REVIEW ESSAY

‘PAVED WITH GOOD INTENTIONS …’ — HUMANITARIAN WAR, THE NEW INTERVENTIONISM AND LEGAL REGULATION OF THE USE OF FORCE


I  INTRODUCTION

Which are we: beasts because we make war, or angels because we so often seek to make it into something holy?1

In his essay ‘Eternal Peace’,2 Kant expresses some bemusement that the word ‘law’ (Recht) is still used in the discourse of war. He finds it surprising that the word

has not been entirely banned from the politics of war as pedantic, and that no state has been bold enough to declare itself publicly as of this opinion. For people in justifying an aggressive war still cite Hugo Grotius, Pufendorf, Vattel and others (all of them miserable consolers).3

Kant’s reflection on states’ repeated recourse to the language of ‘law’ and ‘right’ in order to justify the pursuit of power through violence nevertheless leads him to the sanguine conclusion that

there exists in man a greater moral quality … to try and master the evil element in him … and to hope for this in others. Otherwise the words law and right would never occur to states which intend to fight each other, unless it were for the purpose of mocking them …4

The sage of Königsberg’s transcendental deduction of the foundations of an international legal order nevertheless carries with it the awareness that states frequently invoke international law — and international lawyers — to legitimate power political objectives. Not infrequently, it seems, international lawyers offer ‘miserable consolations’ for inter-state violence by cloaking raison d’état (reason of state) with portentous legal rationales. Thus, Grotius’ celebrated treatise on a

3 Ibid 488–9 (emphasis in original).
4 Ibid 489 (emphasis in original).
right of free innocent passage on the seas, *Mare Liberum*, developed as an apologia for Dutch efforts to wrest control of trade to the East Indies from the Portuguese. Similarly, his concept of states’ ‘right to punish’ conduct against the ‘law of nature’ for the sake of ‘vindicating the cause of the oppressed’ — a concept within the genealogy of modern notions of obligations *erga omnes*, universal jurisdiction and humanitarian intervention — coincided with Dutch imperial expansion. As Richard Tuck observes, '[t]he idea that foreign rulers can punish tyrants, cannibals, pirates, those who kill settlers, and those who are inhuman to their parents neatly legitimated a great deal of European action against native peoples around the world'.

The legal regulation of the use of force continues to be an area where the line between legal reasoning and audacious legitimation is frequently blurred. There persists, it seems, a role for international lawyers in subtly vindicating *raison d’état* by elaborating latter-day versions of a ‘right to punish’. The United States’ 1989 invasion of Panama — an unambiguous violation of the *UN Charter* and condemned by all other members of the Organization of American States — is thus defended as a ‘lawful response to tyranny’ based on a putative right to unilateral pro-democratic intervention. Similarly, the maintenance of aerial exclusion (‘no-fly’) zones over northern and southern Iraq by the United States and the United Kingdom, and air strikes in punishment for failing to comply with a weapons-inspection regime, are claimed to be impliedly authorised by the

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5 Hugo Grotius, *The Freedom of the Seas; Or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (first published 1609, R V D Magoffin trans, James Brown Scott ed, 1916 ed) [trans of: *Mare Liberum, Sive de Jure Quod Batavis Competit ad Indicana Commercia Dissertio*].

6 Where the Portuguese had insisted on their ‘ownership’ of sea routes to the Indies as a ground to debar Dutch commercial ships, Grotius distinguished between ‘ownership’ and ‘jurisdiction’, denying that the former could subsist where occupation was impossible. On this view, a state cannot exercise rights characteristic of private property — such as exclusion — over the sea: ibid 27–8. Grotius’ cousins were among the directors of the United East India Company, while his father, as burgomaster of Delft, was responsible for nominating one of the seats on the company’s board: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999) 79.

7 Tuck, above n 6, 103. In the introduction to his work, Tuck notes (at 14) that:

> It cannot be a coincidence … that the modern idea of natural rights arose in the period in which the European nations were engaged in their dramatic competition for the domination of the world, and in which there were urgent questions about how both states and individuals adrift in a stateless world behave to one another and to newly encountered peoples.

United Nations Security Council, although no express wording is to be found in any relevant resolution.\(^9\)

In light of this historical context, the heralding by some international lawyers of a new ‘right of humanitarian intervention’ in the aftermath of the use of force against the former Republic of Yugoslavia by the North Atlantic Treaty Organisation (‘NATO’) should be approached with caution. Some writers, such as Michael Glennon, abandon any pretence of legal analysis and instead laud ‘America’s new willingness to do what it thinks right — international law notwithstanding.’\(^10\) On this view, the justness of NATO’s use of force is ‘evident’ — perhaps even axiomatic, as no argument is advanced — and represents the ‘ideal of justice backed by power’\(^11\). Those pondering the validity of intervention ‘should not be daunted by fears of some lofty, imagined temple of law enshrined in the UN Charter’s anti-interventionist proscriptions.’\(^12\) The new interventionists must find ways to overcome the resistance of ‘the defiant, the indolent, and the miscreant’,\(^13\) who perhaps will suffer the same fate as ‘cannibals, pirates, those who kill settlers, and those who are inhuman to their parents’.

