

Force Rules: UN Reform and Intervention

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As the United Nations turns sixty, it suffers from a crisis of ineffectiveness and corruption. It failed to produce a consensus on whether the Great Powers should have used force to enforce United Nations Security Council resolutions regarding Iraq. It then failed to prevent the United States and a coalition of nations from invading Iraq without the permission of the Security Council.¹ It has reeled from corruption confirmed by the Volcker Commission's investigation of UN administration of the Iraqi Oil-for-Food program.² As Secretary-General Kofi Annan has acknowledged, UN peacekeepers in the Congo and other African countries have engaged in the sexual abuse of children.³ Recalling its failures in Bosnia and Rwanda, the United Nations has stood by while almost four hundred thousand have died in Darfur, Sudan, with the potential for hundreds of thousands more in the near future at the hands of government-backed militias.⁴

Secretary-General Kofi Annan has responded by proposing reform of the rules governing the use of force and changes in the structure of the Security Council. Presented in a new report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Annan acknowledges that nations may use force more broadly to confront the problems created by terrorism, rogue nations, and human rights catastrophes, but demands that the Security Council still retain its monopoly on the authorization of the use of force beyond that required for self-

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¹ See John Yoo, *International Law and the War in Iraq*, 97 Am J Intl L 563 (2003).

² See generally <<http://www.iic-offp.org>> (visited Sept 23, 2005).

³ Kofi Annan, *Our Mission Remains Vital*, Wall St J A14 (Feb 22, 2005).

⁴ Report of the Task Force on the United Nations, *American Interests and U.N. Reform*, 35-36 (2005), available online at <<http://www.usip.org/un/report/index.html>> (visited Sept 23, 2005).

defense.⁵ He proposes the enlargement of the Security Council to increase the presence of geographic regions not currently well represented and to recognize a shift in global power away from the countries of “Old Europe” and to nations such as Japan, India, and Brazil.⁶ To address the new threats of terrorism and rogue states, Annan also recommends that nations agree on a definition of terrorism, which will henceforth be prohibited,⁷ and asks for an expansion in the UN’s peacekeeping operations by creating a “strategic reserve” of national forces that can be deployed rapidly, but only on the call of the United Nations.⁸ In making these suggestions, the Secretary-General primarily adopted the December 2004 recommendations of a “High-Level Panel on Threats, Challenges, and Change” appointed by him.⁹

At first glance, these reforms suggest a significant change in the way that the United Nations views the use of force. These differences, however, are rhetorical in nature. Indeed, they do not represent any change in the legitimacy of the current use of force by nations, nor would they have the effect of moving legal rules in the best direction to address the world’s current problems. In fact, the Secretary-General’s proposals would likely have the opposite effect—they will inhibit the use of force when it would promote the goals of international peace and security. The choice for the United States is whether it has sufficient control in the United Nations to spark new reforms in promoting international peace and security, whether it ought to seek alternate rules to govern the use of force, or whether it simply ought to ignore the UN and create a separate security framework—as it did successfully during the Cold War.

This Article has three parts. Part I will discuss the existing legal framework established by the UN Charter governing the use of force. It questions whether this structure has succeeded in regulating state practice, and describes both the proposed reforms and the new international environment that prompted them. Part II criticizes the reforms’ response to the rise of rogue nations and international terrorism by emphasizing the legal doctrine of imminence and a recentralization of power in the UN Security Council. It argues that the concept of imminence does not make sense, and should be replaced by a cost-benefit

⁵ United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc A/59/2005 at 33 (2005).

⁶ *Id.* at 42–43.

⁷ *Id.* at 26 ¶ 91 (“... any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.”).

⁸ *Id.* at 31 ¶ 112.

⁹ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 (2004).

analysis of expected harm. Part III addresses whether the reforms successfully grapple with contemporary international problems from the perspective of global welfare analysis. It argues that enforcing peace and security by eliminating rogue nations, pursuing terrorists, or ending human rights disasters supplies an international public good, and that UN reforms will suppress, rather than increase, the amount of needed intervention. Perversely, the UN reforms will have the effect of retarding international cooperation to solve the very problems they seek to prevent.

I.

The UN Charter creates an almost inviolable presumption in favor of state sovereignty and a strict rule against the use of force by nations. It does so in three provisions. First, Article 2(4) requires member states to refrain 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.”¹⁰ Article 2(4) admits no exceptions; preventing humanitarian disasters or rooting out terrorist organizations finds no explicit approval in the text of the UN Charter. Second, the Charter creates a Security Council that has the authority to order nations to use force “as may be necessary to maintain or restore international peace and security.”¹¹ Third, Article 51 reaffirms that if a nation is attacked, it may use force to defend itself:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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 the right of self-defense 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 to maintain or restore international peace and security.¹²

Taken together, these three provisions promote what I have called elsewhere a law enforcement paradigm toward the use of force.¹³ Like the domestic criminal justice system, the international legal system imposes an absolute prohibition on the use of force by nations. Nations give up their right to use force and delegate it to the UN, just as domestic government possesses a monopoly on the legitimate use of violence. The UN, like domestic government,

¹⁰ United Nations Charter, art 2, ¶ 4.

¹¹ *Id.* at art 42.

¹² *Id.* at art 51.

¹³ John Yoo, *Using Force*, 71 U Chi L Rev 729, 738 (2004).

may use force to maintain peace and prevent violence between nations. Force may be used only in self-defense, after another nation has first attacked and thus first violated the law, just as in domestic law an individual may use deadly force to defend against an attack.

