territory of the Federal Republic of Yugoslavia (FRY) in 1999 continues to pose significant and as yet largely unanswered questions to the international legal community with regard to the normative value of existing international law and institutions governing the area of international use of force. This article examines the actions of NATO against the backdrop of traditionally held and arguably evolving interpretations of international law in this supremely important area and concludes that, while some, including Professor Michael Reisman, have argued to the contrary, NATO's actions in the FRY in the spring of 1999 were both presently illegal and prudentially unsound as prospective steps in the evolution of customary international law. The article argues that, instead of working towards the creation of a new custom-based legal order to cover such humanitarian necessity interventions, proponents of the same should rather expend greater energy, and endeavour to achieve more substantial commitment of resources, in efforts to work within the established legal order, with the United Nations Security Council as the governing body thereof. It argues further that, with simple and easily accomplished changes to the procedures of the Security Council, such persuasive efforts will be more likely to bear productive fruit than they have hitherto been.

The 11-week armed intervention by NATO member states against the Federal Republic of Yugoslavia (FRY) in the spring of 1999 brought to a head questions of fundamental importance to the international community, specifically with regard to international law concerning the use of force and the weight of modern international human rights principles in modifying traditional international law on that subject. The debate over humanitarian intervention has been rekindled in recent months due to renewed conflict in the Balkans and to the change in the United States

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administration to one which is at once less approving of the use of military force in situations of non-conventional state interest, but also likely to be more supportive of unilateral action in its prosecution of future armed interventions.¹

This article will attempt to examine the Kosovo intervention from the perspectives of traditional and arguably evolving international law principles. It will provide arguments, based in law and principle, to support the thesis that unilateral armed intervention by members of the United Nations (UN) without the approval of the UN Security Council is and should be a violation of international law.² Such actions, though arguable in their circumstantial expedience and often nobly conceived, have the potential to fatally undermine both the UN and international law in general and should be eschewed by the international community. Rather, this paper describes and supports efforts of institutional reform and re-emphasis calculated to make the United Nations, and specifically the UN Security Council, responsive, to the degree possible given a realistic understanding of world politics and personalities and the proper role of such an organization, to situations of intra-state gross human rights abuse.

1 The Kosovo Intervention

It is important to note preliminarily that the Kosovo intervention was certainly not carried out in a vacuum consisting only of international law considerations. Statements by leaders of NATO member states during the intervention confirm that the primary impetus for military action in Kosovo and other parts of the FRY was to stop the growing human tragedy that was daily broadcast into the homes of leaders and citizens alike in the West.

The US position with regard to the Kosovo intervention was expressed by President Clinton in an address to KFOR troops in Macedonia in June 1999. His statement was one of the first iterations of what later became known as the ‘Clinton Doctrine’ regarding humanitarian intervention:

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 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.³

Speaking the day after the beginning of Operation Allied Force to the House of

¹ See generally Rice, ‘Promoting the National Interest’, 79 *Foreign Affairs* (2000) 45–62; Kaplan, ‘Colin Powell’s Out-of-Date Foreign Policy’, *New Republic*, 1 January 2001. In this article, the term ‘unilateral’, in the context of humanitarian intervention, is used to refer to interventions taken by a state or group of states without the authorization of the UN Security Council or other valid legal justification. Under the author’s interpretation of international law, the fact that a state is joined in violating legal obligations does not lessen the breach of law with regard to the individual state, which grouping the actors together seems to imply. See the International Law Commission’s Draft Articles on State Responsibility, Article 1. The Draft Articles and commentary thereon are viewable at www.law.cam.ac.uk/rcil/LCSR/Arts.htm.

² See *supra* note 1 on the use of terminology in this article.

³ Brown, ‘Humanitarian Intervention at a Crossroads’, 41 *William and Mary Law Review* (2000) 1683, at 1691.

Commons, UK Foreign Secretary Robin Cook pointed to similar reasons as those cited by President Clinton, but further alluded to the motivating dynamic of the continuing credibility of NATO:

The first reason why we took action was that we were aware of the atrocities that had been carried out and we had the means to intervene, but that is not the only reason. Our confidence in our peace and security depends on the credibility of NATO. Last October, NATO guaranteed the cease-fire that President Milosevic signed. He has comprehensively shattered that cease-fire. What possible credibility would NATO have next time that our security was challenged if we did not honour that guarantee? The consequences of NATO inaction would be far worse than the result of NATO action . . . Not to have acted, when we knew the atrocities that were being committed, would have made us complicit in their repression.⁴

Clearly, while the crisis was ensuing and the NATO governments focused their energies on stopping the humanitarian debacle in the province, the international legal consequences of their actions were at best secondary in consideration. However, those consequences must be addressed in the aftermath of the conflict and owned up to by the participating NATO members and the international community in general. Indeed, because of the fundamental importance of the area of use of force in international law the lessons of the Kosovo intervention must be understood and internalized by the international community if the international law system is to have any legitimate future as a system of law, respected and adhered to by the nations of the world.

2 Legal Analysis

A *The United Nations*

Providing for clear regulation of the area of use of force as between states has long been an aim of international law and was at the forefront of concerns leading to the establishment of the United Nations system after the end of the Second World War. Indeed, that purpose is enshrined in the first sentence of the preamble to the UN Charter in these words: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .'⁵ It is reiterated in Article 1 of that document in the official recitation of the purposes of the United Nations, the first such being '[t]o maintain international peace and security, and to that end to take effective *collective* measures for the prevention and removal of threats to the peace'.⁶

To accomplish these purposes, the signatories to the UN Charter, now numbering 189 and including all of the members of NATO, have delegated in Article 24 of the Charter the 'primary responsibility for the maintenance of international peace and

⁴ See Roberts, 'NATO's "Humanitarian War" Over Kosovo', 41 *Survival* (1999) No. 3, 104.

⁵ UN Charter, Preamble.

⁶ *Ibid.*, Article 1 (emphasis added).

security' to the United Nations Security Council 'and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

The Security Council, now composed of 15 members, five of which are given permanent status in Article 23 of the Charter, is entrusted with the sole authority to bring measures to bear upon situations of threat to international peace and security. It may, under Article 41, call upon the members of the UN to suspend economic relations with parties concerned (i.e. impose economic sanctions). In the event that such measures prove inadequate to deal with the situation, the Security Council under Article 42 may authorize UN members to engage in military intervention to restore international peace and security.

Strengthening the understanding of delegation to the Security Council of matters involving international peace and security and manifesting the international law norm of non-intervention, Article 2(4) of the UN Charter requires that '[a]ll 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 manner inconsistent with the purposes of the United Nations'. The only exceptions to this provision provided for in the Charter are actions authorized by the Security Council under Chapter VII, as described above, and the right of individual and collective self-defence outlined in Article 51.

