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The Counter-Reformation of the Security Council

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In September 2003, United Nations Secretary General Kofi Annan launched a major initiative toward reforming the United Nations.[1] A central focus of the initiative was Security Council reform, encompassing both the Council's structure and the principles under which it operates. By October 2005, the most recent attempt to reform the Security Council appeared to be over and many concluded with no results. But there were results, and possibly more important results than simply adding more seats to the Council. One result of the months of reports, proposals and talks, is that the United Nations Charter principles regulating the use of force have been saved from destruction. The Secretary General, his experts, and the vast majority of UN members have endorsed a return to orthodoxy. They have renewed their commitment to banning the use of force except in self-defense to an armed attack or with the authorization of the Security Council. The reform process has also highlighted the need for the Council to respect international legal principles when it does authorize force. These results should translate into greater caution by the Council, and, as I will argue below, better protection of human rights. Finally, re-committing to the Charter is a start toward repairing the damage to the international legal system generally wrought by the 1999 Kosovo intervention and the 2003 Iraq invasion.

One notable heretic remains. The United States may have come away from the reform debate with an even stronger sense of its own exceptionalism. The United States continues to assert the right to interpret the Charter as it sees fit. According to the *San Francisco Chronicle*, the United States refused to endorse criteria to guide Security Council authorizations of force—criteria mandated by existing international law—because the United States refuses "to give the United Nations a

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1 See High-level Panel, *Terms of Reference*, online: The United Nations News Service ‹http://www.un.org/News/dh/hlpanel/terms-of-reference-re-hl-panel.pdf›; see also *Annual Report of the Secretary-General on the Work of the Organization*, UN Doc. A/58/1 (2003), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N03/476/09/PDF/N0347609.pdf?OpenElement› [*Annual Report*]; and the High Level Panel's resulting report, *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59 (2004), online: United Nations ‹http://www.un.org/secureworld/ report.pdf›.

veto over use of its armed forces."[2] The United Nations Charter and general international law, however, do restrict the right of states—all states—to use armed force. The renewal of respect for the Charter through the reform process should make it harder for the United States to argue that it is somehow not bound.

This article examines the 2003-2005 reform initiative relative to the Security Council's authority over the use of force. It looks at why the reform discussion began, what proposals grew out of the discussion, and the legal situation following the 2005 World Summit. The conclusion here is that the reform process has had positive results for the international legal regulation of the use of force, human rights protection, and international law generally. International law scholars are in a position to build on these results, supporting the revival and renewal of Charter law, explaining what exactly that law requires and why, and attempting to bring the United States back into the fold.

THE REFORM MOVEMENT AND ITS MOTIVATIONS

Discussions about Security Council reform are not new. The end of the Cold War gave rise to a lively and hopeful period when it seemed everyone had a plan for expanding the Security Council and modifying the veto. Much of the 2003-2005 debate has simply revisited that earlier discussion, but there has been something new. The more recent proposals have called for substantive legal changes as well as institutional change.

When the Cold War ended in 1989-1990, the Security Council began a period of activism starting with the successful liberation of Kuwait in 1991 and lasting until 1994. Proposals for reforming the Security Council began to pour in, mostly focused on modifying the veto and increasing the Council's membership.[3] In the early 1990s, it was standard in lectures on the use of force to talk about the role of the Security Council and how the Council could be reformed. In lectures at the George C. Marshall European Centre for Security Studies and at the North Atlantic Treaty Organization (NATO) School, both in Germany, I regularly included the following proposal:

> At a minimum, a reformed Security Council should increase in size and representativeness probably to twenty-one, with seven permanent members. The permanent members would be the United States, Russia, and China and a representative from Europe, Africa, Asia, and South America, to be decided as those regions wish. Any permanent member could still veto resolutions,

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2 "Mend the cracks in U.N." *The San Francisco Chronicle* (13 September 2005) B6.

3 See *e.g.*, Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Hague: Kluwer Law International, 1998); Razali Ismail, "The United Nations in the 21st Century: Prospects for Reform" (1998) 14 Med. Confl. Surviv. 97.

