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# Rules, Gaps and Power: Assessing Reform of the U.N. Charter

By  
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## ABSTRACT

In light of several recent international legal and political crises, a wide spectrum of proposals has emerged to reform the rules of the United Nations Charter. These proposals range from broadening the right of states to use force in self-defense to allowing states to conduct humanitarian interventions without the approval of the Security Council. This article presents a framework for assessing such reform proposals that examines the ways in which states' decision-making processes interact with legal rules to cause certain uses of force to be undertaken while others are avoided. Using this framework, this article argues that, regardless of whether they are legally desirable, the most prevalent reform proposals are unlikely to alleviate the system's problems in a tangible way. Instead, the United Nations' member states must conduct a thorough analysis of how the organization can restructure itself to play a more productive role in ensuring international security.

*[T]he UN must undergo the most sweeping overhaul of its 60-year history.*  
- Kofi Annan<sup>1</sup>

*Why have this building? What is it all about?*  
- John Danforth<sup>2</sup>

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1. Kofi Annan, *"In Larger Freedom": Decision Time at the UN*, 84 FOREIGN AFF. 63, 66 (2005) [hereinafter *In Larger Freedom*].

2. Philip Gourevitch, *Power Plays*, NEW YORKER, Dec. 13, 2004, at 35 (reporting John Danforth's frustrations with the United Nations, which were expressed the day before he resigned as United States Ambassador to the United Nations).

I.  
INTRODUCTION

Only the most ardent pacifist would argue that under no circumstance should a state use armed force against another state.<sup>3</sup> The assumption that some degree of force is imperative in the international system was fundamental in the creation of the United Nations Charter, which, while seeking to create a more peaceful world order, does so by limiting the use of force rather than outright prohibiting it. The Charter generally prohibits armed attacks by states, but provides two major exceptions: in self-defense and, otherwise, when authorized by the Security Council.<sup>4</sup> These rules are not only the core of the Charter but are arguably the most important legal rules in the international system.<sup>5</sup>

Member States have regularly and pervasively violated the Charter rules, demonstrating that the Charter system has not succeeded in effectively governing the use of force. In other words, the Charter has not resulted in an environment where uses of armed force are limited to the instances the Charter deems legal. Depending on the criteria used, studies have found that states used military force in interstate disputes several hundred times since the United Nations was created in 1945.<sup>6</sup> As a result of these and other problems facing the United Nations, “[o]ptimism yielded to renewed cynicism about the willingness of Member States to support the Organization.”<sup>7</sup>

These problems are widely acknowledged, and many believe they can be fixed—or at least mitigated—by revising or re-interpreting the Charter rules in one way or another. Indeed, it seems talk of reforming the Charter, while always present in some form since 1945, has rarely been as prevalent. Secretary-General Kofi Annan recently commissioned a High-Level Panel on Threats, Challenges and Change (“High-Level Panel”) to examine whether and how the U.N. system should be reformed, including the rules governing the use of force. The High-Level Panel, which released its findings in December 2004,

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3. See generally Duane L. Cady, *Pacifist Perspectives on Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM 31, 42 (Robert L. Phillips & Duane L. Cady eds., 1996) (noting that absolute pacifism “has very few if any adherents”).

4. U.N. Charter art. 2, para. 4; arts. 39-51.

5. See, e.g., MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 3 (2001) (“It is widely agreed that the most important rules are rules governing use of force; the most important obligation is the obligation not to use force unless in self-defense or pursuant to approval by the United Nations Security Council.”) (citation omitted) [hereinafter LIMITS OF LAW].

6. See, e.g., The Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 140 n.104, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report3.pdf> (“By one count, force was employed 200 times, and by another count, 680 times.”) [hereinafter PANEL REPORT]; GLENNON, LIMITS OF LAW, *supra* note 5, at 67-69 (listing various counts of the uses of force since 1945); ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 181 (1993) (providing a “representative sampling” of uses of military force since 1945).

7. PANEL REPORT, *supra* note 6, at 13.

found that no reform of the rules was needed. "Article 51 needs neither extension nor restriction of its long-understood scope," it concluded, "and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront."<sup>8</sup> Shortly afterward, Annan strongly endorsed the High-Level Panel's findings.<sup>9</sup>

Yet the High-Level Panel's report and Annan's support of it were poorly received by many. *Washington Post* columnist Jim Hoagland called it "incremental tinkering on the edges of a hurricane of change."<sup>10</sup> Richard Haass, President of the Council on Foreign Relations, argued that the flaws in the High-Level Panel's recommendations resulted from equating "process" with "legitimacy."<sup>11</sup> Likewise, Professor Michael Glennon wrote that "the core recommendations of the panel's report, concerning the use of armed force, rest upon wishful thinking rather than empirical evidence. The report evinces a view of a world governed by objective, universal morality rather than by competition for power and shifting national interests."<sup>12</sup>

Were the High-Level Panel and the Secretary-General correct that Charter reform is not necessary? Or should the rules governing when states may use armed force be revised—and, if so, how? This article will attempt to address these questions by stepping back and examining how these legal rules interact with other forces in the international system. Part II reviews three recent crises—Iraq, Rwanda, and Kosovo—where the Charter regime has been accused of failing. The discussion of these situations will shed light on the different flaws in the Charter system and how these flaws manifest themselves in practical terms. Part II asserts that the problems run deeper than the frequent violations of the Charter rules and also include occasions where force was not employed but should have been. With these observations in mind, Part III presents a framework to be used to analyze proposals for reforming the Charter and addressing its flaws. This framework aims to examine the use of force in a broad sense, looking both at occasions where force has been used as well as occasions where it was not. In addition, this framework demonstrates the interaction between the Charter rules and the national interests of member states

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8. *Id.* at 61.

9. The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005); Kofi Annan, *A Way Forward on Global Security*, INT'L HERALD TRIB., Dec. 3, 2004, available at <http://www.un.org/secureworld/oped.html>; Kofi Annan, *Courage to Fulfill Our Responsibilities*, ECONOMIST, Dec. 2, 2004, available at [http://www.economist.com/opinion/displayStory.cfm?story\\_id=3445764](http://www.economist.com/opinion/displayStory.cfm?story_id=3445764).

10. Jim Hoagland, *Failure of Nerve in U.N. Reform*, WASH. POST, Dec. 5, 2004, at B7. See also Max Boot, *Why U.N. Stays Mired in Its Defects*, L.A. TIMES, Dec. 9, 2004, at B17 ("The reality is that most of the U.N.'s 191-member states, to say nothing of its 49,000 employees, aren't terribly interested in making it work better.").

11. RICHARD HAASS, *THE OPPORTUNITY: AMERICA'S MOMENT TO ALTER HISTORY'S COURSE* 176-77 (2005).

12. Michael Glennon, *Idealism at the U.N.*, 129 POL'Y REV. 3, 3-4 (2005).

in the decisions by member states to use force. Utilizing this framework, Part IV reviews some of the most prevalent proposals to reform or reinterpret the Charter, including suggestions for revising the standard for the use of force in self-defense and those allowing states to intervene during humanitarian crises. This article argues that using the framework provided in this article as an analytical tool demonstrates that such proposals are generally impractical because they focus too narrowly on rules as ends within themselves rather than on the political, economic, and social interests that drive state behavior. Finally, the conclusion argues that, alternatively, the more effective way to reshape the United Nations is not by reforming the Charter rules but by exploring ways in which the system can better focus on member states' national interests.

## II. THREE RECENT CRISES

In 1932, Reinhold Niebuhr observed:

[T]here is not yet a political force capable of bringing effective social restraint upon the self-will of nations, at least not upon the powerful nations. Even if it should be possible to maintain peace on the basis of the international *status quo*, there is no evidence that an unjust peace can be adjusted by pacific means. A society of nations has not really proved itself until it is able to grant justice to those who have been worsted in battle without requiring them to engage in new wars to redress their wrongs.<sup>13</sup>

This statement, of course, was made years before the creation of the United Nations, which attempted to provide the type of restraint described by Niebuhr. Nonetheless, if he were alive today, Niebuhr could rightly make the same observation.<sup>14</sup> Indeed, states of every sort continue using armed force against each other—often as if the Charter had never existed and at other times offering half-hearted and questionable justifications for finding their actions legal under its rules.<sup>15</sup> During the Cold War, uses of force in violation of the Charter—such as the Soviet invasion of Afghanistan and the U.S. campaign against Nicaragua—were often perceived as temporary symptoms of the geopolitical climate rather than results of inherent flaws in the Charter rules.<sup>16</sup> Shortly after

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13. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* 111 (1932).