Dr Chesterman’s new work is a useful corrective to those who would cheerily dissolve the distinction between legality and power, or between legal analysis and agitprop. While the book is subtitled Humanitarian Intervention and International Law, its scope is considerably broader than a discussion of any purported customary international law right to use unilateral force to prevent a humanitarian or human rights ‘catastrophe’. It treats carefully the question of whether a right to humanitarian intervention pre-existed the UN Charter, or has crystallised subsequently, but also devotes considerable space to the new legal modalities of the use of force that have emerged in the last 15 years. The latter developments, beginning after the end of the Cold War, have introduced new dimensions into the practice of the Security Council, and portend an unsettling new topography in which the Security Council’s supreme authority over non-defensive uses of force is by turns either co-opted or ignored. At the core of Dr Chesterman’s book is the unfashionable contention that the collective security framework of the UN Charter should be defended, precisely because it seems ultimately more likely to preserve a thin rule of law in international affairs than any ‘right’ of unilateral intervention wielded selectively by powerful states.

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\(^11\) Ibid 7.

\(^12\) Ibid.

\(^13\) Ibid.
II A CUSTOMARY RIGHT OF HUMANITARIAN INTERVENTION?

The first two chapters of the book investigate whether a ‘right to humanitarian intervention’ can be found in pre-UN Charter treatises and texts of international law, or in post-Charter state practice and opinio juris. The examination eschews the breathless enthusiasm for the purported ‘right’ of more superficial texts14 and also avoids the assumption that a seemingly laudable moral imperative must find expression in a legal one. With a sobriety and attention to detail that characterises the work generally, Dr Chesterman reviews both canonical texts of international law and those instances of state practice and opinio juris from the pre- and post-Charter eras most commonly cited as evidencing the existence of a ‘right to intervene’ for ‘humanitarian purposes’.15

Although the use of force as a means of settling disputes between states was not categorically prohibited until the advent of the UN Charter, precisely what constituted a ‘permissible’ intervention before 1945 is revealed to be very uncertain. The lineage of ‘humanitarian intervention’ is traced to antecedents such as the ‘right to punish’ proposed by Grotius,16 who in turn derived his rather bellicose17 conception of ‘war as punishment’ from the prevalent view among scholars of the humanist school that war could be justly waged against those violating ‘the common law of humanity’.18 As Richard Tuck’s survey of the humanist tradition reveals, its proponents were self-consciously preoccupied with the legality of imperial conquest, and invoked such notions as ‘the league of human society’ and ‘natural slavery’ to construct indigenes of the New World as justifiable objects of attack and enslavement. For, it was contended, those who ‘practised abominable lewdness even with beasts, and who ate human flesh … are contrary to human nature, … [and] since we may also be injured as individuals by those violators of nature, war will be made against them by individuals.’19 When Thomas More’s Utopians ‘go to war only for good reasons … [such as] to liberate an oppressed people, in the name of humanity, from tyranny and servitude’,20 it is important to appreciate the particular definition of the ‘humanity’ in whose name war was waged.

16 Ibid 10.
17 It is not without some irony that Grotius’ portrait occupies pride of place in the ‘Peace Palace’ in The Hague.
19 Gentili, above n 18, vol 2, 123–4, cited in Tuck, above n 16, 34–5. The other conclusion drawn from the notion of a league of human society was that ‘vacant land’ or land not cultivated could be taken by those who needed it: at 48–9. Thomas More’s Utopia, a work in the humanist tradition, embraces the justness of appropriating ‘idle’ lands from those whose violations of the law of nature render them undeserving of it. ‘The Utopians say it’s perfectly justifiable to make war on people who leave their land idle and waste yet forbid the use and possession of it to others who, by the law of nature, ought to be supported from it’: Thomas More, Utopia (first published 1516, G M Logan and R A Adams eds, 1989 ed) 56.
20 More, above n 19, 87–8.
Nevertheless, as Dr Chesterman notes, Grotius’ concept of a ‘right to punish’ was not accepted by all of his contemporaries or their successors. The humanists’ belligerence towards ‘barbarians’ and other inferior peoples was challenged by other European jurists (such as Dominicans and Jesuits) who judged warfare by more restrictive criteria and questioned the legitimacy of the conquest of the New World. The Lutheran Pufendorf, who lived in the group of European states at risk from militarist expansion by imperial powers, was unsurprisingly unenamoured of Grotius’ liberal interpretations of *jus belli*, rejecting a state’s right to punish except in retaliation for injuries directly inflicted upon it by other peoples:

> [W]e are not to imagine that every Man … hath a Right to correct and punish with War any Person who hath done another an Injury, barely upon Pretence that common Good requires, that such as oppress the Innocent ought not to escape Punishment, and that what toucheth one ought to affect all. For otherwise, since the Party we suppose to be unjustly invaded, is not deprived of the Liberty of using *equal* Force to repel his Enemy, whom he never injured; the Consequences then would be, that, instead of one *War*, the World must suffer the Miseries of two. Besides, it is, also, contrary to the natural *Equality* of Man-kind, for a Man to force himself upon the World for a Judge, and *Decider of Controversies*. Not to say what dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence.