> but a veto must be explained and could be overridden by seventeen affirmative votes.[4]

By 1994, with the crises in Somalia, Bosnia, Rwanda, and Haiti, the focus was already off the great new ideas for reforming the Security Council.

The Secretary-General revived the idea of Security Council reform in 2003. He did so apparently out of fear of losing any more U.S. commitment to the UN following two failures by the Security Council to authorize U.S. uses of force. The Secretary-General was also responding to persistent and vehement American accusations of mismanagement and corruption at the United Nations, especially in connection with the Oil for Food Program for Iraq.[5] The Secretary-General convened a group of prominent individuals to propose reforms:

> Seeking to save the United Nations from irrelevance, Secretary-General Kofi Annan will launch plans for "radical reforms" of the world body at the annual opening debate of the General Assembly today.
>
> Since the United States sidestepped the UN to invade Iraq this year, the institution has been looking for a way to recover its global standing. Now, Annan says, the UN must change markedly to revive its legitimacy...
>
> We have come to a fork in the road. This may be a moment, no less decisive than 1945 itself, when the United Nations was founded.[6]

It is not entirely clear why the Secretary-General believed the UN lost legitimacy, when it was the United States and its partners who side-stepped the Security Council. Plus, the United States' criticism of the UN's Oil for Food Program ignored the U.S.'s own oversight role on the Council and its active role in enforcing sanctions on Iraq. Surely in the eyes of the vast majority of the world's citizens, it was the United States, Britain, Australia, and Poland that lost legitimacy when they unlawfully invaded Iraq? And when no weapons of mass destruction were found, we

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4 See J. Fischer, Minister of Foreign Affairs of the Federal Republic of Germany, "Address" (Address at the 54th Session of the UN General Assembly, 22 September 1999), online: German Embassy ‹http://www.Germany-info.org/UN/un_state_09_22.htm›, cited in Mary Ellen O'Connell, "The UN, NATO and International Law After Kosovo," (2000) 22 Hum. Rts. Q. 57 at 87. See also Fassbender, *supra* note 3.

5 It is not at all clear that the UN was ever going to lose the United States, which seems to need the UN as much as the UN needs it. See Ian Johnstone, "US-UN Relations after Iraq: The End of the World (Order) as We Know It?" (2004) 15 E.J.I.L. 813.

6 Maggie Farley, "Annan to propose overhaul of UN: The Secretary-General envisions expanding the Security Council as part of reforms meant to revive the legitimacy of the world today" *Los Angeles Times* (23 September 2003) A1.

had proof that the embargo had worked to control Saddam's weapons program, if not his lethal greed. The Security Council was vindicated. The Council had refused to authorize what a clear majority of members agreed was an unnecessary war. The multilateral deliberative process reached the correct conclusion, and great tragedy would have been avoided if the four interveners had respected the Council's authority. Yet, the Secretary-General's terms of reference to his panel of experts did not indicate concern about law-violating members of the organization. Rather, he implied that the UN had fallen down:

> The aim of the High-Level Panel is to recommend clear and practical measures for ensuring effective collective action, based upon a rigorous analysis of future threats to peace and security, an appraisal of the contribution that collective action can make, and a thorough assessment of existing approaches, instruments and mechanisms, including the principal organs of the United Nations.[7]

REFORM PROPOSALS

The Panel reported back largely in support of the substantive rules of the Charter on the use of force as written. The Secretary General had been concerned about the two major uses of force involving the United States which required Security Council authorization: Kosovo (1999) and Iraq (2003). The United States had spoken of a humanitarian crisis in attempting to justify Kosovo. It tried to justify Iraq by citing Security Council resolutions of 1990-1991 authorizing the liberation of Kuwait and by claiming to act in self-defense—pre-emptive self-defense—to prevent Saddam Hussein from acquiring weapons of mass destruction that could be used against the United States in the future.[8] The High Level Panel addressed the claims behind both wars: both so-called humanitarian intervention and pre-emptive self-defense.