14. See, e.g., GLENNON, *supra* note 5, at 2 (“[N]o rule—neither the prohibition against nondefensive forced prescribed by the UN Charter, nor an alleged customary rule prohibiting or permitting humanitarian intervention or some other use of force—has succeeded in obliging states to refrain from intervention.”).

15. See, e.g., Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 530 (2005) (noting that “states routinely resort to expanded conceptions of self-defense in attempts to justify unilateral uses of force”); Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, 147-48 (1992) (“Obviously, not all states that invoke the doctrine of self-defense, a legal right, to justify their use of force, do so truthfully.”).

16. See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI.

the Cold War ended, however, events such as the First Gulf War, celebrated at the time as a model for international collective security, reintroduced the notion that the Charter and Security Council could effectively govern the use of armed force. The New World Order heralded after the First Gulf War was supposed to be a new era of cooperation among nations and respect for international law.<sup>17</sup> Events since then, however, demonstrate that this moment was short-lived. As the High-Level Panel laments:

It quickly became apparent that the United Nations had exchanged the shackles of the cold war for the straitjacket of Member State complacency and great Power indifference. Although the United Nations gave birth to the notion of human security, it proved poorly equipped to provide it. Long-standing regional conflicts, such as those involving Israel/Palestine and Kashmir, remained unresolved. Failures to act in the face of ethnic cleansing and genocide in Rwanda and Bosnia eroded international support. Optimism yielded to renewed cynicism about the willingness of Member States to support the Organization.<sup>18</sup>

This Part discusses three situations that have occurred since the end of the Cold War that demonstrate, in varying ways, the limitations of the Charter system, the complexity of its flaws, and the reasons for this cynicism: (1) the 2003 U.S.-led invasion of Iraq (often called the Second Gulf War); (2) the 1994 Rwandan genocide and the failure of the outside world to sufficiently intervene; and (3) the 1999 NATO Kosovo campaign. Despite their factual and legal differences, the discussion will demonstrate that these problems have more in common than first impressions suggest.

### *A. The Second Gulf War*

Although there may be a passionate few who would argue otherwise,<sup>19</sup>

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L. REV. 113, 118 (1986) (noting that the United States justified its invasion of Grenada in part because “its nationals [were] facing imminent danger of death” and how the Soviet Union justified its 1968 invasion of Czechoslovakia by claiming it was responding to “that government’s ‘urgent’ request for assistance”).

17. See George H. Bush, *Toward a New World Order*, 1 U.S. DEP’T ST. DISPATCH 91 (Sept. 17, 1990) (predicting greater cooperation between states on economic, military and political matters); MARY ELLEN O’CONNELL, AM. SOC’Y OF INT’L LAW TASK FORCE ON TERRORISM, THE MYTH OF PREEMPTIVE SELF-DEFENSE 17 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf> (“President George Bush led the United States in the Gulf War coalition proclaiming, at the war’s end, a ‘new world order under the rule of law.’ The exemplary conduct of that coalition war reinvigorated the Charter rules and the role of the Security Council.”).

18. PANEL REPORT, *supra* note 6, at 13. See also John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 742 (2004).

19. See, e.g., William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557, 563 (2003) (“Both the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated—without question—by the opponent and where, as here, it is consistent with the resolutions of the Security Council.”); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 575 (2003) (“International law permitted the use of force against Iraq on two independent grounds. First, the Security Council

most now agree that the Second Gulf War was conducted in violation of the U.N. Charter.<sup>20</sup> The Security Council had passed Resolution 1441 late in 2002, threatening Iraq with “serious consequences” if it did not cooperate with weapons inspectors.<sup>21</sup> Yet the United States and its allies failed in their efforts in early 2003 to generate support for the so-called “second resolution” that would have explicitly authorized the use of force against Iraq. Nonetheless, the Bush administration argued that Resolution 1441 and other resolutions passed by the Security Council regarding Iraq provided sufficient authorization.<sup>22</sup> Annan later cited this fact for his conclusion that “[f]rom our point of view and the U.N. charter point of view, [the invasion] was illegal.”<sup>23</sup> Indeed, as Thomas Franck wrote shortly after the invasion, “[w]hile a few government lawyers still go through the motions of asserting that the invasion of Iraq was justified by our inherent right of self-defense, or represented a collective measure authorized by the Security Council under Chapter VII of the Charter, the leaders of America no longer much bother with such legal niceties. Instead, they boldly proclaim a new policy that openly repudiates the Article 2(4) obligation.”<sup>24</sup> Nonetheless, the question of whether the Second Gulf War was legal is secondary to this article. What is most important is the recognition that the United States and its allies conducted the war despite a general perception of its illegality. This was explored poignantly by Pierre D’Argent:

The war was illegal. Yes. And, so what? Is the illegality to be taken that seriously when one knows what it is made of? To be serious, to oppose the war for such a legal reason is not really sufficient nor perfectly credible. Better reasons than this formal legal reason exist to oppose the war. And had the war been authorized, to be in favour of it just for legal reasons is a bit irresponsible, since it would have been waged probably along very similar lines and have created the same political turmoil. Soldiers and civilians would also have been killed, Al-Qaeda would also be rampant, and Saddam would also be in custody, the crimes of his reign

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authorized military action against Iraq to implement the terms of the cease-fire that suspended the hostilities of the 1991 Gulf war. Due to Iraq’s material breaches of the cease-fire, established principles of international law—both treaty and armistice law—permitted the United States to suspend its terms and to use force to compel Iraqi compliance. Such a use of force was consistent with U.S. practice both with regard to Iraq and with regard to treaties and cease-fires. Second, international law permitted the use of force against Iraq in anticipatory self-defense because of the threat posed by an Iraq armed with WMD and in potential cooperation with international terrorist organizations.”).

20. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (“[T]he legal theory actually deployed by the United States is not persuasive.”); Yoo, *supra* note 18, at 735 (“The consensus view among most international legal scholars is that the recent American interventions in Kosovo and Iraq, and the Bush administration’s announced plans to use force preemptively against rogue nations and international terrorist organizations, violate core principles of international law.”).

21. S.C. Res. 1441, ¶ 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

22. See generally Taft & Buchwald, *supra* note 19.

23. Colum Lynch, *U.S., Allies Dispute Annan on Iraq War*, WASH. POST, Sept. 17, 2004, at A18 (reporting answers Annan gave when the BBC questioned him about the war’s legality).

24. Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT’L L. 607, 608 (2003).

revealed.<sup>25</sup>

Put another way, the most important lesson of the invasion is not the extent to which prior Security Council resolutions provided sufficient legal justification to launch an invasion; rather, it is that, whether or not this is reason enough, if powerful states are determined to launch such an invasion then, in practical terms, the legal technicalities become all but irrelevant.

### *B. Humanitarian Intervention and The Rwandan Genocide*

As mentioned in the introduction, when assessing whether the U.N. Charter rules have succeeded in effectively governing the use of armed force, we must examine not only cases where force was used when it should not have been but also those where it was not used when it should have been. The most striking examples of such non-uses of force (or, in some cases, insufficient uses of force) are the failures of the world community to conduct certain humanitarian interventions. Yet not only is humanitarian intervention a controversial policy issue, the very definition of the term is subject to disagreement. In this article, I adopt the flexible definition provided by J. L. Holzgrefe: “[T]he threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.”<sup>26</sup>

Under a strict interpretation of the Charter, such uses of force are illegal unless authorized by the Security Council.<sup>27</sup> Making the problem still more

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25. Pierre d’Argent, *Which Law Through Which War? Law Through War Revisited*, 52 *BUFF. L. REV.* 635, 644 (2004). As I have argued elsewhere, Annan’s insistence on the invasion’s illegality merely “highlighted the irrelevance of that illegality.” Yonatan Lupu, *Self Inflicted*, *NEW REPUBLIC ONLINE*, Sept. 22, 2004, <http://www.tnr.com/doc.mhtml?i=express&s=lupu092204>.