Wolff and Vattel, writing at a time when the emergence of recognisably modern nation-states demanded a stronger theorisation of ‘state sovereignty’, echoed Pufendorf’s concern about the ‘dangerous Abuses’ that a ‘right to punish’ may engender. Wolff framed his rejection of the ‘right to punish’ in terms more familiar to the modern international lawyer: the right of sovereign states to be free from external interference in their internal affairs. Vattel endorsed a qualified right to assist subjects of another state resisting ‘insupportable tyranny’ if they requested help, but otherwise rejected penal wars of the fully Grotian type: ‘To intermeddle in the domestic affairs of another Nation or to undertake to constrain its councils is to do it an injury.’

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21 See Tuck, above n 6, ch 2.
23 The common assertion that the modern regime of state sovereignty was inaugurated with the Treaty of Westphalia seems historically inaccurate. It results, perhaps, from 18th and 19th century jurists’ retrospective interpretation of the Treaty of Westphalia through the prism of a teleological historical consciousness of the nation-state: see Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55 *International Organization* 251.
State practice and *opinio juris* of the 19th and early 20th centuries are no more conclusive as to the existence or content of a ‘right’ of humanitarian intervention. French, British and Russian intervention in the Balkans to support Greek insurgents, the United States’ intervention in Cuba to aid the Cuban revolt against the Spanish, and the French expedition to Syria to protect the Lebanese Maronites, are all examined by Dr Chesterman and found colourable by Great Power rivalry, colonial design or suspicious timing. While the United States’ intervention in Cuba is referred to as ‘perhaps the closest example to unilateral humanitarian intervention in pre-Charter state practice’,26 it is also acknowledged that Cuba ultimately became an ‘American protectorate’,27 illustrating that expressions of humanitarianism could serve imperial purposes on the cusp of the 20th century no less than in the 17th century.28 Ultimately, various versions of a procrustean ‘right’ of humanitarian intervention — from ‘war as punishment’ to intervening ‘on behalf of the oppressed’ — are found to inhabit a nether region (or ‘lacuna’, as Dr Chesterman puts it) between positive right and categorical proscription.29

Article 2(4) of the *UN Charter* proscribes the threat or use of force against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the United Nations, subject only to the inherent right of self-defence.30 Chapters VI and VII of the Charter confer primary (if not exclusive) authority to authorise non-defensive uses of force on the Security Council, which is charged with supervising the maintenance of international peace and security. The Charter framework is accepted as inaugurating a new era in the legal regulation of the use of force, and would seem to resolve the ambiguity of unilateral ‘humanitarian intervention’ on the side of illegality: unless defensive or authorised by the Security Council, an armed attack against a state’s territorial integrity or political sovereignty is prohibited. This reading of the plain words of the Charter was confirmed by the International Court of Justice in the *Corfu Channel*31 and *Nicaragua*32 cases. In *Corfu Channel*, the Court rejected any right of unilateral intervention (even as a reprisal),33 while in *Nicaragua* it

26 Chesterman, above n 15, 33.
27 Ibid 34.
28 The United States’ intervention effectively prevented Cuban independence by instituting a new set of masters to replace the retreating Spanish. As one scholar concludes, the Spanish–American War of 1898: [D]id register an American form of imperialism, for American power (in its broadest sense) was projected abroad and imposed over unwilling subjects; and in taking American power overseas so forcefully and dramatically, the war represented both the continuity of American territorial expansion and its discontinuous passage into the Caribbean and western Pacific. Michael Dunne, ‘US Foreign Relations in the Twentieth Century: From World Power to Global Hegemony’ (2000) 76 *International Affairs* 25, 27 (emphasis in original).
29 Chesterman, above n 15, 42–4.
30 See *UN Charter* art 51.
opined that the prohibition on the use of force was a *jus cogens* norm, violation of which could not be the appropriate method to monitor or ensure [respect for human rights]. ... The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States ...  