As to self-defense, the Panel rejected the right to use military force against vague future threats without Security Council authorization. It called for no changes to the text or interpretation of Article 51, the Charter provision on unilateral self-defense.[9]

With regard to humanitarian intervention, it rejected the right of states to use military force for such purposes without Security Council authorization:

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7 *Terms of Reference*, *supra* note 1; see also *Annual Report*, *supra* note 1.

8 See the United States letter to the Security Council reporting on its use of force against Iraq. John Bolton, "Letter from the Permanent Representative of the United States of America to the United Nations, to the President of the Security Council", UN Doc. S/2003/351 (21 March 2003).

9 *A More Secure World*, *supra* note 1 at 63.

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[10]

Thus, with respect to both challenges to the Charter posed by Kosovo and Iraq, the High Level Panel largely endorsed the Charter regime. But it did more. It looked into general international law on the use of force and found the criteria that should regulate any use of force, even that by the Security Council.[11] In recommending that the Council be guided by these principles, the Panel showed the way for the Council to demonstrate it is not a lawless body, acting only in response to political expedience. Its decisions can be guided by legal principle. In identifying these guiding criteria, the Panel allayed fears that in incorporating the terminology of "responsibility to protect",[12] it was endorsing greater use of force in international affairs, not less. Given the very real limitations on the benefit of military force to be of any positive use in human rights crises, if these principles are respected, the Security Council will find itself turning to non-lethal responses.[13] Before authorizing force, the Council must consider the following criteria:

(a) seriousness of threat
(b) proper purpose
(c) last resort
(d) proportional means

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10 *Ibid.* at 57.

11 For the law governing the use of force generally, see Mary Ellen O'Connell, *International Law and the Use of Force* (New York: Foundation Press, 2005).

12 The phrase 'responsibility to protect' comes from a report commissioned by Canada following the Kosovo intervention. Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Commission on Intervention and State Sovereignty, 2001). It is discussed in more detail in the articles by Ian Johnstone and Nicholas Wheeler also in this volume. The report proposes that in certain humanitarian crises states be allowed to use military force without Security Council authorization. Apparently, some viewed the inclusion of criteria for authorizing force by the High Level Panel as having the result of compelling the Council to authorize force in certain situations when the criteria were met. As is explained in the text, in the real world of military force, respect for these criteria is more likely to result in greater Council caution in authorizing force.

13 In the overemphasis on military force, measures short of force are often overlooked, such as the delivery of aid with heightened security; carefully targeted sanctions; monitors, mediators, and the use of positive incentives to bolster non-violent responses, to win concessions, or to induce participation in talks.

(e) balance of consequences[14]

These principles arguably amount to the need to respect principles of proportionality, necessity, and proper purpose—all principles already binding on states using force.[15] *Necessity* refers to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.[16] *Proportionality* prohibits that "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage

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[14] *A More Secure World, supra* note 1 at 67. The Report includes the following description of each principle:

(a) *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

[15] The principles of necessity, proportionality are the central customary law principles of international humanitarian law. (Some would add humanity and distinction though these are arguably included in necessity and proportionality.) The three concepts are closely related and not always listed individually. API, art. 51(5): "In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Judith Gardam, "Proportionality and Force in International Law" (1993) 87 A.J.I.L. 391. The International Court of Justice (ICJ) confirmed the status of necessity and proportionality as customary international law in the Nuclear Weapons Case, the Nicaragua Case, and Oil Platforms. See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] I.C.J. 2, at paras. 240-246; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S)*, Merits, 1986 I.C.J. Rep. 14, at para. 237 [Nicaragua]; and *Oil Platforms Case (Iran v. U.S.)* 2003 I.C.J. Rep. 43, at para. 74; see also, Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law", (1996) 90 Am. J. Intl L. 238, 240; Michael Reisman & Douglas Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9 E.J.I.L. 86, at 94-95.