Some have argued that the right to use force internationally is even narrower than the right to use force in self-defense under domestic law. Several prominent legal scholars believe that Article 51's condition on the right to use force only "if an armed attack occurs" limits self-defense to only *after* an enemy attack crosses a border or otherwise begins.¹⁴ They argue that such a strict rule is necessary to prevent pretextual claims of self-defense or international instability produced by the use of force between nations.¹⁵ Critics of this reading argue that Article 51 codified the right of self-defense as it existed under customary international law at the time of the Charter's adoption, but did not extinguish it, a view shared by the International Court of Justice in the *Nicaragua* case.¹⁶ Under this view, pre-Charter customary international law had permitted nations to use force in anticipation of an attack that had not yet occurred—so long as the attack was imminent. Most authorities trace the imminence test back to the *Caroline* incident,¹⁷ in which the United States and Great Britain agreed that a pre-emptive attack was justified if the "necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹⁸

While the Charter's rule remains strict, it does not appear to have succeeded in its goals of preventing war. From 1945 to 1997, according to the Correlates of War project, twenty-three interstate wars have occurred.¹⁹ Another study records thirty-eight interstate wars from 1945 through 1995, which would

¹⁴ See, for example, Ian Brownlie, *International Law and the Use of Force by States* 275–80 (Oxford 1963).

¹⁵ See, for example, Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in Antonio Cassese, ed, *The Current Legal Regulation of the Use of Force* 505, 515–16 (Martinus Nijhoff 1986).

¹⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar v US)*, 1986 ICJ 14, 94 (June 27, 1986). See also Abraham D. Sofaer, *International Law and Kosovo*, 36 Stan J Intl L 1, 16 (2000) (advocating the abandonment of rigid and often dishonest rule-based evaluations of use-of-force decisions in favor of a more flexible standard that might elicit honest reason-giving by international actors); Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich L Rev 1620, 1634 (1984); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am J Intl L 597, 599 (1963); D. Bowett, *Self-Defence in International Law* 182–99 (Manchester 1958).

¹⁷ *The Caroline*, 2 Moore Digest of Intl Law at 409 (1906).

¹⁸ Daniel Webster, Letter to Henry Fox, British Minister in Washington (Apr 24, 1841) in Kenneth Bourne and D. Cameron Watt, eds, 1 Part I, Ser C *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print* 153, 159 (Pub of America 1986).

¹⁹ Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 Conflict Mgmt and Peace Sci 123–44 (2000).

increase to at least forty-one in 2003 with the addition of the wars in Kosovo, Afghanistan, and Iraq.²⁰ Only two—the Korean War in 1950 and the first Persian Gulf War in 1991—received the authorization of the UN Security Council. Mark Weisburd counts more than one hundred uses of force between nations, many falling short of what the Correlates of War project would define as a “war.”²¹ Certainly the UN Charter’s rules have not eliminated interstate war.

But has the UN Charter at least helped to reduce war? In absolute numbers, it does not appear so. According to the Correlates of War database, from 1816 to 1945, fifty-six interstate wars occurred, a rate of 0.43 per year. From 1945 to 1997, that rate is 0.44 per year. A different study found that from 1715 to 1814 there were thirty-six interstate wars, from 1815 to 1914 there were twenty-nine wars, from 1918 to 1941 there were twenty-five interstate wars, and then from 1945 to 1995 there were thirty-eight wars.²² According to these figures, the rate of interstate wars either roughly remained the same or increased during the period of the UN Charter and the League of Nations. When corrected for the number of states, however, the frequency of interstate war seems to have dropped during the UN Charter period. From 1715 to 1814, the number of interstate wars per year per state was 0.019; from 1815 to 1914, it was 0.014; from 1918 to 1941 it was 0.036; and from 1945 to 1995 it was 0.005.²³

These figures suggest that the nature of armed conflict appears to have shifted since the end of World War II. First, it appears that the great majority of casualties suffered since World War II have arisen in intrastate, rather than interstate, wars. In World War I, the number of deaths was approximately thirteen to fifteen million; in World War II, approximately fifty to sixty million; in the conflicts since World War II, about forty million.²⁴ Of all of the armed conflicts since World War II, roughly 75 to 80 percent have occurred within a state, and approximately 80 percent of overall casualties during this period have resulted from such wars.²⁵ Second, conflicts during the post World War II period have become more localized. Since the end of World War II, there have been no global, multi-state conflicts, no Great Power conflicts, and no wars in Western Europe or North America. Third, conflicts seem to have lost their territorial focus. Most wars occur within a state, not between states, and do not

²⁰ K.J. Holsti, *The State, War, and the State of War* 24 (Cambridge 1996).

²¹ A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* 308–22 (Penn State 1997).

²² Holsti, *The State, War, and the State of War* at 24 (cited in note 20).

²³ Id.

²⁴ Yoo, 71 U Chi L Rev at 747 (cited in note 13).

²⁵ Id. at 748.

seem to be fought for territorial gain, with some notable exceptions such as the Iran-Iraq war and the first Persian Gulf War.²⁶

At the outset, this data suggests that the rules of the UN Charter no longer fit the world we face today. On the one hand, the Charter's rules were literally designed to fight the last war—the global, multi-state, mechanized wars that had killed so many in World Wars I and II. The international system, however, has enjoyed a long period of freedom from the scourge of massive interstate warfare, such that the leading historian of American foreign relations during the Cold War has called the 1945 to 1991 period “the Long Peace.”²⁷ On the other hand, the Charter's drafters did not anticipate that the challenges to international peace would arise not from interstate wars, but from intrastate conflicts rooted in civil wars or the collapse of government institutions. The UN Charter's strict rules against intervention except in self-defense renders any outside effort to stop civil wars or prevent humanitarian disasters illegal without the permission of the Security Council.