Some of the closest legal argument in Dr Chesterman’s work is his convincing refutation of scholars who propound a narrow reading of article 2(4) in an effort to render it compatible with a purported right of humanitarian intervention. Put simply, their contention is that article 2(4) does not prohibit force which is not used to usurp another state’s territory or impose alien rule upon its peoples, or which is used to promote one of the purposes of the United Nations. The argument has a superficial attraction, but is a specious reading of the relevant *Charter* provisions. As Dr Chesterman demonstrates, the intention of the drafters as discerned from the *travaux préparatoires* was to prohibit the use of force in the broadest possible terms, so as to render trans-border armed attacks illegal. To suggest that armed attacks which do not seize territory or colonise a state are not against that state’s ‘territorial integrity nor political independence’ is to adopt a construction worthy of Orwellian Newspeak. Similarly, the words ‘or in any other manner inconsistent with the Purposes of the United Nations’ is revealed to have been inserted not to create new exceptions to the prohibition of the use of force, but as a residual phrase to ensure an ‘absolute all-inclusive prohibition; the

34 [1986] ICJ Rep 14, 100. Article 103 of the *UN Charter* provides that *Charter* obligations prevail over all other treaty obligations of the state party, and Simma refers to the *Charter* as ‘an instrument of singular legal weight, something akin to a “constitution” of the international community’: Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 18.


36 One of the more vulgar expositions of this position is found in Julie Mertus, ‘Legitimizing the Use of Force in Kosovo’ (2001) 15 *Ethics and International Affairs* 133, 140 (emphasis added, citations omitted): In either case, intervention that promotes central principles of the *UN Charter* is permissible. The central purposes of the UN, as set forth in Article 1, include developing ‘respect for the principle of equal rights and self-determination of peoples’ and ‘encouraging respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religion.’ Humanitarian intervention thus promotes the most central aim of the organization, the maintenance of international peace and security — which must mean more than merely the absence of an internationally recognized war. Human rights violations short of all-out war also constitute major breaches of peace and security, and Articles 55 and 56 of the *UN Charter* implore ‘all Members [to] pledge themselves to take joint action in cooperation with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms for all.’ The *UN Charter* not only permits intervention on humanitarian grounds, but in cases of gross and systemic human rights abuses against civilians who are members of minority groups, it requires it. Apart from ignoring that ‘peaceful settlement of disputes’ is among the primary purposes of the United Nations set out in art 1, the passage quoted also overlooks that the references to human rights promotion in arts 55 and 56 fall within a chapter entitled ‘International Economic and Social Co-operation’ and have nothing whatsoever to do with the use of force. Moreover, arts 55 and 56 mandate international co-operation with the UN to achieve the specified aims, which is inconsistent with a unilateral right of intervention.

37 Chesterman, above n 15, 51.

phrase “or in any other manner” was designed to insure that there should be no loopholes. In any event, while the promotion of human rights through ‘international cooperation’ is to be found among the purposes of the United Nations, the first listed purpose in article 1 is the maintenance of international peace and security through the prevention and removal of threats to the peace, the suppression of breaches of the peace, and the peaceful settlement of disputes. While it is uncontestable that violations of internationally recognised human rights cannot be claimed to fall exclusively within the domestic jurisdiction of states, it does not follow that hortatory statements concerning human rights protection within the Charter provide any legal basis for the unilateral use of force to prevent human rights abuses. In the absence of a Security Council resolution authorising force under Chapter VII, the Charter envisages the promotion of human rights protection through the monitoring function of various subsidiary organs, such as the Economic and Social Council and the Commission on Human Rights.

The post-Charter state practice and opinio juris reviewed by Dr Chesterman also appear to lack the ‘consistent and widespread’ character required by prevailing theories to establish a new norm of customary international law. Indeed, the three conflicts most commonly cited as clear instances of bona fide humanitarian intervention — Indian intervention in East Pakistan, Vietnamese intervention in Kampuchea and Tanzanian intervention in Uganda — are shown to have been justified by the intervening state as cases of self-defence or protection of nationals. The international community’s reaction to the Indian and Tanzanian interventions was to affirm their respective rights to self-defence while calling for a cessation of hostilities; in neither case was there approval for a ‘right’ to use force to stop grave human rights abuses.

In the case of Vietnam’s invasion of Kampuchea, international reaction (led by the United States and China) was positively hostile. While proposed Security Council resolutions condemning Vietnam failed due to a Soviet veto, numerous states condemned the action as an illegal use of force in violation of the principle of non-intervention. States uniformly rejected the argument that ending the Khmer Rouge’s genocide could have justified the invasion (although Vietnam never expressly relied upon this rationale), with the United Kingdom, for example, stating, ‘whatever may be said about human rights in Kampuchea, it cannot excuse Viet Nam, whose own human rights record is deplorable, for

41 Chesterman, above n 15, 71–5, 77–81.
43 It is noteworthy that Vietnam’s claim of self-defence was plausible. After a long-running border dispute, and an increase in troop presence on both sides, the Khmer Rouge regime launched a series of armed attacks on the Vietnamese side of the border, which destroyed 25 townships and 96 villages, and left 257 000 Vietnamese homeless. Grant Evans and Kelvin Rowley, Red Brotherhood at War: Vietnam, Cambodia and Laos since 1975 (1984) ch 4.
violating the territorial integrity of Democratic Kampuchea.’ The General Assembly refused to recognise the representative of the Vietnamese-installed regime, allowing the Khmer Rouge to continue to occupy Kampuchea’s seat in the Assembly until 1990.