26. J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 15, 18 (J. L. Holzgrefe & Robert O. Keohane eds., 2003). A stricter definition has been provided by Fernando Tesón: “[T]he proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.” Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION*, *supra* at 93, 94. A definition that, unlike Holzgrefe’s and Tesón’s, does not explicitly include threats, has been offered by Professors Franck and Rodley: “The theory of intervention on the ground of humanity is properly that which recognizes the right of one state to exercise an international control *by military force* over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.” Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT’L L.* 275, 277 n.12 (1973).

27. See SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 129 (1996); Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, in 178 *RECUEIL DES COURS* 9, 143-44 (1982); Tom J. Farer, *Human Rights in Law’s Empire: The Jurisprudence War*, 85 *AM. J. INT’L L.* 117, 121 (1991) (“The nub of the matter . . . is that if one deems the original intention of the founding members to be controlling with respect to the legitimate occasions for the use of force, humanitarian intervention is illegal.”); Louis Henkin, Editorial Comments, *NATO’s Kosovo Intervention: Kosovo and the Law of*



complex, even a well-intentioned intervention can lead to unforeseen, negative consequences. As Robert L. Phillips has argued, “there is often a very large gap between the (sometimes) good intentions of the interveners and the carrying out of an operation.”<sup>28</sup> Yet even the United Nations has expressed its support for humanitarian intervention in general terms. The High-Level Panel, for example, wrote: “[w]e 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.”<sup>29</sup>

While there seems to be widespread agreement that when humanitarian crises arise the world should intervene, when actual crises do occur the outside world’s response is either slow or non-existent.<sup>30</sup> Indeed, for various reasons, there have been few examples of humanitarian intervention. Michael Walzer wrote in 1977 that he had “not found any, but only mixed cases where the humanitarian motive is one among several.”<sup>31</sup> But Walzer wrote this comment prior to certain recent examples and may have used a stricter definition than that adopted in this article. On a micro level, Israel’s 1976 raid on the airport in Entebbe, Uganda to rescue Israeli citizens held there by Palestinian terrorists is a relatively non-controversial and morally justifiable example.<sup>32</sup> Large-scale operations often cited as humanitarian intervention include India’s 1971 invasion of East Pakistan/Bangladesh, Vietnam’s 1978 invasion of Cambodia to oust the genocidal Khmer Rouge and Tanzania’s 1979 invasion of Uganda.<sup>33</sup>

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“*Humanitarian Intervention*”, 93 AM. J. INT’L L. 824 (1999) [hereinafter Henkin, *NATO’s Kosovo Intervention*].

28. Robert L. Phillips, *The Ethics of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM, *supra* note 3, at 1, 3.

29. PANEL REPORT, *supra* note 6, at 66.

30. See generally SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 508-16 (2002) (analyzing U.S. reluctance to intervene to stop acts of genocide). But see Tesón, *supra* note 26, at 112 (“Humanitarian intervention undermines . . . stability both by the very act of intervening, and by creating a dangerous precedent that lends itself to abuse of aggressive states. The use of the doctrine of humanitarian intervention rationale by even well-intentioned governments will contribute to generalized chaos, and an unjust order is preferable to chaos. Injustice should be remedied in ways that do not undermine the stability of the state system, that is by ‘peaceful’ means.”) (citation omitted).

31. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 101 (1977).

32. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41 (2d ed. 1991) [hereinafter Henkin, *Use of Force*] (referring to the Israeli action as a “paradigmatic case” of humanitarian intervention).

33. See Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 26, at 130, 130. See also FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 179-223 (2d ed. 1997) (citing the following examples: (1) Tanzania’s 1979 invasion of Uganda; (2) France’s 1979 intervention in the Central African Republic; (3) India’s 1971 invasion of East Pakistan/Bangladesh; and (4) the United States’s 1983 campaign against Grenada); James P. Terry, *Rethinking*

Yet it seems that recent history is characterized more by failures to prevent or end humanitarian crises than successes (or even partial successes) in doing so.

Perhaps the most tragic recent example of this failure is the Rwandan genocide of 1994. In October 1993, the United Nations established a peacekeeping mission in the country to monitor the implementation of a peace accord between the Rwandan government and Tutsi rebels. But the unstable peace collapsed on April 7 of the following year after the death of the Rwandan president in a plane crash. Immediately, the military and Hutu militia began rounding up and murdering Tutsi and moderate Hutu civilians. Meanwhile, the peacekeepers attempted to coordinate peace talks but, by the terms of the U.N. mandate, could not engage the killers—even to defend unarmed civilians—except in self-defense. The killers were able to freely carry out their agenda. By the end of June, more than 800,000 people had been killed.<sup>34</sup>

Almost as appalling as the murders themselves was the world's response to them. After the outbreak of violence, Roméo Dallaire, commander of U.N. forces in Rwanda, pleaded with the United Nations for reinforcements and a revised mandate that would allow his troops to use force against the *genocidaires*. The Security Council refused his early requests, opting instead to withdraw most of the peacekeepers.<sup>35</sup> Finally, in mid-May, the Security Council approved the deployment of 5,500 troops, but reinforcements did not arrive until late June, by which time most of the fighting had already ended.<sup>36</sup> Furthermore, these reinforcements were supplied by France, which Samantha Power argued was “probably the least appropriate country to intervene because of its warm relationship with the genocidal Hutu regime.”<sup>37</sup> Explaining how

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*Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism*, 2004 ARMY LAW. 36, 41 (citing the Stanleyville intervention, an operation conducted by the United States, Belgium and Great Britain to rescue civilians held hostage by Congolese rebels). But see GLENNON, LIMITS OF LAW, *supra* note 5, at 72-75 (pointing out possible alternate justifications for several examples of interventions often regarded as humanitarian).

34. See generally Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998), *aff'd* Kambanda v. Prosecutor, Case No. ICTR 97-23-A, Judgment (Oct. 19, 2000); ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2004); Jose E. Alvarez, *Crimes of States/ Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

35. See generally DALLAIRE, *supra* note 34, at 263-91. Dallaire believed that “[i]f we were given a new mandate and the necessary force, we might be able to get the two parties back to the negotiating table.” *Id.* at 276. But see Alan J. Kuperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 94 (2000) (“A close examination of what a realistic U.S. military intervention could have achieved . . . finds insupportable the oft-repeated claim that 5,000 troops deployed at the outset of the killing in April 1994 could have prevented the genocide.”).

36. See S.C. Res. 918, ¶ 5, U.N. Doc. S/RES/918 (May 17, 1994); S.C. Res. 925, ¶ 2, U.N. Doc. S/RES/925 (June 8, 1994). See generally DALLAIRE, *supra* note 34, at 374-420; Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 100 (2002) (“[I]n Somalia in 1993, Rwanda in 1994, and Bosnia in 1995, the UN action taken (if taken at all) was widely perceived as too little too late, misconceived, poorly resourced, poorly executed, or all of the above.”).

37. POWER, *supra* note 30, at 380.

and why the genocide was allowed to occur, Dallaire later wrote:

The international community, of which the UN is only a symbol, failed to move beyond self-interest for the sake of Rwanda. While most nations agreed that something should be done, they all had an excuse why they should not be the ones to do it. As a result, the UN was denied the political will and material means to prevent the tragedy.<sup>38</sup>

### C. The NATO Kosovo Campaign

In certain ways, NATO's campaign against Kosovo is the most complex of the three situations highlighted in this article. In March 1999, without explicit authorization from the Security Council, NATO began a military campaign against Serbian forces in Yugoslavia (now Serbia and Montenegro) aimed at protecting the Albanian population in Yugoslavia's southern province of Kosovo. Fighting between Kosovar rebels and the Serb-controlled government, which had broken out in large scale in 1998, resulted in hundreds of thousands of Kosovar Albanians fleeing their homes by the time NATO began its operations. Fearing a repeat of the mass murders that had taken place in Bosnia several years earlier, European and American leaders sought to intervene, but knew that Russia would veto a Security Council resolution authorizing force. Rather than taking the matter to the Security Council, they opted instead to use NATO.<sup>39</sup>

NATO's intervention in Kosovo was far from perfect. Immediately after the bombing campaign began, the fighting on the ground intensified significantly. On June 9, 1999, Yugoslav President Slobodan Milosevic agreed to withdraw Serb forces from Kosovo and to permit NATO peacekeepers to enter. By then, however, more than 1.3 million Kosovars had been driven from their homes.<sup>40</sup> Despite the deep flaws of the NATO campaign, the Independent International Commission on Kosovo (the "Kosovo Commission") found that "[a]lthough the intervention produced a temporary and severe worsening of the ordeal faced by the Kosovar Albanians, over time it averted their worst fears of ethnic cleansing, and had the emancipatory effect for them of dismantling the oppressive Serb police and paramilitary structure."<sup>41</sup>

Regardless of what some consider a noble purpose,<sup>42</sup> the NATO campaign

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38. DALLAIRE, *supra* note 34, at 516.