A defender of the UN system could argue that the UN Charter has produced the post-1945 period of international peace and stability. This seems to be the view of the United Nations High-Level Panel on Reform, which argues that “the United Nations helped to reduce the threat of inter-State conflicts through the Secretary-General's ‘good offices,’ or quiet diplomacy aimed at defusing crises and providing hostile parties the opportunity to talk freely and test intentions.”²⁸ This argument, however, confuses correlation with causation. As far as I can tell, there are no empirical studies that show that the UN Charter has caused any reduction in interstate warfare. In fact, leading diplomatic history and international relations scholars attribute the period of relative peace and stability in the post-World War II period to the bipolar balance of power between the United States and the Soviet Union and their possession of large nuclear arsenals, which encouraged them to avoid conflict.²⁹ Even the UN High-Level Panel recognizes this in its report, with the observation that “for the first 44 years of the United Nations, Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 rarely providing credible cover.”³⁰

²⁶ Holsti, *The State, War, and the State of War* at 21 (cited in note 20).

²⁷ John Lewis Gaddis, *The Long Peace: Inquiries into the History of the Cold War* 219–37 (Oxford 1987).

²⁸ United Nations, *A More Secure World* at 32 (cited in note 9).

²⁹ Gaddis, *The Long Peace* at 219–37 (cited in note 27); Kenneth Waltz, *A Theory of International Politics* 170–76 (McGraw-Hill 1979).

³⁰ United Nations, *A More Secure World* at 54 (cited in note 9).

Not only do the UN Charter's rules on the use of force fail to respond to the change in the phenomenon of armed conflict, they also do not account for political and technological developments. As the September 11, 2001 attacks demonstrated, non-state actors have emerged, able to wage armed conflict with a power that only nation-states once possessed. Yet, international terrorist organizations, by their very methods of operation, may render the self-defense rules obsolete. Terrorists deliberately disguise themselves as civilians, have no territory or populations to defend, and attack by surprise. This makes it virtually impossible to use force in self-defense once an attack is in motion, and provides no target to threaten in retaliation. Rogue states may share the undeterrable character of terrorist organizations, because they have removed themselves from the international system and their leaders may have little regard for attacks on their territories or populations. Marrying these political developments with the proliferation of weapons of mass destruction ("WMD") technology has even further undermined the rules on the use of force. If nations or groups can launch a sudden attack with weapons of devastating magnitude, the time to respond, along with the effectiveness of nonviolent measures are reduced. This urges the use of pre-emptive action to prevent a WMD attack.

Secretary-General Annan and his High-Level Panel on UN Reform nod to these developments, but propose no serious measures to allow the United Nations to respond in a meaningful way. To his credit, Annan recognizes that dispute over the rules governing the use of force has divided the United Nations. Nations

have disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right—or perhaps the obligation—to use it protectively to rescue the citizens of other States from genocide or comparable crimes.³¹

In other words, the Secretary-General classifies the use of force into three types, in addition to pure self-defense from an attack: (i) pre-emption, which he defines as a response to an imminent attack; (ii) prevention, which he defines as a response to a latent but not yet imminent attack; and (iii) protection, which he defines as force used to stop genocide or other humanitarian disasters.

In one good sign, the Secretary-General argues in favor of interpreting Article 51 to permit the use of force in self-defense to address imminent attacks. According to Annan, "imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack

³¹ United Nations, *In Larger Freedom* ¶ 122 (cited in note 5).

as well as one that has already happened.”³² This puts the United Nations on the side with the bulk of scholarly opinion that Article 51 permits the use of force in anticipatory self-defense. But it does not represent a great change in the law, as the *Caroline* doctrine had already established the imminence doctrine.

Unfortunately, in regard to the second and third types of the use of force—prevention and protection—the reports of the Secretary-General and the High-Level Panel are long on rhetoric but short on practical reform. With regard to both, the Secretary-General recognizes that the use of force may constitute an effective remedy for the spread of WMD to hostile hands or to humanitarian crises, but he still restricts the authority to use force to only the Security Council:

Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?³³

The High-Level Panel similarly chose to restrict the right to use force for prevention to only the Security Council. According to its report, “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies.”³⁴ In terms of humanitarian crises, the High-Level Panel further explained that the Security Council should stay firm in the understanding that it can use its Chapter VII powers to authorize collective military action, so long as it finds that the situation rises to the level of a threat to international peace and security.³⁵

Rather than loosen the restrictions on the use of force, both Annan and the High-Level Panel provide new criteria to guide the considerations of the Security Council. According to Annan, the Security Council “should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.”³⁶ The High-Level Panel provided more explanation for the articulation of standards. The panel believed the problem was an absence of agreement on

³² Id at ¶ 124.

³³ Id at ¶ 125.

³⁴ United Nations, *A More Secure World* at 55 (cited in note 9).

³⁵ Id at 57.

³⁶ United Nations, *In Larger Freedom* at ¶ 126 (cited in note 5).

the Security Council about humanitarian intervention, and a lack of trust by non-Security Council members in the Council's decisions. By adopting these criteria, the panel sought "to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of Member States bypassing the Security Council."³⁷

II.