Genuinely ‘humanitarian’ interventions, then, are difficult to find: where states expressly profess humanitarian intentions, non-humanitarian reasons seem more significant; where interventions actually do terminate genocide or crimes against humanity, they are not justified, or accepted, as evincing a ‘right’ to do so. A cautious analysis of the state practice and opinio juris leads Dr Chesterman to conclude that unilateral ‘humanitarian intervention’ remains an inchoate principle, occasionally tolerated by states without being endorsed. In the cases of Tanzania and India, the international community reacted consistently with the norm of non-intervention, but imposed no countermeasures, which suggests one way of understanding humanitarian intervention is not so much as a ‘right’, but as illegal conduct which is tolerated by the international community in extreme circumstances.

III THE NEW INTERVENTIONISM — DELEGATION AND ‘COLLECTIVE UNILATERALISM’?

Perhaps the most interesting and analytically novel dimension of Just War or Just Peace? is its reflection on the changing nature of Security Council practice in relation to intervention since the end of the Cold War. Dr Chesterman considers two separate but related aspects of these developments: the new interpretations of a ‘threat to international peace and security’ that have underpinned Security Council authorisations to use force; and the trend towards ‘delegation’ of enforcement powers to various states or ‘coalitions of the willing’. Once again, the reader is greatly assisted by a precise and scholarly exposition of the terms of Chapter VII of the Charter, and the interpretive possibilities to which it gives rise.

There has been an extraordinary increase in the enforcement of Security Council authorisations since 1990, with 35 peacekeeping operations and 10 sanctions regimes authorised to the end of 1999. A corollary to this growth in authorisations is the emergence of expansive interpretations of the meaning of a ‘threat to international peace and security’, and what may be authorised in response to such a threat. Dr Chesterman’s review of 12 instances in the 1990s where the Security Council determined the existence of a threat to international peace and

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44 UN SCOR, 24th sess, 2110th mtg, 6, UN Doc S/PV.2110 (1979), cited in Chesterman, above n 15, 80, fn 249.
46 Chesterman, above n 15, 231–2.
security illustrates the enlargement of the term to encompass internal armed conflicts, humanitarian crises and ‘disruptions to democracy’. His careful analysis of the terms of each of the relevant resolutions and conduct by implementing states reveals that there is little consistency or underlying coherence in the Security Council’s employment of the term. More troublingly, the increasing plasticity of a ‘threat to international peace and security’ may reflect a manipulability of the Charter framework to coincide with the political will (and, by extension, the foreign policy objectives) of states desiring to intervene in a given situation. An example which suggests this possibility is the Security Council’s declaration that Libya’s refusal to extradite to the United States or United Kingdom two alleged terrorists was a ‘threat to international peace and security’, even though Libya had concluded no extradition treaty with either requesting state and its demand for international arbitration of the dispute was within the terms of the Montreal Convention.

As Dr Chesterman rightly points out, it is difficult to envisage how things could be otherwise in an ‘[o]rganization tied to a legal framework still subject to the will of member states.’ Nevertheless, he accepts that the very idea of an international rule of law demands the restraint of arbitrary uses of power and should ‘prevent the exercise of such power being legitimated by dubious legal processes.’ The alternative is inconsistency, incoherence and a discrediting of both international law and its instruments.

The spectre of a Security Council which is either co-opted or undermined is also raised by the second trend examined. The expansive interpretation of threats to international peace and security has developed in conjunction with increased delegation of enforcement measures to individual states or coalitions, particularly through the inclusion of the ‘all necessary measures’ form of authorisation. Article 53 of the Charter specifically provides for the Council to utilise regional arrangements or agencies for authorised enforcement actions, but the cases analysed by Dr Chesterman include delegation to any state willing to act, and to specifically nominated states. In the absence of the standing United Nations intervention force envisaged by Article 43 of the Charter, reliance on states’ willingness to implement enforcement measures is, of course, unavoidable. But Dr Chesterman’s review of the factual circumstances and terms of each instance of delegation in the last decade discerns a more problematic dimension: the

52 Chesterman, above n 15, 162.
53 Ibid 161.
Security Council has ceased debating enforcement measures in open session, and instead has moved to ‘granting its formal imprimatur to pre-arranged deals.’