39. See generally INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 67-87 (2000) [hereinafter KOSOVO REPORT]; POWER, *supra* note 30, at 443-48; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 167-70 (1999).

40. See POWER, *supra* note 30, at 450.

41. KOSOVO REPORT, *supra* note 39, at 163.

42. See Tony Blair, *A Military Alliance, and More*, N.Y. TIMES, Apr. 24, 1999, at A19; Tony Blair, *A New Moral Crusade*, NEWSWEEK, June 14, 1999, at 35; William J. Clinton, *A Just and Necessary War*, N.Y. TIMES, May 23, 1999, at 17. But see Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN

is generally viewed as being in violation of the Charter.<sup>43</sup> Not only were the attacks not authorized by the Security Council, but NATO could not reasonably claim that the campaign was conducted in self-defense. Thus, as Michael Byers and Simon Chesterman recently wrote, “[u]nder traditional understandings of international law, the only way the Kosovo intervention could have been legal was if a right of unilateral humanitarian intervention had somehow achieved the status of *jus cogens* and thus overridden conflicting treaty obligations.”<sup>44</sup> The question of the legality of the Kosovo intervention was complicated, however, by the fact that the Security Council established a U.N. peacekeeping mission in the region only a day after the NATO campaign concluded, thereby giving the intervention an air of legitimacy.<sup>45</sup> In addition, the Kosovo Commission later said “the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”<sup>46</sup> As a result, there has been much debate over the legality of the Kosovo intervention, including analysis of the potential effects of this retroactive legitimization.<sup>47</sup> As Annan wrote shortly after Kosovo:

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INTERVENTION (Aleksandar Jokic ed., 2003) (arguing that the campaign in Kosovo was driven by U.S. political and economic interests).

43. See, e.g., KOSOVO REPORT, *supra* note 39, at 4; Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 25 (1999) (“[T]his moral action is contrary to current international law.”) (emphasis in original); Yoo, *Using Force*, *supra* note 18. But see Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1751 (2000) (“[E]xisting law offers ample support for assessing the legality of the NATO intervention in Serbia proper and Kosovo.”).

44. Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION, *supra* note 26, at 177, 181. See also Richard Falk, *Humanitarian Intervention after Kosovo*, in LESSONS OF KOSOVO, *supra* note 42, at 31, 40 (“In essence, the textual level of analysis, upon which legalists rely, cannot give a satisfactory basis for the NATO intervention, nor can it provide a suitable rationale for rejecting the humanitarian imperative to rescue the potential victims of genocidal policies in Kosovo.”).

45. S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999).

46. KOSOVO REPORT, *supra* note 39, at 4. Addressing a possible counter-argument, the Commission wrote: “It is, however, possible to argue that, running parallel to the Charter’s limitations on the use of force, is Charter support for the international promotion and protection of human rights . . . . The main difficulty with such a line of argument is that Charter restrictions on the use of force represented a core commitment when the United Nations was established in 1945—a commitment which has reshaped general international law. In contrast, the Charter provisions relating to human rights were left deliberately vague, and were clearly not intended when written to provide a legal rationale for any kind of enforcement, much less a free-standing mandate for military intervention without UNSC approval.” *Id.* at 167-68 (citation omitted).

47. See, e.g., Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION, *supra* note 26, at 232, 232 (“[T]he legal basis for NATO’s intervention in Kosovo remains contested.”); Richard B. Bilder, *Kosovo and ‘The New Interventionism’: Promise or Peril?*, 9 J. TRANSNAT’L L. & POL’Y 153 (1999); Thomas M. Franck, *Break It, Don’t Fake It*, 78 FOREIGN AFF. 116 (1999); Michael Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2 (1999); Yoo, *Using Force*, *supra* note 18.

The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority . . . . On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?<sup>48</sup>

These questions of permissibility and legitimacy, while legally significant and complex, are not, however, the only issues involved. Like the Second Gulf War, Kosovo happened—legal or not—and the Security Council could do nothing to stop it. In addition, if it was illegal, those who executed it are hardly the worse for that illegality. As a result, like Iraq, Kosovo reinforced notions of Security Council weakness and—more importantly—the weakness of the Charter rules.<sup>49</sup>

Read together, the crises in Iraq, Rwanda and Kosovo point to two critical and recurring flaws in the Charter system. First, as they did regularly during the Cold War, states continue to use force in violation of the Charter, offering dubious claims as to their actions' legality. Second, when humanitarian crises arise, the Security Council is often unable to form the consensus, and the will, necessary to prevent or end them. As John Yoo wrote, "[w]e appear to be returning to an era of Security Council paralysis, as demonstrated by the threatened vetoes of authorizations for the Kosovo intervention by Russia and the Iraq war by France and Russia."<sup>50</sup> Some argue well beyond this conclusion, stating that the pervasive nature of the recent Charter violations indicates that the general prohibition on the use of force in Article 2(4) is no longer a rule at all. Anthony Arend, for example, has argued that through their consistent disregard of Article 2(4), "states have effectively withdrawn their consent from this provision."<sup>51</sup> In broader terms, Glennon has written that "[t]he scholastic international law rules purporting to govern intervention neither describe accurately what nations do, nor predict reliably what they will do, nor prescribe what they will do, nor prescribe intelligently what they should do."<sup>52</sup> Even

48. Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST*, Sept. 18, 1999, at 49.

49. See, e.g., Richard Perle, *Thank God for the Death of the UN*, *GUARDIAN* (U.K.), Mar. 21, 2003, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,918812,00.html> (arguing that the U.N. system has resulted in "anarchy" and "abject failure").

50. Yoo, *Using Force*, *supra* note 18, at 742.

51. ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 75 (1999). Arend goes on to write that "[i]f there are frequent and widespread violations of a particular 'rule,' it is very difficult to conclude that the rule is truly controlling of state behavior." *Id.* at 94.

52. GLENNON, *supra* note 5, at 204. Glennon also noted: "What lesson is to be drawn from this sorry record? It is impossible to avoid the conclusion that use of force among states simply is no longer subject—if it ever was subject—to the rule of law. The rules of the Charter do not today constitute binding restraints on intervention by states. Their words cannot realistically be given effect in the face of widespread and numerous contrary deeds." *Id.* at 84. See also Michael Glennon, *Why the Security Council Failed*, 82 *FOREIGN AFF.* 16, 16 (2003) ("By 2003, the main question facing countries considering whether to use force was not whether it was lawful. Instead, as in the nineteenth century, they simply questioned whether it was wise.").

Louis Henkin, a long-time supporter of the Charter system, has acknowledged that “[t]here is doubt if not cynicism as to the efficacy of law in deterring, preventing, or terminating the use of force, as to whether its prescriptions are relevant and material to the policies of nations.”<sup>53</sup>

### III.

#### A FRAMEWORK FOR EVALUATING THE USE OF FORCE

As the discussion in Part II demonstrates, the problems facing the U.N. system are grave and, some have argued, threaten the continued viability and relevance of the body. It should be no surprise, then, that proposals for dealing with these problems are far-ranging. Some advocate a bottom-up reconsideration of the Charter rules; others favor tweaks, either by revising or re-interpreting the rules. Still others assert that the rules should remain as written. Yet what methodology can be used to assess whether and how the system should be reformed? This Part addresses this question by providing an analytical framework that examines the ways in which legal rules interact with political realities in generating certain uses of force while preventing others.

Quite often, the analysis regarding a particular use of force focuses largely on the question of whether the action was legal.<sup>54</sup> Such an analysis is vital, but, as suggested in Part II, it does not tell the whole story. To assess reform, a taxonomy different from legal/illegal is more instructive. An analysis could begin instead by forming a category consisting simply of all the interstate uses of armed force that have taken place. This category of “Actual” uses of force includes those that have been conducted both in accordance with and in violation of international law. Second, we may form a category of the “Legal” uses of force; that is, those in compliance with international law.