The reforms proposed by the Secretary-General and the High-Level Panel fail to address the actual challenges to international peace and security. Arguably, their proposals do not work any real change in existing doctrine on the use of force. For example, they recognize that the right to self-defense is not limited to cases involving a cross-border attack actually in progress, as some academics had thought; but the imminence rule was one that state practice had recognized even before the Charter. Requiring that states receive the approval of the Security Council for all other uses of force maintains the current system, which already prohibits all use of force except those in self-defense or approved by the Council. By continuing to tie the legitimate use of force to an imminent attack, the United Nations will remain trapped in an outmoded framework that does not take account of the realities of terrorism, rogue nations, or WMDs.

This Part criticizes the reforms' emphasis on imminence as the line between legitimate and illegitimate uses of force. Imminence depends on timing; only when an attack is just about to occur can a nation use force in its self-defense. Imminence, however, does not take into account the magnitude of harm posed by a threatened attack. According to conventional doctrine, a nation must wait until an attack is imminent before using force, whether the attack comes as a small band of cross-border rebels, as in *The Caroline*,³⁸ a rogue nation wielding nuclear missiles, or a terrorist organization armed with biological or chemical weapons. Imminence also fails to recognize the windows of opportunity that could allow a nation to use force against an enemy, such as a terrorist operative, who comes into clear view at a time when his attack is not temporally imminent, but who could then disappear or disguise his future attack within a civilian population. Finally, the imminence doctrine cannot address cases in which an attack seems certain, even if temporally far off.

Rather than imminence, we should understand the use of force in self-defense as a question of expected harm. Expected harm can be measured by

³⁷ United Nations, *A More Secure World* at 57 (cited in note 9).

³⁸ *The Caroline* (cited in note 17).

multiplying the probability of an attack against the estimated magnitude of harm. Imminence under the *Caroline* test is better understood as a measure of probability, rather than of timing. An imminent attack is simply one that is close to 100 percent certain. Temporal imminence fails to account for the magnitude of potential harm. At the time of the *Caroline* decision in the early nineteenth century, the main weapons of war remained the sailing ship, horse cavalry and horse-drawn artillery, and infantry which marched on foot armed with single-shot weapons. There was a technological limit on the destructiveness of armed conflict.

In an age of modern weapons, however, temporal imminence does not fully capture the probability of an attack. Missile technology may allow an enemy to attack suddenly, and WMD knowledge could boost the destructiveness of those attacks well beyond anything possible before 1945, not to mention the time of the *Caroline*. In other words, modern technology may allow enemies to launch attacks so quickly that there is no real opportunity to use preemptive force to stop them. Adopting a probability-based approach, however, should allow for more finely-tuned judgments. Nations could use force preemptively when the probability of a hostile attack appears high, even if the timing of the attack is still uncertain. A probability-based approach also directly affects nations' ability to present an armed response to terrorist groups. A terrorist attack may prove extremely difficult to detect, because a terrorist organization does not go through the broad mobilization and deployment of regular armed forces that usually signal an imminent attack. A nation might identify terrorist operatives when an attack is not temporally imminent. It may have assets nearby that could carry out a preemptive strike, and it cannot be sure that it will be able to locate the terrorists again when their attack is in fact imminent. A nation will have a limited window of opportunity to use force at a time when the probability of the future attack will be lower, but without any assurance it will have the chance to attack at that future moment. A temporally-based imminence test would prevent a country from taking advantage of an opportunity to escape wide-spread casualties and destruction.

Self-defense should also take into account the magnitude of harm. Nuclear weapons and other WMDs have increased the potential harm from an attack. WMDs threaten profound, long-term damage to large segments of the civilian population and environment. As the International Court of Justice recognized in its 1996 advisory opinion on the legality of nuclear weapons, such weapons possess unique characteristics, "in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to

generations to come.”³⁹ Missile technology means that nations can launch WMDs with very little warning, making the possibility of a pre-emptive strike within a window of temporal “imminence” extremely difficult, if not impossible. If North Korea, for example, were to have the capability to launch an intercontinental ballistic missile with a nuclear warhead with only fifteen minutes warning, American military forces may very well prove unable to destroy the missiles before they left the ground. WMDs can also be delivered in unsophisticated ways—a suicide bomber could detonate a “dirty bomb” using a truck or spread a biological agent with a small airplane. Unconventional delivery of WMDs by terrorists or rogue nations makes it even more difficult, if not impossible, to prevent an imminent attack with military force. As military technology has changed, our test for the use of preemptive force should evolve beyond a test based in temporally-based imminence to one that takes into account the lethality of modern weapon systems.⁴⁰

An additional benefit of an expected harm approach is that it answers the difficult question of proportionality. International law requires that the use of force be proportional but it has never provided a satisfying means of determining proportionality. An expected harm approach would calculate proportionality by determining the expected harm—the magnitude of an attack multiplied by its probability. If a nation can use force that can forestall the attack at a lower cost than the expected harm, then the use of force would be proportional. Understanding anticipatory self-defense in this manner indicates that a nation could use force earlier, even when an attack is less probable, so long as it uses lower levels of force that are in proportion to the expected harm.

Brief examples from the Cold War may help illustrate this approach. During the Cuban Missile Crisis, the United States was confronted with a covert Soviet effort to base intermediate-range nuclear missiles in Cuba. Before the missiles were functional, President John F. Kennedy ordered a naval blockade of the island to prevent any further shipments of Soviet military equipment. While President Kennedy did not authorize a more direct use of force, such as a preemptive aerial attack or even an invasion, a naval blockade has long

³⁹ Advisory Opinion No 95, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 244 (July 8, 1996).