In the process, the Council’s supervision of when and how enforcement mandates are carried out, its monitoring of delegated operations, and its ability to determine when such operations should conclude, have all been undermined. This diminished control has resulted in some states bypassing the Security Council altogether, while legitimising their use of force against certain countries on the basis of earlier resolutions determining a threat to international peace and security. One example considered in detail by Dr Chesterman is the decade-long, low-intensity aerial war waged against Iraq by the United States and the United Kingdom. While candidly admitting that the imposition of ‘no-fly’ zones and periodic aerial bombardment were partly intended to achieve the (illegal) foreign policy objective of destabilising the Iraqi government, the United States and United Kingdom maintained that bombardment to enforce aerial exclusion zones and a weapons-inspection regime were authorised by the initial resolution mandating the expulsion of Iraq from Kuwait, and by a later resolution author-


56 Chesterman, above n 15, 185. A tragic example of the Security Council’s complete loss of operational control during a ch VII mission was the United States’ determination to pursue clan leader Mohamed Farah Aidid (a situation which in itself was the product of ignorance, confused diplomacy and indeterminate mission objectives), leading it to launch an intensive armed assault in Mogadishu, and secretly introduce a commando strike force. In the course of the hostilities, United States’ forces bombed a hospital and a United Nations compound, and killed between 500 and 1000 Somali civilians; casualty estimates range from 6000 to 10 000 Somali civilians. Despised by Somalis in Mogadishu, the United Nations mission collapsed. Other peacekeeping forces, such as the Belgians, Canadians and Italians, also committed gross human rights abuses against Somali civilians, including torture, rape and murder. See generally Alex de Waal, ‘US War Crimes in Somalia’ (1998) 230 New Left Review 131; Scott Peterson, Me against My Brother: At War in Somalia, Sudan and Rwanda — A Journalist Reports from the Battlefields of Africa (2000) chs 4–5, particularly at 88 for civilian casualty figures.

The dangers of allowing one state to control a mission, and thus set its own rules of engagement and military objectives, are illustrated by a troubling statement attributed to then-President William J Clinton by his former adviser, George Stephanopoulos:

“We’re not inflicting pain on these fuckers [Aideed’s faction],’ Clinton said, softly at first. ‘When people kill us, they should be killed in greater numbers.’ Then, his face reddening, his voice rising, and his fist pounding his thigh, he leaned into Tony [Lake], as if it was his fault. ‘I believe in killing people who try to hurt you … And I can’t believe we are being pushed around by these two-bit pricks.’


As journalist Scott Peterson (at xvii) observes, ‘the disastrous US policy in Somalia … led directly to another disastrous, shameful US policy of genocide denial in Rwanda.’

57 Chesterman, above n 15, 196–206.


ising the delivery of humanitarian aid to Iraqi Kurds. As Dr Chesterman convincingly demonstrates, neither of these arguments has any legal merit. Security Council Resolution 678’s authorisation to use force ended with the termination of the Iraqi occupation of Kuwait, and the conclusion of the formal cease-fire embodied in Security Council Resolution 687. Security Council Resolution 688 authorised only humanitarian assistance and, unlike the 14 prior Security Council resolutions concerning Iraq, was not made pursuant to Chapter VII.

An interesting speculation at the conclusion of Dr Chesterman’s analysis of these two trends in Security Council practice is his suggestion that we may be witnessing the emergence of circumstances reminiscent of an earlier era in the legal regulation of the use of force. The trend towards delegation turns Council authorisation into a formal endorsement of pre-arranged deals among powerful states, and has made regional interventions supported by ambiguous Council authorisations more common. The natural progression of this tendency may well be indicated by NATO’s Operation Allied Force in 1999, in which ‘support of’ or ‘consistency with’ Security Council resolutions concerning Kosovo were proffered as sufficient bases to claim the imprimatur of the Charter framework in the absence of any express authorisation. The Security Council’s determinations were thus reduced to offering ‘one policy justification among others’ for the recourse to force, which Dr Chesterman analogises to the merely recommendatory powers held by the Council of the League of Nations. A system which relies on alliances of convenience to pursue ‘recommended’ enforcement actions may ‘come to resemble something slightly older — notably, the alliances of the nineteenth century under the Concert of Europe.’ Where the Security Council does more than ‘recommend’, it may become a ‘law-laundering service’ which

Murphy, above n 58, 473–5. The cruel irony of claiming that the no-fly zones are intended to ‘protect Iraqi Kurds’ would not be lost on the Kurds themselves, who have been subject to a brutal counterinsurgency campaign by Turkish troops crossing the border into Iraq. In the 1990s, United States’ weapons supplies to Turkey reached unprecedented levels, even as serious human rights abuses committed against the Kurds by the Turkish military were documented by international human rights groups: see, eg, Human Rights Watch, The Kurds of Turkey: Killings, Disappearances and Torture (1993); Human Rights Watch, Weapons Transfers and Violations of the Laws of War in Turkey (1995); Human Rights Watch, Forced Displacement of Ethnic Kurds from Southeastern Turkey (1994); Tamar Gabelnick, William Hartung and Jennifer Washburn, Arming Repression: US Arms Sales to Turkey during the Clinton Administration (1999) Federation of American Scientists <http://www.fas.org/asmp/library/reports/turkeyrep.htm> at 1 October 2001 (copy on file with author).

provides legitimising mandates for the unilateral use of force or the use of force by a coalition of like-minded states.69

IV What Is to Be Done?