[16] Reisman & Stevick, *ibid.* at 94.

anticipated."[17] These customary principles also influence the legality of a resort to force. In the Nicaragua Case decided in 1986, the International Court of Justice (ICJ) said, "Even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however, they were not, this may constitute an additional ground of wrongfulness."[18] Similarly, in 2003, the ICJ said the following regarding necessity and proportionality: "whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."[19]

Greenwood, too, argues that the legal basis on which force is initiated is linked to how a conflict is conducted. If the basis for using force is the right of self-defense,

> [t]his right permits only the use of such force as is reasonably necessary and proportionate to the danger. This requirement of proportionality... means that it is not enough for a state to show that its initial recourse to force was a justifiable act of self-defense and that its subsequent acts have complied with the *ius in bello*. It must also show that all its measures involving the use of force, throughout the conflict, are reasonable, proportionate acts of self-defence. Once its response ceases to be reasonably proportionate then it is itself guilty of a violation of the *ius ad bellum*.[20]

In short, any decision to resort to war, whether in self-defense or by Security Council authorization,[21] requires that the decision be consistent with the principles of necessity and proportionality.

The Panel emphasized that fulfilling these principles requires the commitment of states to send sufficient troops and other resources to do missions right. The Panel warned that in the "absence of a commensurate increase in available

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17 API, art. 51(5). According to Gardam: "The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Gardam, *supra* note 15 at 391.

18 *Nicaragua supra* note 15 at para. 237.

19 *Oil Platforms*, *supra* note 15 at para. 74, citing *Nicaragua*, *supra* note 15 at para. 194.

20 Greenwood, supra note 17 at 221, 223.

21 For a discussion of the humanitarian law binding on the Security Council, see Mary Ellen O'Connell, "Debating the Law of Sanctions" (2002) 13 E.J.I.L. 63.

personnel, United Nations peacekeeping risks repeating some of its worst failures of the 1990s."[22]

The Secretary General largely endorsed the High-level Panel report. He restated and supported the Panel's criteria for Council authorization of the use of force. Unlike the Panel, he did make a specific reference to Article 51's restriction of the right of self-defense to response to an 'armed attack.' The need to show evidence of the objective fact of armed attack is expressly required by the Charter.[23] Restricting unilateral resort to force in this way is a lynch pin of the proper working of the Charter regime.[24] The 2005 World Summit Outcome states simply,

> We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.[25]

And with regard to humanitarian intervention, while the Outcome document uses the word *responsibility*, it is consistent with the Charter in requiring Security Council authorization of force in cases other than self-defense:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations form genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII... should peaceful means be inadequate and national authorities manifestly fail to protect their populations.[26]

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22 *A More Secure World*, *supra* note 1 at 59.

23 Report of the Secretary General, *In Larger Freedom: Toward Development, Security and Human Rights for All*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at 13.

24 O'Connell, "Lawful Self-Defense", *supra* note 14 at 890-93.

25 UN General Assembly, *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), online: United Nations <http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement> at 22.

26 *Ibid.* at 30.

THE COUNTER-REFORMATION

The experiences of Kosovo and Iraq very likely lie behind this return to the Charter.[27] These two tragic cases remind us of why the use of military force has been regulated as it was in the Charter.[28] These cases show that military intervention inevitably results in the deaths and injury of innocent men, women and children; it results in the destruction of homes, livelihoods and irreplaceable cultural heritage; it ravages the natural environment. These facts rarely come up in discussions of humanitarian intervention. Rather, proponents continue to cite the Srebrenica and Rwanda tragedies as requiring new rules or as justification for ignoring existing ones.[29] The argument is that if Western countries had used military force while the killing in those cases was in progress, it could have been stopped. This argument fails to acknowledge that it was the presence of inadequate military forces in the first place that helped set the conditions for both massacres. In both Bosnia and Rwanda, lightly-armed UN peacekeepers were present. They had mandates to do more than they could. Their presence gave people a false sense of security. If the peacekeepers had not been there, people may well have done more to protect themselves. In Srebrenica, Bosnians may not have remained in the vicinity of Serb militias if the UN had not promised to protect them. In Rwanda, Tutsis might have been less trusting of their Hutu neighbours while Tutsi rebels were advancing on the country. The presence of military forces prepared only to carry out classical peacekeeping in conditions of on-going armed conflict, abetted the killing. Sending inadequate forces in the wrong conditions into future humanitarian crises will likely have similar outcomes.