⁴⁰ Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am J Int'l L 597, 598 (1963) (“[T]he understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.”); W.T. Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law*, 31 Geo Wash L Rev 335, 348 (1962) (“[i]n the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques, Secretary Webster’s formulation could result in national suicide if it actually were applied instead of merely repeated.”).

constituted an act of war and can itself require the use of force. Nonetheless, no attack on the United States by the missiles in Cuba was imminent, and President Kennedy could not claim otherwise. Rather, the United States intervened to prevent a dramatic change in the strategic status quo which would have placed most of the United States within the range of Soviet nuclear weapons for the first time. President Kennedy's response makes sense legally only if it is understood as a restrained use of force that was proportional to the probability of a Soviet attack, taking into account the magnitude of potential harm from nuclear weapons. Other American uses of force during the Cold War do not make sense unless understood in this light. President Ronald Reagan's order of precision aerial attacks on Libya in 1986 did not arise from any imminent threat of future Libyan attacks, but instead—due to Libya's covert support of terrorism against United States military personnel in Berlin—can be understood as limited uses of force in proportion to the threat of future Libyan-sponsored terrorist attacks. President George H.W. Bush's invasion of Panama did not preempt any threat of attack on the United States, but instead removed a dictator who had destabilized the canal area.

The United Nation's proposed reforms of the use of force rules make little sense against this backdrop. If the use of force is to be judged against the expected harm of an attack, as measured by probability and magnitude of harm, then the timing of the actual attack should not make any important difference in receiving Security Council approval. If North Korea gains the capability to launch nuclear missiles with little warning, and hence imminence does not provide a nation with any space for a preemptive attack, then why should a nation under threat have to go to the Security Council for permission? The timing makes no difference in estimating the probability of attack. This is further underscored by the challenges of terrorism. Because of their covert, surprise nature, terrorist attacks often present little windows of opportunity that fall within temporal imminence. Again, why should a temporal line dictate when a nation must go to the Security Council to preempt a terrorist attack?

One response is offered by the Secretary-General's High-Level Panel, which favors maintaining the imminence standard. According to its report, "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted."⁴¹ This argument is common; it essentially claims that if the rules on the use of force are loosened, nations will claim self-defense pretextually as a justification for illegal interventions, and ultimately the rules will lose any binding effect at all. As the High-Level Panel declares,

⁴¹ United Nations, *A More Secure World* at 55 (cited in note 9).

“Allowing one to so act is to allow all.”⁴² There are several problems with this critique. First, it assumes that there is a causal relationship between the relative peace and stability between the Great Powers over the last six decades and the strict rules on the use of force. There is no empirical study that shows this to be true, and, as observed earlier, many of the leading scholars believe that the bipolar balance of power between the nuclear-armed United States and the Soviet Union produced global order. Second, it assumes that relaxing the rule on the use of force will lead to a world without any legal rules at all. It may be the case that legal rules have no effect on any nation’s decision to use force, as Michael Glennon argues,⁴³ in which case none of these arguments matter. But if legal rules do make a difference, there is no evidence that would support the conclusion that relaxing the rule on self-defense would encourage more warfare in undesirable places and ways. In fact, as will be explained in Part III, there is reason to believe that modifying the rules on the use of force will produce more desirable interventions.

Third, the conventional view against changing the use of force rules assumes that ex ante rules will be more effective than ex post rules. Under either set of rules, it is possible that preemptive attacks will occur against nations that had no true hostile intentions or abilities—in other words, a mistake is made—or that pretextual invasions will occur. The current UN Charter system follows the form of a rule that is designed to reduce the discretion of nations in the future to use force and requires less decision costs and information to implement. It is enforced by the requirement of ex ante permission from the Security Council. A different approach to legal rules is possible. Instead of a rule, use of force could be configured as a standard. Standards allow for the balancing of different relevant factors, but require more information and expend more costs in decision-making. Rules generally create more ex ante legal certainty, but at the expense of higher error rates, because the rules are not shaped to the exact context of a particular case. Standards increase legal uncertainty, but because they delegate authority to ex post decision-makers, generally reduce error costs. It would seem that the use of force is better governed by a standard than by a rule. The stakes in this area are so high, and the individual cases often unique, that it is difficult to conclude that use of force situations have a certain similarity and regularity which make them opportune for governance by inflexible ex ante rules. Rather, nations could judge the use of force through consideration of more information ex post, which should lead to less errors. If nations disagree with a pretextual use of force, they can take counteractions, including the use of

⁴² Id.

⁴³ See generally Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (Palgrave 2001).

force or withholding cooperation in the post-conflict situation. If nations believe a use of force was in error, they can place pressure on the attacking nation to provide remedies. Defenders of the UN Charter system have failed to show why the use of force is more appropriately governed by an *ex ante* rule than an *ex post* standard.

III.

Proposed reforms of the use of force rules bear a second signal defect in addition to their mistaken reliance on the imminence standard. They fail to recognize that the international system has changed and with it the means for protecting international peace and security. The UN Charter system was designed to prevent large interstate wars and established a criminal justice approach to the use of force that sought to drive international armed conflict to zero, much in the way domestic criminal law attempts to eliminate all killing. The primary threats to international peace and security, however, do not come from the Great Power wars of the first half of the twentieth century, but instead derive from the combination of rogue states, terrorist organizations, and humanitarian disasters. Reconceiving the rules on the use of force to address a collective action problem, rather than to enforce individualized notions of liability, will lead to a more effective framework.