In their editorial comments on NATO’s Operation Allied Force, Louis Henkin and Jonathan Charney both question the desirability of allowing collective security arrangements to be replaced by a ‘right’ to humanitarian intervention.70 Henkin echoes Pufendorf when he observes that ‘the law against unilateral intervention may reflect, above all, the moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely [whether force should be used].’71 Dr Chesterman’s conclusions place him among these distinguished counsels of caution:

[U]nilateral enforcement is not a substitute for but the opposite of collective action: as unilateral assertions of humanitarianism come to displace multilateral institutional legality, so the normative restraints on the recourse to force weaken. The resulting fragmentation and regionalization of the international security system thus makes it reliant, once again, on the eirenic munificence of the modern Great Power(s). And, as international law is deprivileged to become just one policy justification among others, so fade the hopes of mediating those Great Power relations through an international rule of law.72

Such caution is an important counterpoint to the, at times, uncritical celebration of ‘the end of sovereignty’ by well-intentioned human rights groups, and less well-intentioned foreign policy ‘spin’ experts. The ‘growing willingness to transcend sovereignty’ and a ‘new readiness [by] the international community’ to deploy troops to address crimes against humanity, celebrated by Human Rights Watch in its World Report 2000,73 too easily become a triumphal unilateralism by self-appointed ‘enlightened’ states:

This perspective can only be centred on a new unity of purpose among Western peoples and governments, since only the West has the economic, political and military resources and the democratic and multinational institutions and culture necessary to undertake it. The West has a historic responsibility to take on this

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71 Henkin, above n 70, 825.

72 Chesterman, above n 15, 236 (emphasis omitted).

73 Human Rights Watch, World Report 2000 (2000) xiii–xiv. To assert that the ‘end of sovereignty’ improves the prospects for human rights law enforcement is to mistakenly assume that it is ‘sovereignty’ which has deterred necessary interventions in the past. This assumption is demonstrably false. It was not concern over state sovereignty that impeded intervention to prevent genocide in Rwanda, but rather concern over state self-interest, and this is likely to persist whatever the fortunes of the concept of ‘sovereignty’. On states’ calculations as to their national interests when contemplating intervention in Rwanda, see Linda Melvern, A People Betrayed: The Role of the West in Rwanda’s Genocide (2000).
global leadership, not because it should impose itself on the rest of the world,
but because so many people in the rest of the world look to it for support.74

Post-colonial states in the developing world — erstwhile ‘beneficiaries’ of an
earlier ‘historic responsibility’ claimed by powerful states75 — are understanda-
bly apprehensive about any potential new licence for unilateral military action by
the West.76 It may provide some of these states with an excuse to seek security,
not through collective frameworks, but by enhancing national military capabili-
ties and developing weapons of mass destruction. In the aftermath of NATO’s
attack on Yugoslavia, Indian Prime Minister Atal Bihari Vajpayee warned
ominously, ‘Who is safe in this world? … In this situation, we cannot let our
defenses slip. Nuclear weapons are the only way to maintain peace.’77

Dr Chesterman’s alternative to a ‘right’ to humanitarian intervention — that
humanitarian intervention should be declared illegal, but the international
community may justifiably withhold countermeasures in appropriate circum-
stances — nevertheless leaves us asking what those circumstances may look like.
Richard Falk’s observation that maintaining a strict legalism in the face of
genocide or comparable crimes is ‘politically and morally unacceptable’ — and
may further marginalise international law78 — underscores that any judgment as
to the ‘acceptability’ (or ‘excusability’) of a claimed humanitarian intervention
requires recourse to ethical and empirical criteria informed by the values and
principles underlying the Charter framework. The criteria tentatively suggested
by Falk and Chesterman79 overlap in substance, and require:
1 the existence of severe and immediate human rights abuses, amounting to
genocide or crimes against humanity;
2 the exhaustion of peaceful options, pursued in a sincere and convincing
manner;
3 an inability to pursue collective action through either the Security Council or
General Assembly; and