When the poor record of military force to protect human rights is reviewed, some try to counter it by arguing that states have simply failed to commit the requisite resources. Committing resources is surely part of the problem. Since states are unlikely, however, *ever* to commit the massive resources that may be necessary for successful humanitarian intervention, this factor weighs against allowing such intervention. Simply stating there is a responsibility to protect is not going to overcome the important reasons governments have been unwilling to commit adequate personnel and materiel. Again, Srebrenica and Rwanda indicate how using

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27 See Wheeler regarding the impact of the Iraq invasion on support of arguments favoring humanitarian intervention. Nicholas Wheeler, "A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit" (Paper presented to the Journal of International Law and International Relations Conference 'The UN at Sixty: Celebration or Wake?" (6 October 2005) at 6.

28 Adapted from Mary Ellen O'Connell, *Challenging the Claims for Humanitarian Intervention* [forthcoming in a volume edited by Gerd Haenkel.]

29 See *Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, UN Doc. A/54/549 (1999); *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, U.N. Doc S/1999/1257 (1999).

inadequate military force can result in more harm than good. Those places are often cited by scholars arguing for more military force; they should be cited for using less.

Even if massive resources are committed, resources alone cannot overcome the need for communities to develop their own leadership—leaders who are identified with the community they will lead and not with a foreign power. The United States has committed hundreds of billions of dollars and massive numbers of troops in Iraq and yet violence and chaos continued as insurgents fought the foreign invader. International law recognizes the human right of self-determination and that right is violated when outside powers put local leaders in place.

The problems of resources and building successful societies are only the second and third objections to humanitarian intervention. The first problem is that inherent in the idea of humanitarian intervention is the argument that it is legitimate to kill, maim, and destroy to preserve human rights. Such thinking can only undermine the very idea of human dignity at the core of respect for human rights. Already in 1971, Ian Brownlie warned us about the inhumanity of humanitarian intervention:

> What is the price in human terms of intervention? What were the casualty ratios in the Stanleyville [Congo] operation in 1964, the Dominican Republic in 1965, and other possible examples? How many were killed in order to "save lives"? To what extent does the typical intervention cause collateral harms by exacerbating a civil war, introducing indiscriminate use of air power in support operations, and so on?[30]

We should be asking these same questions today about Kosovo, the one intervention that was affirmatively justified on humanitarian grounds. U.S. Secretary of State Albright had been warned by military and intelligence officials that a bombing campaign would not meet her stated goals regarding Kosovo—protecting human rights, getting Serb forces out of the province, and removing Slobodan Milosevic from power. In fact, bombing accomplished the opposite. It continued for 78 days, triggering a mass exodus of refugees and widespread killing of civilians by Yugoslav regular forces, militias and by NATO bombs. Human rights groups charge that NATO killed approximately 500 civilians in violation of the laws of war.[31] The bombing only ended when the Russians intervened with Milosevic to persuade him to pull his forces from Kosovo. Milosevic himself was in office for another year because even his strongest opponents rallied around him when their country was attacked. When Serb forces left Kosovo, Serb residents fled as Kosovo Albanians

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30 Ian Brownlie, "Humanitarian Law" in John Norton Moore, ed., *Law and Civil War in the Modern World* (Baltimore: John Hopkins Press, 1974).

31 See the detailed facts provided in *Bankovic v. Belgium* (2001) Eur. Ct. H.R reprinted in 123 I.L.R. 94.

began the systematic murder of Serbs and other minorities. Five years after the NATO bombing, the province remained part of Serbia but almost no Serbs lived there. The few who did remain survived only through the protection of a large and costly U.N. peacekeeping effort.[32] Kosovo is a case study of the military's advice to political leaders that using force to protect human rights is fraught with difficulty.[33] Despite the laudable motives of many advocating for military force in Kosovo, the results show more harm than good.