Unlike the domestic criminal justice system, it is not obvious that the international legal system ought to seek as its goal the reduction of the use of force to zero. Historically, states have used force in ways that have produced global benefits, such as ending the slave trade. There may be certain types of regimes whose spread harms not just the United States, but international stability or global welfare. Fascism serves as an instance in which the use of force removed a regime devoted to coercive expansion and the systematic violation of human rights. Global welfare may have increased when the West contained the spread of totalitarian communism to new countries. A combination of the preceding two characteristics—systematic human rights abuses and dangerous ideologies—define “rogue” nations such as North Korea and the former regime of Saddam Hussein in Iraq.

Intervention may also be desirable in states where centralized authority has collapsed, or where it has been hijacked by violent non-state actors. Failed states allow for human rights catastrophes and may provide international terrorist organizations safe haven. Without an effective central government, these states cannot respond to demands from others that they apprehend terrorists or stop harmful activities within their borders. A terrorist network may project power into multiple nations, which may in turn destabilize the governments and societies of those nations. The international system may benefit from the use of

force by eliminating a base that supports destabilizing terrorist attacks in nearby nations.

Intervening to stop a massive human rights catastrophe would constitute another example where the use of force could provide benefits that outweigh the costs. The post-World War II period contains many examples of government repression, the collapse of state authority, or religious and ethnic fighting. The Security Council has responded by finding some humanitarian crises to be a threat to international peace and security, which allowed it to authorize the use of force in Somalia, Haiti, Bosnia, and East Timor.

Rather than applying use of force rules that arise from the criminal law, we would better understand rogue nations, terrorism, and human rights violations as collective action problems. In the study of the domestic legal system, markets allow the uncoordinated actions of self-interested actors to reach the optimal production of goods and services. Market failure, however, will result in the undersupply of public goods which create positive externalities that are not fully captured by the producer.⁴⁴ Public goods have two salient characteristics: they are non-rivalrous and non-exclusive; consumption of a public good does not leave less for others, and it is not feasible to prevent people from consuming the good without paying. As a result, private firms will not supply the good or service at the optimal rate, because they do not internalize all of its benefits.⁴⁵ In the domestic arena, classic examples of public goods include clean air and national defense, which benefit all members of a community, regardless of whether they pay for them. Government action also can provide a public good by suppressing activity that produces negative externalities, such as pollution or overuse of commons.

International affairs have their own share of collective action problems. Market failure at the international level can lead to an undersupply of financial stability, environmental pollution controls, health, biodiversity, and trade.⁴⁶ But perhaps preceding all of these, as perhaps the most important international public good, must come international peace and security. Just as domestic law and order ensures the necessary stability for civil society and government to

⁴⁴ See generally Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* 9–16 (Harvard 1965).

⁴⁵ Robert Cooter and Thomas Ulen, *Law and Economics* 42–43 (Addison Wesley 3d ed 2000).

⁴⁶ See generally Joseph S. Nye, Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* 137–71 (Oxford 2002); Inge Kaul, Isabelle Grunberg, and Marc A. Stern, eds, *Global Public Goods: International Cooperation in the 21st Century* (Oxford 1999); Todd Sandler, *Global Challenges: An Approach to Environmental, Political, and Economic Problems* (Cambridge 1997); Charles P. Kindleberger, *International Public Goods Without International Government*, 76 *Am Econ Rev* 1 (Mar 1986); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 49–64, 107–08 (Princeton 1984).

address other collective action problems, so too international peace and security establishes the foundation to solve international health, environment, and financial problems. Peace and stability are international public goods because they are non-exclusive, non-rivalrous, and benefit all nations by reducing the need for defense expenditures and allowing trade to occur. If a nation or alliance maintains international peace, all nations benefit even if they do not contribute to the costs.⁴⁷

If international peace and security are public goods, then we should expect that nations rationally pursuing their self-interest will undersupply them. Nations will use force up to the point where the costs equal the benefits that they capture from the intervention. But the optimal point for the use of force would occur where the costs equaled the benefits for the international system as a whole, rather than just the benefits to the intervening nations. International legal rules on the use of force, therefore, ought to encourage nations to use force in situations involving rogue nations, terrorism, or human rights disasters, rather than seek to lower the level of international armed conflict to zero.

International legal rules currently suppress the supply of intervention below the already sub-optimal level predicted by public choice theory. As noted earlier, the UN Charter makes the political independence and territorial sovereignty of nation-states inviolable. For decades, many believed that humanitarian intervention transgressed the UN Charter, regardless of whether the Security Council approved the use of force. Even though the Security Council has approved interventions to stop human rights abuses in Haiti, Somalia, and Kosovo, it failed to approve the use of force in time to stop the horrible catastrophes in Rwanda and Bosnia, and is now allowing genocide to occur in Sudan without taking action. It similarly failed before September 11, 2001 to authorize the use of force to pursue the al Qaeda terrorist network in Afghanistan and has not taken action to stop the acquisition of WMDs by rogue nations such as Iraq and North Korea.