In a subsequent attempt to clarify authoritatively the meaning of the non-intervention norm as stated in Article 2(4), the UN General Assembly issued a declaration resolving in pertinent part:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, or cultural elements, are in violation of international law.⁷

Thus, in an action manifesting a desire to collectively regulate the use of force between states, the members of the United Nations have delegated to that organization, and specifically to the UN Security Council, the primary and authoritative role⁸ in the resolution of international disputes. In doing so, the UN member states,

⁷ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (24 October 1970) (emphasis added). Supporting the authoritative status of this Declaration, see Article 31(2) and (3) of the Vienna Convention on the Law of Treaties regarding subsequent agreements by the parties to a treaty and the effect thereof upon treaty interpretation. See also UN Charter, Articles 2(7) and 53(1). Concerning the interpretation of Article 2(4), some have recently advanced arguments derived from a non-contextual reading of its text to the effect that international acts of force not expressly aimed to change the possession of a state's territory or usurp its political independence are not forbidden by Article 2(4). This article will not attempt to analyze the merits of this argument as others have already done so sufficiently. It will suffice at this point to state that the present author does not hold with such an interpretation and considers it an unwarranted and unprofitable attempt to wriggle out of the clear strictures of the Article as interpreted in its context. See generally D.J. Harris, *Cases and Materials on International Law* (5th ed., 1998) 25 n. 2 and 865 n. 5.

⁸ See UN Charter, Article 2(7).

including those comprising NATO, have taken upon themselves binding obligations under international law to respect the terms of the UN Charter and its established procedures outlined above for bringing *collective* force to bear on situations of threat to international peace and security.

B Customary International Law

Despite the clear delegation of authority in the area of use of force to the United Nations in the UN Charter, some have recently argued that in addition to the strictures of the Charter regarding the use of force there has developed in customary international law an independent right of military intervention in the affairs of other states for the purpose of 'protect[ing] individuals from continuing grave violations of fundamental human rights'.⁹ Proponents of this view point to provisions in the UN Charter and to other sources of international law including multilateral treaties which indicate that fundamental human rights are to be respected by states. They point out that certain of these norms, including prohibitions on genocide and crimes against humanity have arguably reached the status of peremptory norms from which, theoretically, no state may derogate in its actions.¹⁰ They argue that, as presently constituted, the UN Security Council is unable to act effectively as a guardian of these rights in authorizing collective UN actions for their enforcement. They point to the failings of the Security Council in this regard, and observe that since the institution of the UN Charter there have been a number of cases in which military force has been used to intervene in the affairs of states for arguably humanitarian purposes without the approval of the Security Council.¹¹ An evolving norm of humanitarian intervention, they argue, grants legal justification to unilateral state acts of forceful intervention carried out with humanitarian objectives.

To understand and evaluate this argument, one must first understand how customary international law is made, and how it interacts with other principles of international law. Customary international law is one of the two primary sources of international law which, along with treaties, make up the bulk of international law rules.¹² Unlike treaties, which are contractual in nature and generally written instruments, customary international law is composed of two elements: state practice and *opinio juris* (the sense of legal obligation under which a state acts).¹³ It is through analysis of these two elements, as well as their duration and character, that rules of customary international law eventually develop and are accepted by the international community as binding law. It is important to understand that both elements (state practice and *opinio juris*) must be satisfied before a principle may become a candidate for recognition as customary international law.

With regard to the proposed norm of humanitarian intervention, the argument can

⁹ Brown, *supra* note 3, at 1686–1687.

¹⁰ See *ibid.*, at 1697–1699.

¹¹ See *ibid.*, at 1703–1706.

¹² See Statute of the International Court of Justice, Article 38 (listing the sources of international law) (the Statute is an annex to the UN Charter).

¹³ See *ibid.*, at Article 38(1)(b).

be made that since the coming into force of the UN Charter there has been a sufficiency of examples of states violating the territorial sovereignty of other states in order to forcefully terminate gross violations of the human rights of citizens of the target state. Such examples include the military action by Arab states against the state of Israel in 1948, the Belgian action against the Congo in 1960, the US intervention in Grenada in 1983, and of course the NATO operation in the FRY in 1999. In all such examples there were attributed to the effort of the intervenors arguable intentions, to greater and lesser degrees, of terminating or preventing human rights violations against the citizens of the target state.

However, when examination of these and other instances of purported humanitarian intervention shifts to an analysis of the actual statements of intervening governments manifesting the grounds on which they legitimized their actions, support for the idea that these incidents have created a customary international law norm of legal humanitarian intervention outside the ambit of the UN Charter fades significantly.

A review of official state pronouncements of legitimizing principles for the above actions and others since the institution of the UN Charter reveals very few if any instances of clear state reliance on an independent customary international law doctrine of humanitarian intervention.¹⁴ Indeed, after summarizing the official statements of such intervening states up until 1993 and their purported grounds for action, Professors Arend and Beck conclude that:

[t]o 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.¹⁵

This observation proved consistent with regard to the statements of NATO member state leaders during and after the Kosovo conflict. The legal justifications officially employed to legitimize the Kosovo intervention centred on two main legal arguments: first, that previous UN Security Council resolutions could be construed to lend some authority to NATO's actions; and, secondly, that principles of general international law provided for a right of intervention on the grounds of 'overwhelming humanitarian necessity'.¹⁶ While seemingly an endorsement of a legal right of humanitarian intervention on its face, the precedential and obligatory weight of these statements are compromised significantly by the fact that in their official statements the NATO governments chose not to support their assertions by significant reference to prior state practice or to the long tradition of academic writing on humanitarian intervention.¹⁷ As Professor Roberts notes:

[i]n April and May 1999, after Yugoslavia brought a case in the International Court of Justice against certain NATO states, accusing them of illegal use of force, the NATO governments

¹⁴ See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force* (1993) 114.

¹⁵ See *ibid.*, at 129.

¹⁶ See Roberts, *supra* note 4, at 105–106.

¹⁷ See *ibid.*, at 107.

involved generally eschewed the opportunity to make a ringing legal defence of their actions, and largely confined themselves to technical and procedural issues. The simple and general statements made by NATO governments in 1998–1999, such as that by the UK, were for the most part based on the proposition that the situation faced in Kosovo was exceptional.¹⁸

The lack in all of these instances of clear reliance on a legal right of humanitarian intervention to legitimize the use of force against another state manifests a fatal deficiency of relevant *opinio juris* by the intervening states involved. Thus, arguments for such an established principle in customary international law prove, upon closer examination, to be untenable.

Though the foregoing examination would seem to satisfy the immediate question of an alleged customary international law norm of humanitarian intervention, it is important to point out that even if such a norm could in the future be established, the corollary argument that such a norm would grant an absolute right of intervention on the grounds of humanitarian necessity is seriously flawed. Though among the several sources of traditional international law there is no established absolute hierarchy which would lead to a *per se* trump of obligations embodied in the UN Charter over obligations in customary international law, it is significant to point out that the converse is also true.¹⁹ Therefore, even if parallel contradictory customary international law were to develop, such a customary rule would not necessarily affect the treaty obligations of United Nations members under Article 2(4) of the UN Charter. Thus, should the occasion arise in which a state forwarded a humanitarian intervention right based in customary international law in an action brought against it before the International Court of Justice on grounds of aggression in violation of the UN Charter, even if the Court were to recognize such a customary law-based entitlement, it would nevertheless be likely to find a breach of the defendant state's treaty obligations under Article 2(4) and impose a remedy.