The Kosovo intervention is also linked to weakened respect for international law. Those who advocated for the intervention in violation of the law called into question not just the prohibition on the use of force, but, ironically, the very treaties and rules of customary international law that set out what human rights are.[34] These advocates of war failed to take into account the corrosive impact of championing law violation. U.S. Secretary of State Colin Powell said on 20 October 2002, that the United States had the same authority to use force in Iraq that it had in Kosovo.[35] Some have tried to distinguish the two law violations—but why is it any less illegal to intervene in Kosovo in violation of the Charter, but on moral grounds as determined by the fifteen NATO members, than to intervene in Iraq, again in violation of the Charter but on moral grounds as decided by the almost 30 states that supported that invasion?

In the aftermath of the Kosovo failure and the Iraq tragedy, it only made sense to return to the Charter. The people who drafted the U.N. Charter had a much clearer understanding of the nature of war and what it can accomplish and what it cannot. The Charter prohibition on humanitarian intervention is built on well-considered moral and pragmatic underpinnings. For that reason, it has withstood the arguments in favour of radical departure. Governments at the 2005 World Summit generally seemed to understand that damage had been done to the Charter and the rule of law; the 2005 World Summit outcome returns to the Charter. Indeed, the Summit did not even embrace the addition to the Charter of criteria for

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32 Human Rights Watch, "Human Rights Overview: Serbia and Montenegro" (2005), online: Human Rights Watch ‹http://hrw.org/english/docs/2005/01/13/serbia9859.htm›; Timothy Kenny, "Poverty and violence are still commonplace in Kosovo", *Chicago Tribune* (September 25, 2005) section 2, p. 1.

33 See *e.g.* Michael O'Hanlon, *Saving Lives with Force: Military Criteria for Humanitarian Intervention* (Washington: Brookings Institution Press, 1997) at 49-52.

34 In addition to those who advocate for humanitarian intervention even in violation of the law, Anne-Marie Slaughter and Lee Feinstein have advocated for using force to eliminate weapons of mass destruction without necessarily having Security Council authorization. See Lee Feinstein and Anne-Marie Slaughter, "A Duty to Prevent" (Jan./Feb. 2004) 83 Foreign Aff. 136.

35 Interview of Secretary of State Colin L. Powell (20 October 2002) on *This Week with George Stephanopoulos*, ABC Television; U.S. State Department, Press Releases & Documents (20 October 2002).

governing Security Council authorization of force—as urged by the High Level Panel. Nevertheless, it is my position that the Panel's criteria are already part of general international law. Scholars of international law are in a position to explain this and to follow-up the momentum of the reform process by calling for ever-greater respect for governing legal principle. In this way, they can remedy the damage done by scholarship promoting ever-greater flexibility in interpreting the Charter.

We need to turn our attention not just to states, but to the Security Council as well. Since the end of the Cold War, the Council has not adhered strictly to the provisions of the Charter or general international law either.[36] The Council's failure to strictly adhere to the law may have influenced the failure of members, in turn, to comply. It may well be the case that if we want to see law compliance by UN members, we need to press for it by UN organs.

There are those, however, who would argue that under a classic interpretation of the Charter, the Council is not bound by general international law as I maintain here.[37] They argue that Article 24(2) of the Charter requires only that the Security Council conform to the Charter, and they cite a statement of the Secretary-General, repeated in the International Court of Justice Advisory Opinion on Namibia: "[T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."[38] Yet, Chapter I, Article 1(1) does refer to international law, stating that a purpose of the UN is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes." And as Judge *ad hoc* Sir Elihu Lauterpact stated in the *Genocide Case*, "[O]ne only has to state the proposition thus—that a Security Council Resolution may even require participation in genocide—for its unacceptability to be apparent."[39] Judge Weeramantry expressed a similar view in the *Lockerbie Case*: "The history of the United Nations Charter corroborates the view that a clear limitation on the plenitude of the Security

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36 See *e.g.*, Mary Ellen O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy" (1997) 36 Colum. J. Transnat'l L. 473; Jose Alvarez, "The Once and Future Security Council" (1995) 18 Wash. Quart. 3.