The proposed UN reforms will only exacerbate the UN's failure to act to solve collective action problems. While the Secretary-General calls on nations to recognize a right to protect, which could bear some similarities to an international public good, he fails to initiate any institutional reforms that could make the use of force easier to authorize. In fact, Annan's report recommends *expanding* the size of the Security Council, either by adding to the number of

⁴⁷ See Mancur Olson, Jr. and Richard Zeckhauser, *An Economic Theory of Alliances*, 48 *Rev Econ & Stats* 266, 278 (August 1966) (describing NATO as a collective good); Joseph S. Nye, Jr., *The American National Interest and Global Public Goods*, 78 *Intl Aff* 233, 243 (April 2002) (explaining that the United States can reduce international instability for everyone, even if not all nations participate in the mediation process).

permanent members (but not expanding the veto), or by adding more rotating members. Under either proposal, the size of the Security Council will rise, which will only increase the transaction costs of authorizing force. David Caron and Thomas Weiss similarly express concern that increasing membership would not improve the effectiveness or legitimacy of the Security Council.⁴⁸ Not only will more nations have more foreign policy interests that will make any consensus more difficult to achieve in terms of substantive outcomes, but the sheer increase in number of members will simply hinder the ability of the members of the Security Council to negotiate and bargain to reach a decision. This is not to say, of course, that the Security Council will never authorize intervention in cases where a nation is producing negative externalities. Public choice theory, however, predicts that the increase in the size of the membership will further reduce the ability of the Council to reach decision.

These institutional changes would not have a negative impact if the substantive rules themselves were loosened. For example, if the UN reforms permitted nations to use force without Security Council permission when state authority has collapsed or when a human rights disaster has occurred, then the international legal system still might encourage nations to provide more intervention than it currently does. One could even argue that the current system is more desirable than the reforms. Under the current system, as it works in practice, nations have engaged in humanitarian intervention without the approval of the Security Council. The most notable examples are India's intervention in Bangladesh, Vietnam's intervention in Cambodia, Tanzania's intervention in Uganda, and NATO's intervention in Kosovo. However, the Security Council did not authorize the use of force at any time between the Korean War and the first Persian Gulf War. One could argue that the international legal system was developing a norm in which nations could use force to prevent chaos in failed states or to stop humanitarian disasters without Security Council approval. Such actions are then judged *ex post* in the form of other nations' decisions to recognize the results of the intervention or to assist in bearing the cost. Nations, in effect, were developing a way around the literal restrictions of the UN Charter in order to address collective action problems.

This positive development could be brought to a halt by UN reform. The reports of the Secretary-General and the High-Level Panel go to great lengths to clarify that the UN Charter does not permit any intervention, short of self-defense from an imminent attack, without Security Council approval. This proposal would prevent nations from developing a new norm of international

⁴⁸ David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 Am J Int'l L 552, 573-74 (Jan 1993); Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 Wash Q 147, 149 (Autumn 2003).

law that, through the practice of the last few decades, has moved toward permitting intervention in discrete situations involving failed states and human right disasters. It would also impose an unwieldy institutional process, made even more difficult by expansion of the Security Council, upon decisions that pose severe collective action problems.

The question of rogue nations such as Iraq may prove to be a test case for the effectiveness of these different approaches to the use of force. Many scholars have focused on the threat that the United States' invasion of Iraq posed to the Security Council. Glennon argues that the Security Council's unwillingness to support the Iraq invasion demonstrated its inability to adapt to the "unipolar world" of American hegemony.⁴⁹ According to Glennon, "[p]ower disparities . . . and differing views on the use of force" between the United States and its fellow UN members have led to the Security Council's collapse.⁵⁰ He does not foresee a multilateral institutional framework determining the use of force in the future.⁵¹ Thomas Weiss asserts that the central concern for the Security Council is "whether it can engage the United States, modulate its exercise of power, and discipline its impulses."⁵² If the Security Council continues to disagree frequently with US foreign policy on central issues, it could end up "resembl[ing] its defunct predecessor, the League of Nations."⁵³ In contrast, Thomas Franck and Anne-Marie Slaughter share a more supportive view of the United Nations. Franck emphasizes the necessity of maintaining the power of the United Nations' "jurying function" to restrain the United States' exercise of its option to use force.⁵⁴ Slaughter insists that the United States will need the United Nations "more than ever in the aftermath of war—to provide for refugees, to monitor human rights violations, above all to establish a transitional administration with genuine legitimacy[.]"⁵⁵

The fate of the Security Council depends largely on the lessons learned from the use of force in Iraq. According to the Bush administration, Iraq posed a threat to international peace and security, based on information that existed before the 2003 invasion. There can be little doubt that Iraq had been a

⁴⁹ Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 Va J Intl L 91, 94–95 (2003).

⁵⁰ Id at 107.

⁵¹ Id at 112.

⁵² Weiss, *The Illusion of UN Security Council Reform* at 156, quoting David M. Malone, "Conclusions," in *The Future of the UN Security Council* (cited in note 48).

⁵³ Id at 153.

⁵⁴ Thomas M. Franck, *The Use of Force in International Law*, 11 Tul J Intl & Comp L 7, 14–19 (Spring 2003).

⁵⁵ Anne-Marie Slaughter, *The Will to Make it Work: Accused of Irrelevance and Deeply Divided Over Iraq, the United Nations Has Never Mattered More*, Wash Post B1 (Mar 2, 2003).

destabilizing force in the Middle East. It pursued the acquisition of nuclear weapons, invaded Iran and Kuwait, and attacked Israel during the Gulf War. It supported terrorist groups and used chemical weapons against its own people. The United States and its allies spent billions annually after the Gulf War to contain Iraq—a good measure of the significant costs imposed by Iraq on the international system.