An analogy to this situation can be found in domestic law contract principles. In the common law of contract between individuals, a subsequent change in the law of the jurisdiction in which a contract is in force will not generally serve to render the obligations of that contract void unless an act to be undertaken by a party under the obligations of the contract is made illegal. Similarly, in international law, the only way for a treaty provision subsequently to be made invalid by a customary norm is for that norm to achieve the status of *jus cogens*, or a peremptory norm from which no derogation is permitted.²⁰ In the case of the norm of humanitarian intervention, such status has not been remotely approached, and is not likely to be for the foreseeable

¹⁸ *Ibid.*

¹⁹ See Harris, *supra* note 7, at 23 n. 3. But for a caveat on this point, see *infra* note 22.

²⁰ See Vienna Convention on the Law of Treaties, Articles 53 and 64. There has been some discussion of the eventual modification of treaty norms by subsequent state practice. However, the Vienna Convention mentions such practice only in regard to interpretation of the treaty, and states that such practice is to be 'taken into account' in addition to other interpretive guides and to the more weighty ordinary meaning and context of the provisions in question. See *ibid.*, at Article 31. See generally Michael Byers, *Custom, Power and the Power of Rules* (1999) 166–180.

future due to the significant standards which must be met for peremptory norm status to be accorded.

Thus, even if a customary international law rule of humanitarian intervention were to be clearly established, it would not, as a matter of pure legal analysis, necessarily justify the abrogation of the obligations of UN Charter members mandating their avoidance of actions or threats of actions ‘against the territorial integrity or political independence of any state’.²¹

3 Policy Analysis

A Customary Law Theory

Having established that there is no existent principle of humanitarian intervention in customary international law by which the NATO countries could credibly legitimize their intrusion into the territorial sovereignty of the Federal Republic of Yugoslavia, this article will proceed to consider further the policy aspects of the issue of humanitarian intervention as a principle of customary international law lending legitimacy to such actions as those engaged in by NATO in the spring of 1999.

The strongest arguments against the evolution of such a rule are rooted in a deep concern that a clear rule of law governs this most important area of international relations.²² Indeed, the maintenance of international peace through clear regulation of the use of force between states can be seen to be at the very foundation of modern international law.²³ This fact, of course, springs from a historical recognition that without a clear, definitive, and mutually acknowledged system of objective rules to

²¹ UN Charter, Article 2(4). A second legal argument which would likely preclude the recognition of a rule in customary international law overcoming a treaty provision such as Article 2(4) is the interpretive rule of *lex specialis derogat legi generali*, which states that, when a general and a more specific international norm apply simultaneously in the examination of a certain set of facts, the more specific rule must be given priority. In such a case, as in the one outlined above, the written provisions of the UN Charter would almost certainly be taken in preference and in priority to a more general and inherently ambiguous rule of custom allowing humanitarian intervention. See generally Perrazzelli and Vergano, ‘Terminal Dues under the UPU Convention and the GATS: An Overview of the Rules and their Computability’, 23 *Fordham International Law Journal* (2000) 736, at 747; and Harris, *supra* note 7, at 23 n. 3.

²² While the present author would be the first to characterize the current system of international law as not yet having obtained a number of prerequisite characteristics for classification as a true system of law (the absence of a realistic system for universal enforcement, even in a theoretical sense, being the most outstanding of these), as he has stated previously, areas of international law such as international use of force law, which govern states in their capacity as world citizens (as opposed to international humanitarian law’s attempts to integrate with and authoritatively affect the national laws of a traditionally domestic nature) are precisely the sort of legitimate subjects of international law which the nations of the world should support in their development as increasingly substantial and binding areas of international law. See Joyner, ‘A Normative Model for the Integration of Customary International Law into United States Law’, 11 *Duke Journal of Comparative and International Law* (2001) 133.

²³ See Dinstein, ‘The Thirteenth Waldemar A. Solf Lecture in International Law’, 166 *Military Law Review* (2000) 93, at 95.

govern international uses of force, the entire system of ordered international interaction which international law has traditionally sought to provide becomes moot in its ineffectiveness to provide for the most basic protections of human life, freedom and prosperity. Out of this recognition and a desire to prescribe such protective rules, the UN Charter was born in 1945.

It must be remembered that the UN was created at a time when its framers understood, better than we do now, the failings of an international law system without clear rules proscribing illegitimate uses of force by states, living as they were at the end of one of the most flagrant examples of state aggression in the history of the world. In framing the UN and its organs they sought to provide not only a forum for international dialogue and diplomacy, but a universal and binding set of rules governing state use of force, an area of international law which until that time had been fraught with ambiguity.²⁴

Although those rules established a basic non-intervention norm, they also recognized that use of force by states is not in all cases avoidable, and is in some circumstances necessary and justified. One such recognized situation can be broadly termed self-defence. States of course have the right to defend themselves against armed attack by necessary and proportionate armed response and have the right similarly to defend other states from aggression under the same standards if invited to do so by the target state. Although the contours of this right established in Article 51 of the Charter, as with any right provided by law, are subject to judicial interpretation and elaboration, it was established in that document to provide a clear, objective principle, binding upon all Charter signatories, in a legal framework governing the area of use of force. It is important at this juncture to note again the differences between treaties and custom as sources of law in the international legal system as that distinction directly bears on the normative value of the development of a customary rule to be the basis of claims of legitimacy for humanitarian interventions. Unlike treaties which are contractual, written instruments, customary international law is a very dynamic source of law.²⁵ It is 'created' by the acts and intentions of states, and is thus in a relatively constant state of flux, with the continual possibility of change from a variety of sources.²⁶ Indeed, the very terms by which such acts and intents are analyzed, namely, state practice and *opinio juris*, are definitionally unsure and often very difficult to apply.²⁷ Even when agreed on the definition of its terms, nations are not the final arbiters of what is or is not customary international law, as the only means, absent codification by treaty, of concretely establishing rules of customary international law is by the rendering of an opinion in an adjudication

²⁴ See Peter Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (7th ed., 1997) 308–309.

²⁵ See *supra* notes 5–10 and the accompanying text.

²⁶ See *supra* note 2 and the accompanying text.

²⁷ See Harris, *supra* note 7, at 25 n. 2 and 41 n. 4.

before an international court.²⁸ Since adjudication of international disputes is relatively rare,²⁹ many averred principles of customary international law have yet to be ruled upon by any such court. Customary international law rules thus suffer from ambiguity, as they often lack sure existence and are interpretively unclear in many instances. Any element of the international legal regime governed by customary international law is therefore compromised by the inherent uncertainty of the form of law upon which it is predicated. This effect is not as deleterious in other areas of international law coverage, as the potential problems emanating from that ambiguity are not as extreme as in the case of the governance of use of force law. However, it must be understood that a reliance on customary international law as a basis for the legal governance of international uses of force carries with it profound disadvantages in clarity and susceptibility to abuse as compared to governance by treaty, especially a treaty with the almost universal acknowledgment and general prohibitory structure of the UN Charter.