74 Martin Shaw, Global Society and International Relations (1994) 180–1.
75 The parallels between the ‘white man’s burden’ which justified colonialism, and the ‘global
burden’ rhetoric of the new interventionism are troubling. It is also worth recalling that the
scramble for Africa was spurred in part by pressure from Christian missionaries to suppress the
slave trade.
76 See the press reports discussed in Stanley Kober, ‘Setting Dangerous International Precedents’ in
NATO’s nebulously expansive revised strategic concept, which includes ‘[e]thnic and religious
rivalries, territorial disputes, … failed efforts at reform, the abuse of human rights and the dis-
solution of states’ in non-NATO areas as potential threats to NATO’s security, would do little to
ease this concern about a global military reach: see John Borawski and Thomas-Durrell Young,
NATO after 2000: The Future of the Euro-Atlantic Alliance (2001) 48. Nor, for that matter,
would statements by high-level United States officials that the strategic concept ‘does not sug-
gest that NATO must have permission from the United Nations or any other outside body before
it can act’ (Walter Slocombe, then Under Secretary of Defense for Policy) or that ‘[w]e should
avoid language in the Concept which would require NATO to have a UN or other mandate’
(William Cohen, then Secretary of Defense): see at 49.
77 Cited in Kober, above n 76, 115.
Journal of International Law 847, 852–3.
79 Ibid 856; Chesterman, above n 15, 228–9.
that the use of force is in fact likely to protect the population, is limited to the degree necessary to prevent further violations, and is conducted in a manner consistent with the laws of war.80

These criteria provide a useful guide to international lawyers and concerned persons trying to navigate the quagmire of whether an intervention is ethically appropriate in the context of a world order that endeavours to deter and contain the use of force between states. It seems appropriate that a strong burden of persuasion must be discharged to excuse a use of force outside the United Nations’ framework, and hence the criteria should be applied stringently and with a critical eye to a purported humanitarian intervention, particularly when a war is being waged in ‘our’ name and government ‘spin’ is unrelenting. Vigilant application of these criteria would demonstrate, I think, that the ‘double blackmail’ that we must ‘[a]ct or do nothing’81 is rarely, if ever, defensible.82 Certainly, it is doubtful whether NATO’s Operation Allied Force meets three out of four of these tests, leaving a justifiable concern that the war was both unnecessary and unnecessarily destructive.83

80 Chesterman, above n 15, 229 also notes that some writers demand that the humanitarian motives of the intervener be ‘paramount’. In principle, it is difficult to see why this should necessarily be the case, as an intervention motivated by other reasons may still terminate international crimes (eg, Vietnam’s intervention in Kampuchea and India’s intervention in East Pakistan). Nevertheless, if the intervening state has the welfare of the other state’s population as a paramount concern, it seems more likely to satisfy criteria 2 and 4.

81 These words were uttered by British Prime Minister Tony Blair as the basis for Operation Allied Force: Rachel Sylvester, ‘The Blair Doctrine: This Is an Ethical Fight’, Independent (London, UK), 28 March 1999, 18, cited in Chesterman, above n 15, 220.

82Indeed, the perils of ‘doing something’ were illustrated in Somalia, where military intervention in a humanitarian crisis neither averted disaster nor resolved the underlying conflict: Alex de Waal and Rakiya Omaar, ‘Can Military Intervention Be “Humanitarian”?’ (1994) 24(2)-(3) Middle East Report 3. As de Waal and Omaar comment, ‘[r]elief agencies must realize that military intervention does not make the job of fighting famine any easier; it merely makes it different’: at 7. Mohamed Sahnoun, former Special Representative of the UN Secretary-General for Somalia, states: ‘I was in Somalia at the time. We did not need troops. The worst came when we began to send troops’: Joe Stork, ‘It’s Difficult to Point to a Situation Where Armed Intervention Represented a Solution’ (1994) 24(2)-(3) Middle East Report 28, 30.

Discussing why she went from being a supporter to a critic of NATO’s operation, east European human rights advocate Dimitrina Petrovna explained her deep concern that the banner of ‘human rights’ was becoming indistinguishable from official political ideology … [producing] a gradual usurpation of human rights culture by the dominant powers, and the very argument for the [sic] human-rights is turning into an apologia for the global status quo, all in the interests of these very powers.84

Dr Chesterman’s useful book provides legal and analytical tools that, hopefully, will help us differentiate between an excusable illegality, and yet another cynical usurpation of international law in the service of raison d’état.

NEHAL BHUTA*

93 and sources cited in fns 23–4. Disturbingly, the International Criminal Tribunal for the former Yugoslavia has not applied the same standards to NATO as it has to other combatants. In July 1995, it indicted Milan Martic for violating the laws and customs of war by using cluster munitions. United States planes dropped cluster bombs for most of Operation Allied Force, but no indictment has been issued. See Human Rights Watch, NATO’s Use of Cluster Munitions in Yugoslavia (1999).

84 Cited in Robert Hayden, UN War Crimes Tribunal Delivers a Travesty of Justice, Woodrow Wilson International Center for Scholars <http://wwics.si.edu/NEWS/hayden.htm> at 1 October 2001 (copy on file with author).

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