According to the Secretary-General and the High-Level Panel, the legality of the war on Iraq ought to turn on whether the United States and its allies were under imminent threat of attack by Iraq. If an attack were imminent, then the United States could take preemptive action; if no attack were imminent, then the use of force was preventative and required Security Council approval. Without a claim of self-defense, the war in Iraq was illegal without the Security Council's *ex ante* approval. That approval was unlikely, not just because of the difficulties of determining whether the benefits of intervention outweighed the cost, but also because of the collective action problem of forging a consensus among numerous Security Council members, several of whom had their own strategic interests in maintaining the status quo in Iraq. Yet the Security Council's refusal to grant authorization to use force in the lead-up to the war did not stop the United States and its allies from invading Iraq and engaging in regime change, just as the absence of Security Council approval did not prevent the uses of force that occurred during the Cold War period.

Contrast this result with the international public goods approach suggested here. If the United States and its allies can capture many of the gains from intervention in Iraq, and those benefits outweigh the costs of the intervention, then they will use force. If the *ex ante* estimates turn out to be incorrect, or if there are substantial gains to the international system that would allow the overall benefits to outweigh the costs borne by the intervening nations, the United States and its allies could seek assistance and contributions after the invasion. Conversely, other nations would already have an incentive to free-ride, so they would likely be unwilling to contribute except in particularly clear cases where the intervention promoted an international public good. Thus, if other nations disagreed with the invasion of Iraq, they could refuse to provide *ex post* military or financial support to the US-led coalition. Failure by the intervening nations to receive support will lead them to be more reluctant to bear the concentrated costs of intervention in the future. At the current time, we can see this process at work as the United States attempts to maintain its coalition and to receive new support for the reconstruction of Iraq.

To be sure, loosening the rules on the use of force expands the possibilities for pretextual uses of force. There are several reasons to believe, however, that an *ex post* approach to policing undesirable uses of force will prove superior to the current *ex ante* system. First, since the end of World War II, the costs of war have risen and the benefits seem to have fallen. Before World War II, claims of

self-defense or humanitarian assistance served as pretexts for conquest. But territorial conquest may no longer provide the benefits that it once did, perhaps because the advent of nuclear weapons and other WMDs has made it easier for nations to impose costs on invaders, because the costs of administering a hostile territory have greatly increased, or because the talented labor or capital that can make a territory valuable are more mobile. This suggests that an over-inclusive rule that serves a prophylactic purpose—barring all uses of force out of concern over interstate invasions of territorial conquest—is unnecessarily broad because other circumstances will help enforce the prohibition on the use of force.

Second, invaders will usually claim a pretext; even World War II Germany claimed that its invasions were consistent with international law. The question is not whether a use of force rule will prevent nations from claiming pretexts, but whether it will discourage or encourage uses of force that are desirable from a normative viewpoint. It is difficult to see why an *ex ante* system ought to be more effective across the board to an *ex post* approach. A strict rule designed to eliminate pretexts makes the most sense if most cases are fairly similar and require little decision costs. An *ex post* system would be more effective in judging the legality of conduct whose legality is context-specific and depends on the weighing of many factors. It would seem that intervention in other nations is often, if not always, dependent on facts unique to each crisis.

CONCLUSIONS

The last decade, if not the close of the Cold War, has demonstrated that reform of the United Nations' use of force rules is badly needed. Under existing UN Charter rules, nations may only use force in response to armed aggression by another nation or when authorized by the Security Council. These rules were established when the primary threat to international peace and security arose from large, mechanized warfare between advanced nation-states that killed millions. Threats to international peace and security six decades later are quite different. Rather than Great Power wars between multi-nation alliances that span the globe, the destabilizing factors in international politics arise from rogue nations, international terrorism, and human rights catastrophes. Current use of force rules place a legal obstacle before attempts to use force to intervene in the territory of individual nations to confront these new threats. Usually the United Nations must give its blessing before regional or international powers can intervene to end such threats to international peace and security.

Proposals from Secretary-General Annan and the High-Level Panel on UN reform do nothing to address this problem. In fact, they exacerbate it. The reforms suggested merely repeat the imminence standard for the use of force in self-defense without taking into account the probability or magnitude of an attack—this represents no change in the conventional interpretation of the use

of force rules. While the reform proposals properly identify threats to international peace and security as arising outside the context of Great Power warfare, they make it even more difficult for nations to address these new challenges. They attempt to codify a rule that gives the Security Council complete authority over all uses of force short of national self-defense, rather than provide flexibility for the development of new international law doctrine through practice. They also expand the size of the Security Council, which will only aggravate the body's collective action troubles in authorizing force.

Rather than refusing to acknowledge the dramatic changes in international security in the post-Cold War world, reform of the UN's use of force rules should begin by modifying the rules to produce higher levels of desirable uses of force. If we want the international legal system to address rogue nations, international terrorism, and WMD proliferation, we must reconceive the imminence doctrine to take into account expected harm of an attack, rather than strictly limit self-defense to cases where an attack is temporally imminent. If we want to increase, rather than suppress, military intervention that will produce positive externalities to the international system by ending rogue states, flushing out international terrorist groups, or ending human rights disasters, we should adopt an international public goods approach to thinking about the use of force. The international legal system ought to promote, rather than deny, uses of force to solve these problems. Only then will reform of the UN Charter system account for the true challenges to international peace and security and adopt rules designed to address them.