As previously mentioned, the UN Charter provides that all other international use of force by member states be previously approved and sanctioned by the Security Council, through resolution provided for in Chapter VII of the Charter. This most basic element of the UN system governing the use of force has come under increasing criticism in recent years, with many scholars and government officials decrying the ‘inability’ of the Security Council to respond effectively to, in particular, situations of intra-state human rights violations.

This criticism may be summarized in the words of Professor Michael Reisman, one of the chief apologists for the legitimacy of Kosovo-type interventions on extra-Charter grounds:

Assigning a nearly exclusive right to use force to a Security Council, on which the five most powerful states of the world sit as permanent members, is a workable idea if the responsibility of that Council is restricted to resisting threats to and breaches of the peace and acts of aggression. These are fundamental and venerable postulates of international politics on which, for the time being, the permanent members can usually agree. But the assignment of exclusive power to the Council ceases to be workable if the writ of the United Nations is also extended to the protection of human rights, the international control of the essential techniques by which governments manage and control their people internally. On these matters, there are profound, possibly unbridgeable divides between the permanent members.³⁰

This critique may be responded to on two particular points. First, it seems to the

²⁸ See e.g. the Statute of the International Court of Justice, Article 38(1), stating that the ICJ, the judicial arm of the United Nations, ‘whose function is to decide in accordance with international law such disputes as are submitted to it’, is to apply, among other things, ‘international custom, as evidence of a general practice accepted as law’. Thus the ICJ applies the elements of customary international law to see if it is indeed present in the facts presented to it, and then uses such divined rules as the basis of its decision. It is only through this process in such tribunals that rules of customary international law can be given concrete definition and force.

²⁹ See Harris, *supra* note 7, at 985: ‘In international relations, most disputes are settled through negotiation between the parties or by third party assistance in the form of good offices, conciliation, or the conduct of fact finding-inquiries.’

³⁰ Reisman, ‘Kosovo’s Antinomies’, 93 *American Journal of International Law* (1999) 860, at 861–862.

present author that Professor Reisman's distinction between breaches of the peace by aggression and 'protection of human rights' is overly simplistic and does not withstand objective scrutiny. After all, in the eyes of the Yugoslav leadership, what happened during the NATO intervention in Kosovo was no more than an act of aggression in breach of the peace, and in abrogation of traditional international law principles of territorial sovereignty. This is not to say, of course, that there was no difference between this use of force and, for example, the aggressive use of force displayed by Germany in the Second World War, but rather that the distinction between the two events lies primarily in the subjective intent of the actors. It is difficult to see why one use of force by member states should be regulated by the strictures of the Charter while another, using similar military measures and arguably causing just as great a threat to international peace and security, should be absolved from the Charter's regulation and left solely to the discretion of its prosecutors.³¹ One need not be a specialist in law and political science — or in history for that matter — to understand that such an argument, if taken as authoritative precedent by other, less-well-meaning states, could lead to the entire overthrow of the United Nations system of use of force regulation and the thrusting of the international community into a new epoch of unrestrained state use of force, nominally justified on humanitarian or other grounds, and regulated by a system of customary international law rules the contours of which would be mired in ambiguity and subject to redefinition by powerful states almost at their whim. This potentiality, even if distant and unsure, argues strongly that any use of force between states, stemming from whatsoever subjective motive it may, should be first authorized by a collective and representative body of the international community using objective and mutually agreed-upon standards.³² This process inherently recognizes that any international use of force has ramifications and potential consequences not just for the actors and

³¹ In support of the contention that humanitarian interventions can produce equally significant threats to international peace and security as acts of aggression, one must look no further than the aftermath of the Kosovo intervention itself. As at the time of this article's completion in mid-2001, coalition forces are still stationed in Kosovo and the area has recently seen an increase in actual and potential hostilities between Albanian separatists and the governments of Macedonia as well as Yugoslavia. Such a situation is manifestly volatile, and is aggravated in many respects by the very presence of the former humanitarian intervention prosecutors, whose role has now switched almost 180 degrees to one of protection of local governments and citizens from elements of the very people they were initially dispatched to defend, and whose make-up of soldiers from some of the world's most powerful nations makes their involvement in any future hostilities exactly the sort of international use of force activity the UN Security Council was set up to regulate. This eventuality further sanctions a greater heed to be given to the voices of military leaders who largely oppose humanitarian interventions on such logistic and practical grounds by idealistic and far less practically experienced academics.

³² See Dinstein, *supra* note 23, at 101: 'I regard what happened in Kosovo not only as bad law but also as a dangerous precedent. I have no doubt in my mind that, in Kosovo, the "children of light" were confronting the "children of darkness". But what is sauce for the goose is sauce for the gander. Who can guarantee that in future it would not be the "children of darkness" who would fight the "children of light" in the name of the self-same principle? . . . The pivotal point is that when a state — or even a group of states (like NATO) — intervenes unilaterally with force in the affairs of another country, its action is automatically suspect. Only the seal of approval of the Security Council can remove doubts concerning the sincerity of the intervenors.'

the target, but for all members of the international community, and thus that the community collectively should have a say on what direction the legitimate use of force takes.

Secondly, there are sound reasons why the member states of the United Nations gave pre-eminence over the area of international use of force to the Security Council and why the Security Council was formulated as it was with the institution of five particular states as permanent members of that body with effective veto power over every significant decision of the Security Council. Again, one must hearken back to the time of the inception of the UN Charter and the forced understanding of its framers of the wisdom and necessity of providing that international uses of force be subject to the collective consent of the world's most powerful nations — those which had the ability to embroil the world in yet another international conflict of devastating proportions, two of which they had seen in their own lifetimes.³³ The fact, as Professor Reisman observes, that those most powerful nations do not agree on the issue of humanitarian intervention is therefore not a reason to scrap the UN system, but rather evidence of its necessity in order to avoid larger threats to international peace and security brought on by major economic and military powers who feel that their voice on an important issue of international governance is being ignored. Indeed, the 'inability' of the Security Council to respond to the Kosovo crisis and to other occurrences of internal human rights violations is in fact a derogatory description of that body functioning exactly as it was intended to, and deciding in the particular case not to act. In such cases, the Council is not in fact 'paralyzed' as it has been previously put, but is rather fulfilling its role as a discretionary, governing body of nations whose withholding of consent is indicative of their dissatisfaction with the proposed action, which dissatisfaction was permitted, by the organization of the Security Council, to be expressed in a peaceful and diplomatic manner rather than communicated by corresponding reprisal by force.³⁴ This is a crucial facet of the United Nations system, and one which is perhaps wilfully misunderstood by critics of the Security Council's handling of humanitarian intervention cases, who apparently desire the legitimacy of representative authorization for their actions by the Council, but who are unwilling to abide by the denial of that authorization by the same body.