This taxonomy of “Legal” and “Actual” is not alone sufficient to provide a complete analysis of the ways in which states use force against each other. Let us assume for the sake of argument that the majority view is correct and that both the Second Gulf War and the Kosovo campaign were illegal. Under our taxonomy, this would put both interventions into the “Actual” category but not the “Legal.” But can they accurately be categorized in the same way? Kosovo, most believe, was to some extent motivated by humanitarian concerns. By contrast, the United States largely justified its invasion of Iraq on other grounds.<sup>55</sup> In addition, how do the categories already described account for

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53. Henkin, *Use of Force*, *supra* note 32, at 37. *But see* Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33 (“What is most important here is that the contending sides continue to regard United Nations approval as a necessary component of the use of force.”).

54. *See, e.g.*, Murphy, *supra* note 20.

55. Although Saddam Hussein had committed human rights violations in the past, because

Rwanda? An individual state or group of states could have intervened early in the crisis; in other words, a non-use of force allowed a humanitarian disaster to continue. This non-use of force plainly does not fall into the “Actual” category. Also, a unilateral intervention in this situation could not have been characterized as “Legal” under most readings of international law because the Security Council did not authorize it.

To address these issues, it is helpful to consider a third category of uses and non-uses of force that includes only those which, objectively speaking, are “Ideal.” That is, this category consists only of situations that, on balance, foster international stability, promote long-term peaceful coexistence between states, and protect human rights. Needless to say, the “Ideal” category is highly theoretical. It is virtually impossible to agree to place a particular situation in this category, be it an historical event or a contemplated future action. Nonetheless, this category is a useful analytical tool because, regardless of how one conceives of the “Ideal,” it is, by definition, a category toward which the international system should strive.

We can think of the three categories as concentric circles, each partially overlapping the other two, as Figure A illustrates. This conclusion is based on three observations regarding the interaction between these categories. First, not all “Ideal” uses of force are “Legal”—and vice versa.<sup>56</sup> An example of such a situation might be the Kosovo campaign, if we take the view that it was both successful and illegal. Second, some “Actual” uses of force are not “Legal”—and vice versa.<sup>57</sup> An example would be the 2003 invasion of Iraq, if we take the majority view. Third, not all “Ideal” uses of force are “Actual”—and vice versa. For example, if a state had taken unilateral action to intervene in Rwanda in the early days of the genocide and had succeeded in saving hundreds of thousands of lives, such a use of force would probably have been “Ideal.”<sup>58</sup>

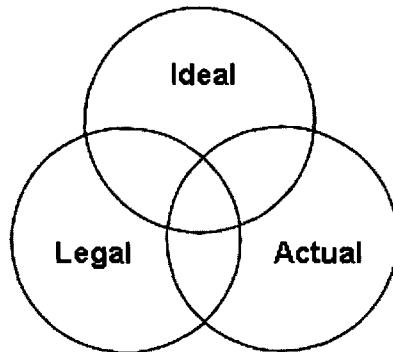
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the invasion was not justified on the basis of preventing or ending human rights violations, it does not qualify as a humanitarian intervention under the definition adopted in this article. See Part II.B, *supra*.

56. A minority of commentators, however, have argued that an illegal act cannot be moral. See, e.g., J.S. Watson, *A Realistic Jurisprudence of International Law*, 34 Y.B. WORLD AFF. 265 (1980); ALFRED RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 70-206 (1997).

57. That is, there have been occasions when a state would have been legally justified in taking military action against one of its neighbors but refrained from doing so. A recent example of such a non-use of force is Israel’s decision during the First Gulf War not to retaliate against Iraq for attacking it with SCUD missiles, an action that, under Article 51, could have been taken in self-defense following an armed attack.

58. As Richard Haass recently noted, “[i]f there had been an outside intervention to prevent the genocide, hundreds of thousands of innocent lives would have been spared. It would have been the right thing to do. It would have been legitimate because of what it was, not because it was approved by the UN.” HAASS, *supra* note 11, at 176.

*Figure A*

Viewing the use of force under this framework allows us to detect the ways in which the international system—and, by correlation, the U.N. Charter system—has ineffectively governed the use of force. Criticism often focuses exclusively on the problem of the frequent and illegal use of force by states.<sup>59</sup> Such an analysis is, of course, necessary and beneficial, particularly if it aids in identifying potential legal flaws. But to examine whether the Charter system has been ineffective based on how often it has been violated only looks at half of the picture. Indeed, such an analysis may lose sight of the fundamental goal of the system.<sup>60</sup> Would the system have been successful if states only used force in accordance with the law? This article argues that, as the world's failures to intervene in humanitarian crises such as Rwanda demonstrate, we must answer this question in the negative. The assumption that the goal of the system is to ensure compliance with the rules is not entirely accurate. One must look not only at the occasions where force was used when it should not have been, but also at the occasions where force was *not* used when it *should* have been. Put another way, the system works when it not only prevents uses of force that are

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59. Jack Goldsmith and Eric Posner have recently argued a similar point: "International law scholars spend too much time proclaiming the value of international law and bemoaning its many 'violations,' and too little time understanding how international law actually works. In our view the latter inquiry is more fruitful, and international law scholarship would do well to follow the example of international relations theory in political science and focus on positive rather than normative inquiries." Jack Goldsmith & Eric Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 663 (2000).

60. As Professor Posner has written, "[i]nternational law scholars confuse two separate ideas: (1) a moral obligation on the part of states to promote the good of all individuals in the world, regardless of their citizenship; and (2) a moral obligation to comply with international law. The two are not the same; indeed, they are in tension as long as governments focus their efforts on helping their own citizens (or their own supporters or officers)." Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1914-15 (2003).



undesirable, but when it also fosters the uses of force that are desirable, i.e., when the “Actual” and “Ideal” uses of force are aligned. We can think of the misalignment between the “Actual” and “Ideal” uses of force as the “Behavioral Gap.”

To fully understand the weaknesses of the Charter system, it is instructive to consider the causes of this Behavioral Gap. That is, why do states use (or not use) force in ways that are harmful to the international system? As a fundamental tenet of international relations theory holds, such behavior results when a state perceives such actions (or inactions) to be in its national interest.<sup>61</sup> Simply put, the interests of a particular state (or group of states) often do not align with the interests of the world as a whole, causing that state to behave in ways that are not “Ideal.”<sup>62</sup> As Stephen Krasner recently argued, “[o]utcomes in the international system are determined by rulers whose violation of, or adherence to, international principles or rules is based on calculations of material and ideational interests, not taken-for-granted practices derived from some overarching institutional structures or deeply embedded generative grammars.”<sup>63</sup> In terms of the framework provided in this article, we can think of national interests as being a force that pulls apart the “Ideal” and “Actual” categories, as Figure B illustrates below. While the observation that state interests drive state behavior in ways that may not be in the world’s best interest may seem elementary, it will be a useful consideration when we assess potential reform of the U.N. Charter. Indeed, as will be discussed in greater detail below, the problems identified in Part II—the use of force in violation of the Charter and the failure to intervene—are closely related to this observation.

#### IV. POTENTIAL REFORMS TO THE CHARTER SYSTEM

Many have suggested that the problems identified in Part II can be mitigated by reforming the Charter rules themselves. Part IV briefly discusses the most prevalent of these proposals and, using the framework provided above as an analytical tool, identifies the extent to which these proposals are likely to be effective. In other words, this Part asks whether these potential reforms are likely to reduce (or eliminate) the Behavioral Gap.

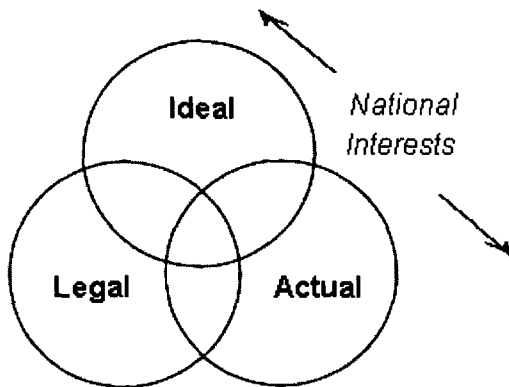
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61. See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973); HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (2d ed. 1995). The term “national interest” has many possible interpretations, and Professors Goldsmith and Posner have recently provided a useful definition: “The concept of a national interest refers to the sum of the interests of domestic individuals and institutions.” Goldsmith & Posner, *supra* note 59, at 654.

62. As Niebuhr put it, “[p]erhaps the most significant moral characteristic of a nation is its hypocrisy.” NIEBUHR, *supra* note 13, at 95.

63. STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9 (1999).

**Figure B**



*A. A Broader Meaning of Self-Defense*

As Christine Gray has argued, Article 51 of the U.N. Charter “is an exception to the prohibition of the use of force in Article 2(4) and therefore should be narrowly construed.”<sup>64</sup> Indeed, the definitive ruling interpreting Article 51 provided by the International Court of Justice in *Nicaragua v. United States* did narrowly construe the provision, requiring that self-defense be used only in response to an armed attack.<sup>65</sup> Whereas some have argued that Article 51 therefore requires a state to wait until it is attacked before it resorts to force, many have countered that it would be irrational for a state to do so.<sup>66</sup> Following the September 11, 2001 attacks, the Bush administration adopted the position that, in an age where rogue states and international organizations could potentially use weapons of mass destruction, the United States should use force preemptively against imminent threats.<sup>67</sup> Crucial to the administration’s

64. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 86-87 (2000).

65. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 51, 176 (June 27). For a critique of the Nicaragua case, see Robert Bork, *The Limits of ‘International Law’*, 18 NAT’L INT. 3 (Winter 1989-1990).

66. See generally THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 97-108 (2002); GRAY, *supra* note 64, at 111-15.

67. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (“The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s

position was the contention that the use of preemptive force was valid under customary international law. Indeed, customary international law has long recognized a right to anticipatory self-defense, famously articulated in the *Caroline* affair of 1837-1842.<sup>68</sup> The *Caroline* test has been generally interpreted as requiring that an armed attack be “imminent” in order for a state to use force legally in anticipatory self-defense.<sup>69</sup> The Bush administration argued that this test should be read as superseding the Charter rules.<sup>70</sup> Others have echoed the Bush administration’s position, calling for reform, either by means of a reinterpretation of the law or a formal codification of new rules. For example, John Yoo wrote that “a more flexible standard should govern the use of force in self-defense, one that focuses less on temporal imminence and more on the magnitude of the potential harm and the probability of an attack.”<sup>71</sup>

As mentioned in the introduction to this article, the United Nations has endorsed neither a re-interpretation nor a revision of Article 51. The High-Level Panel recognized both the *Caroline* test and the basis for the U.S. argument for a broad interpretation of it: “The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.”<sup>72</sup> But it concluded that addressing these concerns does not require a change in the rules. “[I]f there are good arguments for preventive military action,” it wrote, “with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”<sup>73</sup> Therefore, the High-Level Panel concluded,

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attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”). See also Memorandum from William H. Taft IV, Legal Adviser, Dep’t of State, on Old Rules, New Threats to Members of the Am. Soc’y of Int’l Law-Council on Foreign Relations Roundtable (Nov. 18, 2002), available at <http://www.cfr.org/publication.php?id=5250> (“[I]n the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.”). For a general assessment of the Bush administration’s arguments, see the essays collected in *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT’L L. 553 (2003) and *Agora (Continued): Future Implications of the Iraq Conflict*, 97 AM. J. INT’L L. 803 (2003).

68. See Letter from Daniel Webster, U.S. Sec’y of State, to Henry Fox, British Minister in Washington (Apr. 28, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS 1840-1841, at 1138 (1937) (discussing the circumstances of the *Caroline* affair and rejecting the British government’s claims that the act of destroying the *Caroline* was one of self-defense). A summary of the *Caroline* affair is provided in Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214-20 (2003).

69. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 212 (3d ed. 2001).

70. For an assessment of the Bush administration’s argument on this point, see Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89 (2003).

71. Yoo, *Using Force*, supra note 18, at 730. Richard Gardner, however, advocates less drastic reform, consisting of a re-interpretation of the Charter that extends self-defense only “to permit a state to rescue its citizens (and others) faced with a clear and present threat to their security.” Richard N. Gardner, *Neither Bush Nor the “Jurisprudes”*, 97 AM. J. INT’L L. 585, 590 (2003).

72. PANEL REPORT, supra note 6, at 63.

73. *Id.*

“Article 51 needs neither extension nor restriction.”<sup>74</sup> The Secretary-General has since adopted the High-Level Panel’s position: “Most lawyers recognize that the provision [Article 51] includes the right to take pre-emptive action against an imminent threat; it needs no reinterpretation or rewriting. Yet today we also face dangers that are not imminent but that could materialize with little or no warning and might culminate in nightmare scenarios if left unaddressed. The Security Council is fully empowered by the UN Charter to deal with such threats, and it must be ready to do so.”<sup>75</sup>

Regardless of whether reform should, as a matter of policy, be implemented, it is not likely to solve the underlying problem. In terms of the framework provided in this article, rather than focusing on the Behavioral Gap, proposals to revise or reinterpret the rules on self-defense are aimed at aligning the “Legal” and “Ideal” categories, the misalignment of which might be called the “Legal Gap.” The underlying logic of revising Article 51 to allow the preemptive use of force in self-defense explicitly is that, if it is desirable for states to use force in such a way, then it should be legal for them to do so. What is missing from this analysis, however, is a consideration of state practice (i.e., the “Actual” category). Clearly, the fact that (by most interpretations) the invasion of Iraq was illegal did not prevent the United States from conducting it. The reason for this situation is that, legal or not, the Bush administration perceived the invasion as being in the best interests of the United States. The same logic can be applied to the various “abuses” of the law of self-defense that have occurred since 1945; in all such cases, the illegality of the offending state’s behavior was outweighed by political or economic concerns. As Jack Goldsmith and Eric Posner recently wrote, “[e]fforts to improve international cooperation must bow to the logic of state self-interest and state power.”<sup>76</sup>

This conclusion is not to be interpreted as saying the law is meaningless. As many have suggested, international law may have a certain “normative pull” or “compliance pull”; in a sense, the very existence of the law makes states more

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74. *Id.* at 61. Instead of formal reform, the High-Level Panel suggested that, when the Security Council considers authorizing a use of force, it keep the following factors in mind: (1) the seriousness of the threat; (2) whether the use of force has a proper purpose; (3) whether force is used as a last resort (i.e., all diplomatic options have been exhausted); (4) whether the force would be used in proportional means to the threat; and (5) whether the balance of consequences justifies the use of force. *Id.* at 67. Interestingly, these criteria are hardly original but rather, as Professor Glennon has suggested, a “resurrection of the medieval just war doctrine.” Glennon, *supra* note 12, at 14. See also David J. Scheffer, *Use of Force after the Cold War: Panama, Iraq, and the New World Order*, in RIGHT V. MIGHT, *supra* note 32, at 109, 137-39 (noting that the following factors have often been thought to constitute a “just war”: (1) just cause; (2) a lawful authority must decide to resort to force; (3) the intention must be right; (4) force is used as last resort; (5) the cost-benefit ratio must be convincing; (6) a reasonable expectation of victory for just aims; and (7) legitimate and proportionate methods).

75. Annan, *In Larger Freedom*, *supra* note 1, at 69.

76. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 203 (2005).

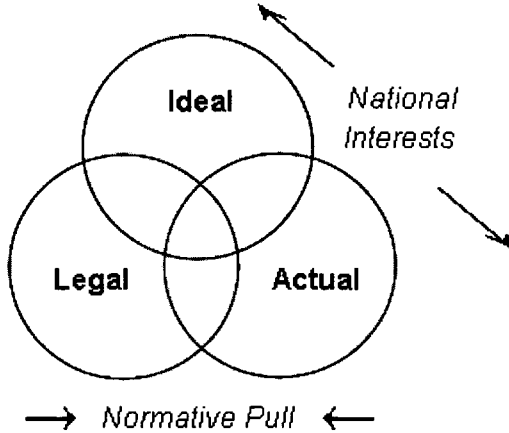
likely to comply with it.<sup>77</sup> The normative pull can be thought of as pulling the “Actual” uses of force toward the “Legal,” as illustrated in Figure C. Nonetheless, it is implausible to suggest that the problem of states using force in violation of international law and in a manner that goes against the best interests of the world as a whole can be solved by simply ‘fixing’ the law. Closing the Legal Gap would not eliminate the Behavioral Gap because state interests would continue to pull state actions away from the “Ideal” use of force. As Richard Falk has written, “[i]nternational law in the area of the use of force cannot by itself induce consistent compliance because of sovereignty-oriented political attitudes.”<sup>78</sup> Similarly, Professor Yoo has noted that “[b]ecause of the lack of any enforcement mechanism, international law can place no restraint on the United States or other countries that make decisions concerning the use of force. Constraints, if any, come only from the costs of undertaking military action and the countervailing power of other nations.”<sup>79</sup>