37 For a discussion of this position and refutation, see Mary Ellen O'Connell, "Debating the Law of Sanctions" (2002) 13 E.J.I.L. 63.

38 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16 at 52.

39 *Application of the Convention on the Prevention and Punishments of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Provisional Measures, [1993] ICJ Rep. 325 at 440 (separate opinion of Judge Lauterpacht).

Council's powers is that those powers must be exercised in accordance with well-established principles of international law."[40] The *Reparations Case* also emphasizes that the UN has both rights as well as responsibilities beyond the specific provisions of the Charter. It stated that rights and responsibilities would evolve with time, influenced by the UN's "purposes and functions as specified or implied in its constituent documents and developed in practice."[41]

Perhaps more significantly, in the area of use of force, the United Nations has committed itself to respect for customary principles of international humanitarian law, although this law is not specifically referenced in the Charter.[42] Even before the explicit acknowledgement, Dietrich Schindler never doubted that customary humanitarian law applied to the UN.[43] Judith Gardam, too, argued before the acknowledgement that the Security Council must respect the customary principles of international humanitarian law, such as necessity and proportionality, both in the decision to authorize force and in the way force is used when authorized.[44] For her, the inclusion in Article 24 of the Security Council's need to observe international law, mentioned in Chapter I of the Charter, could only be interpreted as mandating Council commitment to humanitarian law.

Thus, any decision to resort to force, must be consistent with the principles of necessity and proportionality.[45] If force is in self-defense or for restoring peace, it cannot be used for a different purpose. Lawful armed force today is for the purpose of law enforcement. It is force to counter a previous unlawful use of force or threat of unlawful force. Lawful resort to force can be compared to the force of the police countering the force of the criminal. Such exceptional uses of force must arguably be as limited as possible.

The 2005 World Summit is a good first step back, back to the view that the Charter is a binding treaty and that legal obligations—whether treaty, custom, or general principle—require respect by states, international organizations, and

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40 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.)*, Provisional Measures, [1992] ICJ Rep. 114 at 175 (Judge Weeramantry dissenting).

41 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 180.

42 Daphne Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage" (2000) 94 A.J.I.L. 406.

43 Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (Boston: Martinus Nijhoff Publishers, 1988).

44 Judith Gardam, "Legal Restraints on Security Council Military Enforcement Action" (1996) 17 Mich. J. Int'l L. 285 at 318.

45 For a discussion of the humanitarian law and other principles binding on the Security Council, see O'Connell, "Debating the Law of Sanctions", *supra* note 30.

individuals alike. International law is not open to any subjective interpretation; its meaning is not endlessly flexible.

CONCLUSION

In October 2005 none of the advocates of greater use of military force in international relations were pleased by the results of the UN reform process. Advocates of military force in humanitarian causes and advocates of pre-emptive force in self-defense all concluded that the Charter regime for peace had been re-enforced and not re-written – as they hoped it would be. Rather, the process amounted to something closer to counter-reformation than reformation. For the protection of human rights and the prospects for peace this is a promising development. A strong set of clear definite principles on the use of force is essential to the goals of ending the scourge of war and protecting human rights. Such rules are essential if the United States, in particular, is to be constrained. Given the U.S.'s extraordinary position in the world with its unparalleled military and economic power, the best appeal is to America's commitment to the rule of law. That was difficult by the time of the Iraq invasion when the Charter rules had been so undermined, so subjected to differing interpretation. Prominent American international law scholars even stated there were no rules on the use of force.[46] The reform process has answered that charge. We have a new global commitment to the prohibition on the use of force as found in the U.N. Charter. The reform process has created a new opportunity to seek again a world order under the rule of law—an opportunity where scholars can make a fundamental difference by treating international law as real law—binding and determinate.

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[46] See Michael Glennon, "How war left the law behind" *New York Times* (21 November 2002) A33.