The UN and its organs, in particular the Security Council, has withstood the institutional test of time as an almost universally accepted, legitimate and effective forum for regulating the area of the international use of force by states. It should not be bypassed simply because its procedures lead to a result in some cases unpalatable to a portion of its members, who might consequently believe the international rule of law is better served by their taking total discretion over an area of that law into their own hands and enforcing it with the use of ad hoc vigilante-like coalitions comprised of their own militaries and answerable to no higher authority than themselves. And, while this outcome is distasteful, it pales next to a description of the actual state of

³³ See Arias, 'Humanitarian Intervention: Could the Security Council Kill the United Nations?', 23 *Fordham International Law Journal* (2000) 1005, at 1020.

³⁴ Reisman, *supra* note 30, at 860.

affairs in the world community, in which the enforcers of what are claimed to be inherent principles of human rights do not even attempt to base such protective measures upon a rule of law, but rather upon the dictates of their own collective consciences and wisdom — a standard for legitimately perceived action which is dubious at best and foolhardy at worst. Again, it must be remembered that the NATO governments did not clearly base their intervention in the FRY on principles of law; in fact great pains were taken by them to avoid such a legitimating reliance. A moment's reflection aptly reveals why. Were they to rely on such an 'established' principle of customary international law, they would be giving further credence and legitimacy to it, which would in turn lead to a sort of equitable estoppel to be applied to their objections later when other nations sought to legitimize their actions by reference to the same principle. Those future actions, the NATO governments surely realized, could take the form of legally unobjectionable forays by states such as China, Russia or Iraq into the territories of neighbouring states and the establishment of 'provisional' governments, administered benevolently by the 'intervening' states to further avowed 'humanitarian' ends. As one can easily see, the dearth of objectively guiding legal principle to limit such actions, if not subject to previous approval by the Security Council, was enough to give pause to the NATO states in their contemplation of acceptable avenues of justification for their own actions.

Thus it can be seen that even the states who would, upon first glance, be advantaged in their foreign policy choices by an established rule of customary law permitting independent humanitarian intervention have eschewed the opportunity to create one. Rather, they have preferred their actions along such lines to be seen as constituting exceptions to the established and apparently legitimate order, administered under the UN Charter, as opposed to steps towards the creation of a new and prudentially (as well as legally) suspect legal order in the stead thereof.

B 'Exception' Theory

This position, widely espoused by academics as well as governments, of viewing the Kosovo intervention, and potentially other future interventions, as exceptions to the international legal order for use of force regulation is sufficiently troubling of its own accord. There is a fundamental difference between recognizing an exception to one rule of law based upon another rule of law and recognizing an exception to the law itself. The former has been attempted (albeit unsuccessfully) by the customary law argument above. The latter completely undermines the system of law regarding which it is made and in essence argues that there is no relevant law, for if law can be circumvented at will then it is not law but rather a mere collection of recommendations. This argument is of course in complete harmony with the positions of those who claim that international law is indeed not law, but rather a body of idealistic norms laid out by naive academics and by hypocritical statesmen, who are very interested in the binding nature of international law when it is breached to their injury, but conveniently overlook its strictures if such are not consonant with the national interests of their states. This is a foundational argument at the heart of the

study of international law, a discussion of the merits of which is beyond the ambit of this article. However, whatever the present substance of the international legal system, in the area of international use of force law it is this article's contention that a true system of law should be pursued and supported as such will inure to the benefit of the global community in the long run. This position absolutely rejects the idea that the concepts of law and legitimacy are separable within the international legal system, as they are not generally in domestic legal systems.³⁵ Law was originally conceived for the purpose of legitimizing action deemed proper and delegitimizing action deemed improper by society, and to argue that law and legitimacy are divorced concepts is to undercut law's primary traditional function.³⁶ Rather than seek to explain away the law in this manner, proponents of humanitarian intervention would be better served (and would better serve the international community) by expending their energies in working with the law and investing in its long-term correctness and effectiveness. These efforts will be more likely to produce a mutually supportable and stable system for legal regulation of this area of international relations than will those which seek to establish exceptions to the law, and thus run the risk of the international community's reversion to the pre-UN Charter era of weak and ambiguous use of force regulation, in part responsible for the horrors of the great wars of the early twentieth century.³⁷ This being the case, it is vital that the problem of humanitarian intervention, being a pivotal issue within the area of use of force law, be viewed in legal terms and receive a clear and binding international legal resolution.³⁸

³⁵ This position takes consideration of the practical difficulties of recognizing in law the delineation of all proper and improper acts. However, in the opinion of the author, the international law of use of force should be viewed as being more exhaustive and less subject to override based on moral imperative than, say, domestic traffic laws which might be conscientiously breached by emergency transportation to the hospital, for example. As can be readily conceived, the danger of abuse of such a moral exception, if recognized, is far more egregious in its potential consequences in the case of an evil-minded military intervention into the territorial sovereignty of another state than are the potential consequences of running a red light for the wrong reasons.

³⁶ See the supporting commentary by Cicero and Blackstone in William Seagle, *The History of Law* (1946) 4.

³⁷ See Malanczuk, *supra* note 24, at 18–26.

³⁸ One such resolution has been attempted recently in the non-custom based context by some legal theorists, who argue that humanitarian-motivated international uses of force nominally in breach of Article 2(4) of the UN Charter could be given a degree of legal justification by the establishment of a defence of sorts, which would serve not to substantively legalize the underlying acts, but rather to provide for a bar to punishment of the relevant state actors on the grounds that in such cases the superseding moral imperative of preventing human rights abuses renders the actor morally blameless even though in technical breach of a legal obligation. This 'defence' approach has been expressed compellingly by Professor Stephen Neff of the University of Edinburgh, and is based primarily upon the writings of Grotius, who supported such a distinction between substantive legality and moral blameworthiness giving rise to punishment in international law (see Hugo Grotius, *De jure belli ac pacis libri tres*, Book 2, Chapter 25). While this argument holds some promise of providing clarity and legitimacy to extra-Charter based interventions, the lack of supporting legal authority for the recognition of such a defence, as well as normative problems regarding the widening of legal exceptions for international uses of force and the potential for abuse of such a defence, make it practically insignificant for the foreseeable future and prudentially suspect on policy grounds.

4 Possibilities for Change within the UN System

All this having been said, it remains to be conceded that the UN system, as presently constituted, is in some respects procedurally and systemically imperfect in its ability to respond effectively to situations of gross internal human rights violations when they do occur.³⁹ And while the fact of this imperfection has been readily observed by scholars and diplomats alike, in the present author's opinion many of the conclusions which have been reached regarding the nature of this imperfection within the United Nations system, and resulting proposals for procedural and other modifications, have been largely misguided.