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77. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 49 (1990) (noting that four factors determine the extent to which a particular law affects behavior: (1) “determinacy,” or the clarity of the rule’s message; (2) “symbolic validation,” or the extent to which historical rules have influenced the rule-making process; (3) “coherence,” or the connection between the rule and rational principles; and (4) “adherence,” or the breadth and depth of the system created to interpret the rule. See also LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 44 (2d ed. 1979) (“The ways in which international norms affect governmental behavior are also less than simple. International law obviously influences behavior when it helps to deter violations. It may keep nations from doing what they may otherwise deem to be in their interests, say, from overflying foreign territory in search of intelligence or seizing valuable foreign property. Or obligations may impel nations to do what they might otherwise not do—say, come to assistance of an ally or adopt sanctions at the behest of an international organization.”). See generally GOLDSMITH & POSNER, *supra* note 76, at 134-35. For a critique of Professor Franck’s thesis, see Anne L. Herbert, *Cooperation in International Relations: A Comparison of Keohane, Haas and Franck*, 14 *BERKELEY J. INT’L L.* 222, 233-36 (1996).

78. Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 *AM. J. INT’L L.* 590, 594 (2003). See also Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1622 (1984) (“In sum, the UN political organs provide an institutional mechanism for authoritative judgments on the use of force, but only under some circumstances can they obtain the requisite authority and consequential behavior to endow their decisions with effective

**Figure C**



*B. An Exception for Humanitarian Intervention*

Many accurately view the Security Council’s failure to reach consensus as contributing to the international community’s failures to intervene during humanitarian crises. To address this problem, some commentators have called for a reform of the Charter—and/or international law more broadly—to allow an individual state or coalition to conduct such an intervention. J. L. Holzgrefe, for example, has pointed out three possible arguments for reconciling a right to humanitarian intervention with the Charter as written. First, a true humanitarian intervention does not result in territorial conquest. Second, a powerful argument can be made that such interventions are consistent with the purposes of the United Nations.<sup>80</sup> Both arguments attempt to place such actions outside the scope of the Article 2(4) prohibition on the use of armed force. Similarly, James Terry has argued that “[w]hen a force carefully defines the parameters of their intervention—as in Kosovo—and the force limits its intervention to redressing widespread human rights abuses, the intervention supports the principles of the

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power.”).

79. Yoo, *Using Force*, *supra* note 18, at 795.

80. Holzgrefe, *supra* note 26, at 37-40.

U.N. Charter addressing human dignity.”<sup>81</sup> Finally, Holzgrefe points out that a broad interpretation of Article 39, which permits the Security Council to authorize the use of force in response to “any threat to the peace, breach of the peace or act of aggression,” may be read to permit interventions aimed at ending humanitarian crises.<sup>82</sup>

Others believe a right to humanitarian intervention does not exist under current law, but that the law should be reformed to allow it.<sup>83</sup> Allan Buchanan suggests three ways to create a legal rule allowing humanitarian intervention without Security Council authorization. First, a new exception to Article 2(4)—similar to the Article 51 exception for self-defense—could be created.<sup>84</sup> Second, states could agree to a stand-alone treaty that would bypass the U.N. system altogether.<sup>85</sup> Finally, Buchanan suggests that a “gradualist, case-by-case process” could eventually result in a new rule of customary international law that will not require Security Council authorization in all cases.<sup>86</sup>

Yet, under either of these approaches, how should we determine if the newly created norm applies to a particular situation? To guide such a discussion, several sets of criteria or principles have been suggested. The Kosovo Commission suggested the following: (1) “the suffering of civilians owing to severe patterns of human rights violations or the breakdown of government;” (2) “the overriding commitment to the direct protection of the civilian population;” and (3) “the calculation that the intervention has a reasonable chance of ending the humanitarian catastrophe.”<sup>87</sup> Richard Lillich wrote that we must consider: (1) the immediacy of the violation of human rights; (2) the extent of the violation of human rights; (3) the existence of an invitation by appropriate authority; (4) the degree of coercive measures employed; and (5) the relative disinterestedness of the state or states invoking the coercive measures.<sup>88</sup> Finally, Ved Nanda advocated a slightly revised set of factors: (1) the purpose of the intervention must be limited; (2) the intervention must be conducted by the recognized government of the intervening state; (3) the duration of the intervention must be limited; (4) the intervention must involve a limited use of coercive measures; and (5) there must be a lack of any other recourse.<sup>89</sup>

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81. Terry, *supra* note 33, at 36.

82. Holzgrefe, *supra* note 26, at 40-43.

83. See, e.g., KOSOVO REPORT, *supra* note 39, at 10-12; Gardner, *supra* note 71, at 590.

84. Buchanan, *supra* note 33, at 138-40.

85. *Id.*

86. *Id.*

87. KOSOVO REPORT, *supra* note 39, at 10.

88. Richard Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plan for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, 229 (John N. Moore ed., 1974), reprinted in *NATIONAL SECURITY LAW* 152-53 (John N. Moore et al. eds., 1990).

89. Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti: Revisiting the Validity of Humanitarian Intervention under International Law, Part I*, 20 *DENV. J. INT'L L. & POL'Y* 305, 311 (1992).

Each set of criteria seems reasonable and appropriate, and it is beyond the scope of this article to determine which factors should or should not be considered. The key to observe, however, is that under any set of factors (and either of the approaches suggested by Buchanan) a certain degree of consensus would be necessary regarding when an intervention truly qualifies as humanitarian. Yet the decision is likely to be fraught with difficulties and political wrangling, as both the Rwanda and Kosovo situations demonstrate.<sup>90</sup> Thus, as Holzgrefe wrote, “much theorizing about the justice of humanitarian intervention takes place in a state of vincible ignorance . . . . To be sure, the task of testing a claim that this or that humanitarian intervention will (or would) affect human well-being in this or that way is fraught with methodological and practical difficulties.”<sup>91</sup>

Based to some extent on these challenges, there is a vocal opposition to codifying a rule allowing humanitarian intervention. Many fear that such a rule, particularly because it would be relatively vague by necessity, would be abused for political aims and might undermine a state system based on national sovereignty and territorial integrity.<sup>92</sup> One of the most notable opponents of such reform, Louis Henkin, has argued:

If ‘humanitarian intervention’ is to be permissible it should be sharply limited to actions the purpose of which is unambiguous and limited, for example, to release hostages or execute other emergency evacuations. Even those might better be left to collective (not unilateral) action, for example by special U.N. ‘humanitarian evacuation forces’ (akin to the various U.N. peace-keeping forces), created in advance for that purpose and immunized so far as possible from larger international political tensions.<sup>93</sup>

While there are convincing arguments regarding the risk and benefits of a rule allowing humanitarian intervention, a complete analysis of whether and how the law should be reformed does not end there. As an initial step,

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90. As Professor Glennon has written, “[d]efining *which* criteria count is of course the problem. The history of Western philosophy has in large part been an effort to get away from the subjectivity of that definitional process and to identify objective means for assessing what is just. Alas, a cursory glimpse at that history discloses that the Holy Grail of objectivity has never been found; justice continues to mean different things to different people.” GLENNON, *supra* note 5, at 169.

91. Holzgrefe, *supra* note 26, at 50.

92. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963); Schachter, *supra* note 78, at 1628-33. *But see* Tesón, *supra* note 26, at 113 (“[T]he empirical claim that a rule allowing humanitarian intervention will trigger unjustified interventions and will thus threaten world order is implausible. The claim can now be tested, because there have been a number of humanitarian interventions since 1990 or so.”).

93. HENKIN, *supra* note 77, at 145. Following the Kosovo campaign, Henkin maintained this position: “[U]nilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit humanitarian intervention do not reflect a conclusion that the ‘sovereignty’ of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity.” Henkin, *NATO’s Kosovo Intervention*, *supra* note 27, at 824-25.



Holzgrefe has written, we must consider questions such as, “[d]oes the international community have a moral duty to intervene to end massive human rights violations like the Rwandan genocide?”<sup>94</sup> Indeed, before any legal reform can be agreed to, a certain degree of consensus is required regarding such philosophical issues. Yet, while his question is no doubt imperative, if we answer it in the positive, we must also consider the more difficult question of how to turn moral duty into action. That is, a complete analysis must look not only at whether a particular reform would create sound law, but also at whether such a rule would influence state practice in a desirable way. In terms of the framework presented in this article, would such a rule reduce or eliminate the Behavioral Gap?

