

Unilateral Humanitarian Intervention and International Law*

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Resumo

Este artigo deve ser visto como uma tentativa de participação no debate actual sobre a legitimidade das intervenções humanitárias, através da análise dos desafios morais e legais postos pelas acções unilaterais. Em particular, o autor examina a sugestão de Hedley Bull de que se as intervenções unilaterais exprimirem a “vontade colectiva da sociedade internacional”, então não constituem nenhuma ameaça à ordem internacional. Para discutir devidamente esta observação, é necessário, ante de mais, considerar o significado da expressão, “vontade colectiva da sociedade internacional”. Deve reduzir-se esta vontade colectiva à autoridade das Nações Unidas? Ou existem outros locais de legitimação das intervenções humanitárias? Qualquer discussão sobre o papel da ONU no caso das intervenções humanitárias tem que incluir o tema do direito de veto dos membros permanentes do Conselho de Segurança. Está na altura de rever o direito de veto, limitando-o nos casos de emergências humanitárias? Estas são as questões discutidas pelo artigo.

Abstract

This article seeks to engage with the current debate over the legitimacy of humanitarian intervention by focusing on the legal and moral challenge posed by unilateral action in the society of states. In particular, the author examines Hedley Bull's tentative suggestion that if unilateral intervention expresses "the collective will of the society of states", it need not pose a threat to the ordering principles of international society. To build upon Bull's insight, it is necessary to consider what would constitute such an expression of "collective will" on the part of the society of states. Is UN authority a sine qua non of "collective will" or are there other sites of legitimation possible anchored in the global public sphere? Overshadowing any discussion of the role of the UN in humanitarian intervention is the place of the veto accorded the permanent members of the Security Council. Is it time to revisit the legitimacy of veto power and to establish some restraints on its use in cases of humanitarian emergency? These are the questions addressed by the article.

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Introduction

NATO's unilateral intervention in Kosovo in March 1999 to rescue the Kosovar Albanians elevated the question of unilateralism in international law to centre-stage. What made this action so controversial was that it was the first time since the founding of the UN that a group of states, acting without express Security Council authorisation, defended a breach of the sovereignty rule primarily on humanitarian grounds¹. The international reaction to NATO's use of force has been mixed: on the one hand, it has been welcomed by those who argue that the veto wielded by the permanent members in the Security Council cannot be allowed to stand in the way of the defence of human rights. Some support this position on the grounds that morality should trump legality in exceptional cases where governments commit massive violations of human rights inside their borders. For this group, the law should not be changed to accommodate the practice of humanitarian intervention because this would be open to abuse. Others argue that NATO's action was legal because it represents the crystallisation in state practice of a new customary law of humanitarian intervention. On the other side of the legal argument are states like Russia, China and India which strongly oppose the claim that NATO's use of force was lawful and assert that humanitarian intervention without express Security Council authority jeopardizes the foundations of international order.

In his keynote speech to the 54th session of the General Assembly in September 1999, Secretary General Kofi Annan expressed his concern about the danger to international order if states used force without Council authorization. But he tempered this by posing the following question to the General Assembly: 'If, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?'². The Secretary General did not give an answer to this question but he was sufficiently seized by it to invite the General Assembly to debate the merits of the doctrine of humanitarian intervention. In response to this, a number of recent initiatives have been launched by Western governments and academics³.

1 For a discussion of past cases of humanitarian intervention, see Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

2 Secretary's General Annual Report to the General Assembly, Press Release SG/SM7136 GA/9596, <http://srch1.un.org:80>, 20 September, 1999.