A Article 43

One set of such proposals has focused on the systemic problem area of operational execution of Security Council mandates and the difficulties in that regard caused by the lack of binding authority in the Security Council to compel member states to deploy their forces for the prosecution of such actions.⁴⁰ Such execution-related inefficiencies could be substantially remedied, say these commentators, by the conclusion of 'special agreements' under Article 43 of the UN Charter between the UN and its member states, committing national armed forces to the prosecution of UN-sanctioned actions. Such forces would thereby be deployable in obligatory fashion at the behest of the Security Council. However, while analysis of the Article 43 system for providing armed forces commitments to the Security Council is valuable in understanding the enforcement system envisioned by the Charter's framers, as of the present time such academic consideration comprises the full extent of the practical value of Article 43. The absence of such special agreements — not one of which has ever been concluded — originally contemplated as a prerequisite to the full functioning of the Chapter VII system, combined with the almost total lack of indication from member state officials of imminent plans for the conclusion of such agreements, makes consideration of Article 43 as a realistic option for improvement of the Security Council's ability to respond effectively to human rights abuses little more than an intellectual exercise. Furthermore, even if such agreements were to be

³⁹ This article does not attempt to address in detail the important debate concerning the issue of the timing of interventions when the reality of human rights abuses is relatively clear. This is a politically and morally charged debate pitting the perceived virtues of timely intervention or short-term arrest of violent acts and long-term imposed societal restructuring against the positions of some who feel either that some level of objectively verifiable conflict must be found to exist before the international community can reasonably be expected to intervene as a general rule or that early interventions unnaturally stem the tide of currents of hatred and conflict which will eventually burst their banks regardless of the short-term outside-imposed resolution. In a more extreme version of this latter position, its proponents argue that in some if not most cases the combatants should be allowed to take the conflict towards its 'natural' cathartic climax for a longer duration before the international community intervenes. Rather, this article focuses on the decision-making processes of the Security Council itself and propose modifications to current perceptions regarding the importance of achieving collective consent to action within that body.

⁴⁰ See generally Houck, "The Command and Control of United Nations Forces in the Era of "Peace Enforcement"", 4 *Duke Journal of Comparative and International Law* (1993) 1, at 6–11.

concluded, it must be recognized that those agreements and the obligations to supply forces which they would represent would be effectual in responding to international crises only at the call of the Security Council. Thus in cart-before-the-horse manner, proposals for a renaissance of attention to Article 43 special agreements fail to address the most critical and practically significant area for reformative consideration, which lies rather in the procedures and operation of the Security Council itself — the mandatory initiating body for any legitimate non-self-defensive international use of force prosecuted by any means. It is in an analysis of the workings of that organization that any meaningful attempt to improve the efficacy of the United Nations in dealing with internal human rights abuse situations must begin.

B The Veto Power

In this vein, a second set of reformatory proposals have attempted to empower the proponents of humanitarian intervention by focusing attention on the veto power of the five permanent members of the Security Council and seeking either to circumvent or otherwise to overcome the threat of opposing permanent members' veto in cases of humanitarian intervention.⁴¹

Outstanding among these proposals for procedural change is that contained in the UN General Assembly's 'Uniting for Peace' Resolution, adopted in 1950 at the beginning of the Korean war. In an effort to assert its own role in situations of international conflict, the General Assembly resolved in pertinent part:

that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including . . . the use of armed force when necessary, to maintain or restore international peace and security.⁴²

In support of this assertion of authority, the General Assembly cited its independent responsibilities and rights with regard to the maintenance of international peace and security, as they perceived them, as laid out in the Charter.⁴³ Though obviously designed to correct perceived institutional imbalances between the General Assembly and the Security Council and open up the possibility of legitimate member use of force without the Security Council's sanction, the assertion of authority in this area by the Uniting for Peace Resolution rests upon very shaky legal ground. The proposal that the General Assembly has, by virtue of statements in the UN Charter proclaiming the general aims of the United Nations, rights independent of the Security Council in the area of authorization of international use of force and not subservient to that body's primary authority in rendering a decision not to act in a given situation is legally tenuous at best, when viewed in the light of the overall structure of the Charter. Thus

⁴¹ The permanent members' veto power is established in Article 27 of the Charter.

⁴² 'Uniting for Peace Resolution' of 3 November 1950, UNGA Res. 337(V); UN Doc. A/1775 at para. A.

⁴³ See *ibid.*, preamble.

any 'recommendation' by the General Assembly to the members of the United Nations encouraging international use of force not sanctioned by a Security Council resolution pursuant to Chapter VII of the Charter would likely only be recommending an act which would put those members squarely in breach of Article 2(4) of the Charter discussed earlier.⁴⁴ Perhaps in recognition of this fact, exceedingly few cases have arisen in which General Assembly recommendations pursuant to the Uniting for Peace Resolution have been acted upon by a United Nations member.⁴⁵

Other proposals which have not been officially sanctioned by any body of the United Nations include those to formally amend the procedures of the Security Council, as laid out in Chapters V and VII of the Charter, such as by allowing a supermajority of the Security Council to override the veto of one of the permanent members, or requiring the Council to take up a measure for 'second consideration' if it was first defeated by only one permanent member's veto. In such a case, of second consideration, the measure would only be defeated by the votes of two permanent members.⁴⁶ It has even been proposed that the permanent members' veto power be wholly revoked.⁴⁷ These proposals, though intellectually stimulating and well intentioned, are in the end entirely unrealistic. They have an exposed Achilles' heel and are vulnerable to the very institutional component they seek to change. Article 108 of the UN Charter outlines procedures for the Charter's amendment and states that any such amendment must be ratified by all permanent members of the Security Council. As one commentator has accurately observed, the permanent members not only have the veto power but also the 'veto over the veto'.⁴⁸ Any effort at institutional reform which would diminish the power of the permanent five by a restructuring of their veto prerogatives under the Charter is therefore destined for failure as it must gain their approval to be implemented. Furthermore, these proposals miss the mark in their attempts to remedy the voting procedures and substantive jurisdiction of the Security Council, which as previously discussed were established at the inception of the UN Charter and which are as prudentially sound today as they were at the time of their conception by the Charter framers.

C A More Persuasive Paradigm

However, in the present author's opinion, there is a third avenue for systemic reform the implementation of which is not foreclosed by the reality of the permanent members' interest in protecting their absolute veto power and the underlying

⁴⁴ While the ICJ's ruling in *Certain Expenses of the United Nations*, ICJ Reports (1962) 151, at 163, did give some weight to the General Assembly's recommendations pursuant to the Uniting for Peace Resolution, it stopped short of recognizing in that body any authority to authorize or recommend actions of military force by UN members without Security Council authorization.

⁴⁵ See generally Heath, 'Could We Have Armed the Kosovo Liberation Army? The New Norms Governing Intervention in Civil War', 4 *UCLA Journal of International Law and Foreign Affairs* (1999-2000) 251, at 291-295.

⁴⁶ See Arias, *supra* note 33, at 1026.

⁴⁷ See *ibid.*, at 1025.

⁴⁸ See *ibid.*, at n. 82.

conception of which is in complete harmony with the balance of organizational power and prerogatives established in the UN Charter. This avenue encourages a conceptual paradigm of Security Council action, in cases of opposition by permanent members to situations of proposed humanitarian intervention, which emphasizes the use of diplomatic and other persuasive efforts by proponents of intervention on a case-by-case basis in order to obtain consensual waiving of the veto power on the part of opposing permanent members. Such a paradigm would allow those states who strongly support the Security Council's expanded involvement in and greater efficacy in remedying situations of intra-state human rights abuse the opportunity to make their case, both diplomatically and otherwise, to those members who do not support such positions, and thus persuade them to agree if not to support such measures, then to simply abstain from votes taken on them.