Like the potential reforms discussed in Part IV.B., the proposals to create a new rule allowing humanitarian intervention focus primarily on the Legal Gap rather than the Behavioral Gap. Such a rule, regardless of the manner in which it is implemented, would, by itself, be unlikely to cause states to undertake humanitarian interventions that they would not otherwise have undertaken. To analyze the potential effects of a rule allowing humanitarian intervention, we must first look at the underlying problem. Why do states fail to intervene during humanitarian crises? The answer lies primarily in political, social, and economic concerns, not legal ones. As discussed above, if a state perceives that, on balance, it can gain from an armed attack against a neighbor, then that state is prone to ignore the illegality of such an attack; likewise, if a state does not perceive that, on balance, it will gain from responding to a humanitarian crisis abroad, then it is not likely to do so, even if such response is legally justifiable and morally imperative. As Walzer wrote, “[s]tates don’t send their soldiers into other states, it seems, only in order to save lives.”<sup>95</sup> Humanitarian interventions, even when well-intentioned, can be expensive, complex, and controversial—as Kosovo demonstrated. Indeed, what is lacking is not a legal right to conduct such operations but the political will to do so. Thus, as Professor Yoo wrote, “few if any nations will fully internalize the costs and benefits of using force in situations that go beyond self-defense. Nations have shown great reluctance to use force to stop purely humanitarian disasters, as occurred with the hundreds of thousands killed in Rwanda, even when the commitment of troops required is relatively low.”<sup>96</sup> In Rwanda, the likelihood

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94. Holzgrefe, *supra* note 26, at 18.

95. WALZER, *supra* note 31, at 101. See also Glennon, *supra* note 12, at 11 (“The reason that Rwanda, Darfur, Kosovo and other human tragedies generate mainly yawns within the United Nations is not that states fail to respond to genuine threats to their own security. The reason that states often do not respond to such humanitarian catastrophes is that they do not believe that such events really *are* threats to their own security.”) (emphasis in original); Yoo, *Using Force*, *supra* note 18, at 793 (“Somalia and Rwanda demonstrated that the great powers were willing to risk little, if anything, to stop humanitarian abuses when doing so would not benefit international stability and other strategic goals.”).

96. Yoo, *Using Force*, *supra* note 18, at 792. Ironically, Joseph Nye wrote, “Americans are

that intervention was illegal was not the reason why the U.S. and others stood by. As Samantha Power wrote:

The real reason the United States did not do what it could and should have done to stop genocide was not a lack of knowledge or influence but a lack of will. Simply put, American leaders did not act because they did not want to. They believed that genocide was wrong, but they were not prepared to invest the military, financial, diplomatic or domestic political capital needed to stop it.<sup>97</sup>

## V. CONCLUSION

This article has thus far offered a bleak assessment of the potential efficacy of U.N. Charter reform. Yet this is not to suggest that the problems in the international system cannot be alleviated nor that the Charter should not be reformed. Rather, this article suggests that the Charter system should be viewed as a tool for promoting desired behavior instead of an end within itself. It would be well and good to revise the Charter so that it perfectly reflects the ways in which states should behave, but such reform would be hollow if not accompanied by an analysis regarding how to effectuate such behavior. Indeed, what is needed is a foundational re-thinking of the United Nations's role in promoting the proper use of armed force by member-states.

In terms of preventing uses of force by powerful states without Security Council approval, there is probably little that can be done to improve the role of the United Nations. When a state such as the United States deems it to be in its national interest to use force without the consent of the Security Council, then, as the Second Gulf War demonstrates, U.N. opposition will not deter such action. Short of the wholly unrealistic recourse of providing the Security Council with a powerful means of enforcing its decisions, deterrence for such violations of the Charter will continue to be found in the geopolitical, economic, and social costs of waging war. It may even be constructive for the Security Council to reduce its involvement in such situations. As evidenced by the aftermath of the Second Gulf War, the Secretary General's inability to prevent powerful states from using force without its approval causes the United Nations to appear weak and ineffectual, eroding international confidence in the system as a whole.

The United Nations and its members should instead seek ways to use its political capital, efforts, and resources on preventing situations such as Rwanda

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reluctant to accept casualties only in cases where their *only* foreign policy goals are unreciprocated humanitarian interests." Joseph S. Nye, *Redefining the National Interest*, 78 FOREIGN AFF. 22, 32 (1999) (emphasis in original).

97. POWER, *supra* note 30, at 508. See also Phillips, *supra* note 28, at 86 ("The problem is political will, which especially concerns the United States."); Gourevitch, *supra* note 2, at 35 ("[T]he U.N.'s withdrawal from Rwanda during the slaughter was due not to insufficient laws but to a complete lack of will among the member states to deal with it. No law can change that.").

from recurring. This would involve focusing not just on the moral grounds for conducting humanitarian interventions, but appealing directly to the interests that often dissuade member states from participating in such operations. Often, while states consider human rights to be secondary (at best) to their economic and political security, this perception is uninformed. A potential direction of U.N. activities could be a greater focus on educational activities aimed at exposing to member states and their citizens that the protection of human rights is not as remote an interest as it might appear. Thus, as Professor Yoo has argued:

Whether the international legal system ultimately will accept humanitarian intervention . . . will depend on several factors. One is whether gross human rights violations create a negative externality that itself imposes harms on others. A second factor is whether intervention to stop human rights abuses, if widely used, would prove destabilizing to the international system because of the fears of nation-states that they would no longer control their internal affairs. A third consideration would be the additional systemic benefits of ending regimes that oppress their citizens.<sup>98</sup>

Such efforts could involve attempts to exert influence on the private and personal interests that can generate domestic support for humanitarian operations in powerful states, a factor that is particularly important in democratic countries.<sup>99</sup> Gareth Evans and Mohamed Sahnoun have written that “[t]oo often more time is spent lamenting the absence of political will than on analyzing its ingredients and how to mobilize them. The key to mobilizing international support for intervention is to mobilize domestic support, or at least to neutralize domestic opposition.”<sup>100</sup> Evans and Sahnoun have suggested that generating such support should involve the following activities: (1) moral appeals; (2) financial arguments, such as that preventing disasters is cheaper than recovering from them; (3) security-based arguments, focusing on the international destabilizing effects of human rights crises; and (4) the generally accepted notion that peace is better for business.<sup>101</sup> Professor Goldsmith has also suggested several factors that, if emphasized, could nurture a “more realistic cosmopolitanism”: (1) the inherent limitations of governmental

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98. Yoo, *Using Force*, *supra* note 18, at 793-94. See also Nye, *supra* note 96, at 27-28 (“[T]he United States has to recognize a basic proposition of public-goods theory: if the largest beneficiary of a public good (such as international order) does not provide disproportionate resources toward its maintenance, the smaller beneficiaries are unlikely to do so.”).

99. See David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS* 85, 86 (Pablo De Greiff & Ciaran Cronin eds., 2002) (“In a democracy, the political support of citizens is a morally necessary condition for humanitarian intervention, not just a regrettable fact of life. If the folks back home reject the idea of altruistic wars, and think that wars should be fought only to promote a nation’s own self-interest, rather narrowly conceived, then an otherwise-moral intervention may be politically illegitimate. If the folks back home will not tolerate even a single casualty in an altruistic war, then avoiding all casualties becomes a moral necessity.”).

100. Evans & Sahnoun, *supra* note 36, at 109.

101. *Id.*

institutions; (2) rigorous cost-benefit analysis; (3) the potential role of non-governmental associations and networks; and (4) national strategic and security interests.<sup>102</sup>

For the United Nations to incorporate such suggestions into its endeavors would be anything but simple; it would require a fundamental reconsideration of the body's role in the world. There would surely be controversy regarding which methods, tools, and finances should be used to better impact state action. Yet, as recent history demonstrates, the recognition that the system's underlying flaws are primarily political, not legal, is vital if the United Nations is to play a consequential role in international collective security and live up to its founding mission.

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102. Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1693-94 (2003). Even so, Goldsmith continues, "[t]he best we can hope for is uneven humanitarian intervention that comports with the strategic and security interests that would be furthered by the potentially intervening nations." *Id.* at 1694.