3 The Canadian Government is funding an International Commission on 'Intervention and State Sovereignty' that plans to report to Kofi Annan by the end of next year. The United Kingdom Government has submitted

This paper seeks to engage with the current debate over the legitimacy of humanitarian intervention by focusing on the legal and moral challenge posed by unilateral action in the society of states. In particular, I want to examine Hedley Bull's tentative suggestion that if unilateral intervention expresses 'the collective will of the society of states'⁴, it need not pose a threat to the ordering principles of international society. To build upon Bull's insight, it is necessary to consider what would constitute such an expression of 'collective will' on the part of the society of states. Is UN authority a *sine qua non* of 'collective will' or are there other sites of legitimation possible anchored in the global public sphere⁵? And if UN authorisation is a crucial condition for the legitimacy of humanitarian intervention, what is the proper relationship between the Security Council and the General Assembly? Should the latter be formally accorded an enforcement role in this area? Overshadowing any discussion of the role of the UN in humanitarian intervention is the place of the veto accorded the permanent members of the Security Council. Is it time to revisit the legitimacy of veto power and to establish some restraints on its use in cases of humanitarian emergency?

The first part of the paper briefly considers how the problem of unilateral action is treated in the disciplines of International Law and International Relations. The legality of an action in both domestic and international society is determined by whether it conforms to both substantive principles, and the correct procedural rules by which legal decisions are arrived at (due process). Having established a working definition of unilateral action, the rest of the paper identifies three alternative interpretations of the legality and morality of NATO's unilateral action: first, the intervention was illegal and a fundamental threat to

a framework document on intervention to the Secretary General that sets out six 'guidelines' to determine the legitimacy of intervention by the international community. See Robin Cook's speech on the 19 July 2000 to the American Bar Association, London.

<http://www.fco.gov.uk/news/speechtext.asp?3989>. In addition, on 12 October 2000 the Dutch Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs to produce a joint report on the issues raised by humanitarian intervention. In January 1999, the Danish Government had commissioned a report on the legal and political aspects of humanitarian intervention from the Danish Institute of International Affairs that was submitted to the Minister for Foreign Affairs. In late 2000, the Independent Commission on Kosovo produced its report on the conflict that contained imaginative and far-reaching proposals for a new framework agreement to guide future humanitarian interventions. See *Kosovo Report* (Oxford: Oxford University Press, 2000).

4 Hedley Bull, 'Conclusion' in Hedley Bull (ed.), *Intervention in World Politics* (Oxford: Oxford University Press, 1984), p. 193.

5 This theme is developed in the conclusion to *Saving Strangers* and in Nicholas J. Wheeler, 'Humanitarian Vigilantes or Legal Entrepreneurs: Enforcing Human Rights in International Society', *Critical Review of International Social and Political Philosophy*, 3/1 (Spring 2000).

the principles of international order; secondly, it fails the test of legality but should be morally approved because the law cannot be allowed to block humanitarian intervention in exceptional cases of humanitarian emergency. Finally, it represents a landmark case in the development of a new rule of customary international law permitting unilateral humanitarian intervention. Here, I focus on the legal claims raised by the UK Government in defence of 'Operation Allied Force'. What is fascinating and unprecedented about the legal justification invoked by the UK Government is that unilateral action is justified on the basis of enforcing the purposes embodied in Security Council resolutions. This attempt to link unilateral action to the enforcement of the wider moral purposes of international society challenges the traditional claim that unilateral action is driven by the selfish interests of states.

Unilateralism in International Law

The examples are legion where states act outside international agreements or multilateral institutions to advance their interests. The realist argument is that states will opt for such measures when they cannot secure their interests through international law and international institutions. The danger with unilateralism is that it encourages other states to emulate this practice thereby weakening the fragile restraints against the use of force in the society of states. One response to unilateralism is for states to develop their power capabilities so that they reduce their vulnerability to such attacks. This may provide the basis for a minimum inter-state order, but this is unlikely to endure in the absence of a wider sense of common interests and common values. One manifestation of a society's recognition of shared values and purposes is the existence of legal rules. These seek to constrain the unilateral exercise of power in any society by generating legally binding obligations upon states. However, it would be wrong to think that law and power stand as opposite poles since as Rosalyn Higgins points out, 'Law, far from being authority battling against power, is the interlocking of authority with power'⁶. This understanding of the constraining power of legal rules is found in Michael Byers' stimulating book, *Custom, Power and the Power of Rules*. Law constrains brute power through the process of customary law creation that creates legally binding obligations that inhibit the operation

⁶ Rosalyn Higgins, *Problems and Process: International Law and How we Use it* (Oxford: Oxford University Press, 1994), p. 4.

of power. As Byers writes, 'the outcomes which result from the customary process reflect the ability of legal obligation, in certain situations, to qualify or condition the application of non-legal power by States'⁷.