At the outset of this discussion, it is important to note that the author is well aware that diplomatic and other efforts have long been and are yet utilized by proponents of Security Council action, in the area of humanitarian intervention and otherwise, to persuade members of that council to support, or at least to refrain from opposing, various measures. The proposition of this article is in essence that there be a redoubling of those efforts, particularly in cases of proposed humanitarian intervention, and that proponents of such actions should be willing (in light of the foregoing exegesis of the legal and policy-oriented factors relevant to humanitarian interventions) to commit more of their collective energies and resources to these efforts.

The advantages of a system in such situations of consensual veto-waiving can be easily understood. Apart from the obvious advantages to members supporting further involvement by the Security Council in interventions, the added benefit to the eventual prosecutors of such actions in their perceived legitimacy and harmony with the rule of law can hardly be estimated. And while it may seem improbable for any world power to waive, even in an isolated case, the exercise of an instrument of leverage such as the power of veto on the UN Security Council, such concessions are the traditional object of diplomatic and other negotiation and exchange in the international community, and will surely be granted in the face of sufficient incentive, whether derived by corresponding diplomatic, economic or other concession from supporting states. It is this last consideration which the proposition of this article seeks most particularly to influence.

As previously stated, in light of the asserted present and future utility of the UN Charter-based system and the incentives created thereby to work within its confines and thereby add to its institutional development and establishment as a functioning and binding system of law in the area of international use of force, proponents of humanitarian interventions should be willing, within that forum, to put more significant and a greater variety of persuasive resources on the negotiating table than has previously been the case. These resources should include trade and other economic concessions, diplomatic concessions, and assurances regarding the prosecution of the proposed action, including increased participation by and coordination with the opposing members' militaries. They should also include assurances that

future reciprocal support of measures sponsored by opposing members will be contingent upon their actions in the case at hand. In short, supporting members should be willing to 'put their money where their mouth is' in cases of perceived humanitarian necessity and do what is needed to bring about the requisite corresponding concessions from members opposing remedial action.

To further aid such efforts, it is suggested that supporting members attempt to address the underlying causes of concern of opposing members by submitting arguments based, among other principles, upon international law. The primary concern of states who oppose humanitarian intervention is usually based on the potential precedential effect of the proposed action. States such as Russia and China are acutely sensitive to such propositions, because they fear that their consent to such actions, and the fact of the actions themselves, may contribute to subsequent legal justification for future international involvement in their own domestic affairs or foreign interests or in the affairs of their allied and client nations. However, these concerns may be significantly allayed by a proper understanding of the evolution of international law norms and by the granting of simple procedural accommodations by the Security Council. First, it is important to understand that decisions of the Security Council and the actions taken in pursuance thereof, in and of themselves, do not create customary international law. Such decisions are merely the functioning of a treaty organization and do not manifest the requisite state practice and *opinio juris* necessary for the creation of universally binding custom. Secondly, while acquiescence in Security Council decisions by a permanent member has as a matter of traditional practice been viewed as implying consent to the approved action,⁴⁹ this presumption could be effectively rebutted by the Council's adoption of a statement in each relevant case stating definitively that in furtherance of the effective administration of the Security Council, acquiescence in the vote at hand will be understood as not implying such consent. This understanding could be bolstered by statements by the acquiescing state or states on the record at the taking of the vote to the effect that they do not view the decision as precedential.⁵⁰ Such actions would effectively negate the legal implication of consent and would allow opposing permanent members to abstain without fear of future consequences. Such simple modifications to the procedural workings of the Security Council in cases of proposed humanitarian intervention would not necessitate any formal change to the Charter and would simply be concessions within the power of proponent states to arrange.

Effective arguments would also of course serve to remind the opposing permanent

⁴⁹ See *Certain Expenses of the United Nations*, ICJ Reports (1962) 151, para. VII.

⁵⁰ See Johan Kaufmann, *United Nations Decision-Making* (1980) 129. An example of such a statement may be found in China's comments in the official record of speeches made by Security Council members following the passage of Security Council Resolution 875, which authorized, under Chapter VII, the use of force by member states to ensure the implementation of previously levied sanctions during the 1993 crisis in Haiti. China had in fact voted in favour of the resolution, yet still sought to clarify its position that '[t]he measures authorized in the resolution are special actions taken under the unique and exceptional circumstances in Haiti, and they should not establish a precedent'. UN Doc. S/PV.3293 (16 October 1993).

members that, even in the face of legal precedent, they are not barred from voting in cases in which they themselves or their allies are parties, and thus that they could expressly quash any proposed Security Council action which would undesirably interfere in their own or their allies' affairs.

It should be pointed out that the element in the proposal currently under consideration which provides for the prior agreement of permanent members to consensually waive their veto rights relative to the prospective action distinguishes this proposal from others which seek to render the veto power effectively moot by allowing unilateral state use of force subject only to a subsequent right of approval by the Security Council.⁵¹ Such proposals, in addition to flagrantly misinterpreting the provisions of the Charter on the subject, give little consideration to the original incentives for the granting of a veto right to the world's most powerful states and risk inciting those among that group who will inevitably feel themselves disempowered by such a system, and who may choose to express their consequent umbrage through undesirable means.⁵²

Such a renewed persuasion-based paradigm of Security Council decision-making in humanitarian intervention cases, while by no means revolutionary in its underlying conception, would provide a compromise in which situations of internal human rights abuse could be more often and effectively addressed and acted upon by the Security Council, and in which the originally conceived balance of power within the UN would not be altered. Its result would be a situation significantly more facilitating of general international peace and security than any proposal to abrogate the international order and the rule of law on a more revolutionary and extra-Charter basis. Furthermore, it would have the benefit of requiring institutional adjustments far more realistic than many such proposals which have been previously advanced.

It will undoubtedly be the case that even with such persuasive efforts, proponents of humanitarian intervention will not be able to prevail in all cases of perceived need. It is also true that under this paradigm, those groups desirous of having the international community intervene on their behalf will likely find it necessary to first find champions among more powerful states, who will be motivated enough to expend their energies and resources in persuading opposed permanent members, if such exist. These and other perceived imperfections with current systems of international

⁵¹ See *ibid.*, at 827.

⁵² The foregoing proposition favouring increased emphasis on and commitment to diplomatic persuasion in Security Council decisions in humanitarian intervention cases finds an analogy of sorts in the decision-making procedures of the Council of the European Union. In the face of the establishment of veto-like prerogatives granted to EU member states, such as that enshrined in the Luxembourg Compromise of 1966 and qualified voting requirements in many areas of Council decision-making, there has been a movement within the Community towards providing procedures and a normative framework for facilitating compromise and increased negotiation in Council decisions. This movement has produced what is referred to as the Ioannina Compromise, which states that 'if the members of the Council representing a total of 23 to 25 votes indicate their intention to oppose the adoption by the Council of a decision by qualified majority, the Council will do all in its power to reach within a reasonable time . . . a satisfactory solution that could be adopted by at least 65 votes'. Reprinted in Gary Slapper and David Kelly, *English Law* (2000).

governance are perhaps distasteful, but are in the final analysis unavoidable byproducts of the reality of the world in which we live. In contemplation of this fact and its seeming injustice, many will be tempted to press on in finding ways to remedy all situations of state-imposed human rights violation, calling for change in substantive international law and seeking to supplant allegedly ineffective international institutions with more effective ones. However, a view of the issue within the context of world political reality shows fairly clearly that the current international system for administration of use of force law, with the United Nations Security Council as the central governing body in that system, is as good a system as is politically feasible at this time and for the foreseeable future. The considerations of governance by international institution of this area of law have not substantially changed since the organization of the United Nations was hashed out by the leading nations of the world 56 years ago. Furthermore, if the present system is ever to gain increased effectiveness and evolve to be an even more influential governing body in this area, which should be the hope of all forward-thinking analysts, it cannot be deserted by its members at the first sign of its current inadequacy. The institutional value of the United Nations to the administration of international use of force law is worth preserving even at what may be admittedly a very high cost in certain cases of unarrested intra-state human rights abuse. And, while a general moral obligation to aid citizens of other states is conceded to exist, this article rejects the assertion that when the international community is unwilling, due to its adherence to international law, to come to the aid of persons oppressed by their own governments or by other persons in their countries, the international community is complicit in those oppressive acts. Such assertions unnecessarily place blame for those evil acts where it does not belong, instead of where it does belong — wholly and eternally upon the heads of the oppressors themselves. The international community in deciding not to act on a principled basis and for the greater good is, far from being complicit in violence and terror, seeking to assure that those maladies do not afflict the international community on a far greater level and scope and that a system of law is in place to keep this greater catastrophe from being realized as it has in the past. This understanding recognizes the fact that suffering should be abated wherever it occurs when possible and feasible, but not when the means of abatement are likely to cause more harm than good in their collateral effects upon both the immediate situation and the long-term health of the international legal system. And while it is questionable to what degree the prohibition on unauthorized uses of force currently within that system is effective in deterring aggressive acts not based on humanitarian necessity, it is clear that the codification of that norm in international law does allow the international community, through the UN Security Council, to bring measures to bear collectively and legitimately to forcefully prevent or remedy such action. This fact becomes highly significant when it is realized that, in the current state of the international legal system, such enforcement measures constitute a potentially effective deterrent, even if simply hoping the aggressor state or states will be deterred by the strength of the law itself and the direct legal consequences flowing from its breach often do not.

5 Conclusion

Through legal and policy analysis it can be concluded that the NATO intervention in the Federal Republic of Yugoslavia in the spring of 1999 was and should have been illegal under international law. In so concluding, this article attempts to support, from the perspectives of law and policy, the relative advantages of the system for governing state use-of-force law provided by the UN Charter over a new and revolutionary system of customary international law regulation of a subset of that law, namely, humanitarian intervention law, claimed to be in its evolutionary stages by some scholars.

Considering the UN Charter system in the context in which it was formulated after the Second World War and reviewing its obligations and procedures, this article seeks to reaffirm the position that, although imperfect in the application of its procedures to new trends in the international community favouring forceful intervention in situations of intra-state gross human rights violations, the UN system represents the legal and most prudent system for the governance of the entire area of international use-of-force law, and that its obligations and strictures in this area should not be blithely circumvented in the hope of furthering the cause of humanitarian intervention in the short term. Rather, it supports the proposition that, through diplomatic and other persuasive means and with simple and easily accomplished changes to the procedures of the Security Council, combined with its gradual accumulation of experience in dealing with such situations, the UN system can be an efficient and effective forum for responding to situations of intra-state human rights abuse. The article further asserts that the use of the United Nations system in this regard, as in other areas of its mandate, will add greatly to the perceived legitimacy of measures taken under its authority, which will serve both the long-term interests of a doctrine of humanitarian intervention as well as the interests of the international community in upholding the international rule of law in this supremely important area.

Returning momentarily to the new US administration, the ascendance of which has in part prompted a renaissance of interest in the subject of humanitarian intervention, in the concluding paragraphs of this article the author would like to suggest to those who set the foreign policy positions of the United States that (contrary to the views of its new National Security Adviser, as expressed in a publication prior to her appointment to that office⁵³) supporting the UN Security Council as the authoritative arbiter, under international law, of the legitimacy of international uses of force, including but not limited to humanitarian interventions, does not compromise the national interests of the United States. On the contrary, when viewed from a long-term perspective, and conscious of the ageless maxim that ‘all power is fleeting’,

⁵³ See Rice, *supra* note 1, at 45–62: ‘Power matters, both in the exercise of power by the United States and the ability of others to exercise it. Yet many in the United States are (and have always been) uncomfortable with the notions of power politics, great powers, and power balances. In an extreme form, this discomfort leads to a reflexive appeal instead to notions of international law and norms, and the belief that the support of many states or, even better, of institutions like the United Nations, is essential to the legitimate exercise of power. The “national interest” is replaced with “humanitarian interests” or the interests of “the international community”.’

it is very much in the US national interest to support the establishment of a stabilizing and effective system for the regulation of international use of force by states, particularly in prospective expectation of a time when the United States may not be the sole or even the most powerful of the world's superpowers.⁵⁴

Furthermore, it behoves us all, in the present author's opinion, to inquire whether indeed there is any action of force the US or any nation might take which is truly not only in the national interest, but also in the long-term interest of our global common humanity, and that does not either fall under the legitimizing purview of Article 51 of the UN Charter on individual and collective self-defence, or can be effectively advanced and approved through persuasion in the UN Security Council. Thus it should not be the case that international law in the area of international use of force governance should be viewed as a useless and limiting academic or foreign concoction, but rather that in this area with an eye to the promotion of a more peaceful and stable world, the United States and all nations should support the collective efforts of the Security Council in providing for international peace and security.

Indeed, the institutionalization of international humanitarian intervention within the authority and procedures of the United Nations will very possibly add even to the equity of its application — another subject of criticism of hitherto conducted interventions — as institutional pressures, over time, argue for its use consistently and fairly, without regard to subject territory, adding further to the perceived legitimacy of the doctrine of humanitarian intervention itself.

Thus, a more long-sighted and considered analysis supports the conclusion that unilateral international humanitarian intervention unauthorized by the UN Security Council, such as that attempted by the NATO intervention in Kosovo, should be condemned by the international community as violative of settled principles of international law and at risk of undermining those principles and the institutions that govern them and casting the international community into a state of uncertainty concerning a vital element of international interaction, the results of which could be significant and irreversible.

⁵⁴ See Byers, "Trends in Global Governance: Do They Threaten American Sovereignty?", 1 *Chicago Journal of International Law* (2000) 257.