Byers contention that 'legal obligation' will constrain the recourse to unilateralism by states is open to the objection that it failed to inhibit NATO from using force against the Federal Republic of Yugoslavia (FRY). This action was not justified on grounds of self-defence, nor was it authorized by the Security Council. Instead, it was a direct violation of the Charter's legal procedures for the use of force, and would be adduced by realism as evidence for the view that law only constrains that which state power wants constraining. The problem with this realist position is that NATO did not claim to be dispensing with law. As I show later in the paper, Alliance governments defended 'Operation Allied Force' as permitted under international law.

NATO accepted that it did not have express Security Council authorisation for its intervention, and hence the legality of its action rests on the merits of the substantive claims that it invoked in defence of its action. Procedurally, the Alliance took the fateful decision to disregard the authoritative rules of Security Council decision-making, and in this respect, the Alliance fulfilled the classic criterion of what counts as a unilateral act in international law. W. Michael Reisman defines this as follows: 'a "unilateral action" is an act by a formally unauthorized participant which effectively preempts the official decision a legally designated official or agency was supposed to take. Yet the unilateral action is accompanied by a claim that it is, nonetheless, lawful'⁸. The point, then, is that the defining characteristic of a unilateral act is that the legal procedure by which it should have been taken has been disregarded, but the actor claims that the act is a lawful one on substantive grounds. Consequently, it is clear that when we are talking about unilateral acts in international law, it does not refer to a singular state or entity. Multilateral groupings of states can act unilaterally on this understanding of the term. When I use the language of unilateral humanitarian intervention in the paper, I am referring to cases where there was a breach of the procedural rules for legalizing the use of force.

Lawyers are extremely uncomfortable with vigilantism because the legal process depends, for its legitimacy, upon orderly procedures for determining the validity of competing legal claims. The worry is that to permit unauthorized actions is to place in

7 Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999), p. 15.

8 W. Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', *European Journal of International Law*, 11/ 1 (March 2000), p. 7.

doubt the authority of the law and to encourage others to act outside the formal legal procedures when this suits their interests. A rigid attachment to legalism is defended in terms of the argument that to weaken the authoritative rules for legal decision-making is to undermine the framework of normative constraints, which provide the bulwark against the exercise of raw power in domestic or international society.

Set against this, supporters of unilateral action argue that such measures are necessary if authoritative decision-making institutions are failing to take the appropriate legal decisions. In Reisman's words, 'the prescribed procedure by which [a legal decision] should have been taken has essentially been ignored'⁹. This may be accompanied by expressions of regret and disappointment that such actions have proved necessary, but the only relevant legal criteria invoked to justify the decision is substantive and not procedural.

Unilateral humanitarian intervention involves disregarding the authority of the UN Security Council to sanction the use of force in international relations. The Council is the only body that is authorized to use force on behalf of the collective purposes of the UN. Article 2 (7) is explicit that this function of maintaining 'international peace and security' overrides the prohibition on UN intervention in matters 'essentially within the domestic jurisdiction' of Member States. The purpose of the Charter is to restrict the right of states to use force to the sole purpose of self-defence, and to monopolize the collective use of force in the hands of the Security Council. At the same time, there is no provision in the Charter for the individual or collective use of force to enforce human rights. As Higgins writes, 'the Charter *could* have allowed for sanctions for gross human-rights violations, but deliberately did not do so'¹⁰. The Security Council has increasingly through the 1990s defined gross human rights violations and humanitarian crises such as occurred in Iraq, Somalia, Rwanda, Bosnia and Kosovo as constituting threats to international security, and hence as permitting Security Council actions under the rule in Article 2 (7).

The problem of unilateral action arose over Kosovo because the permanent members of the Council were divided over whether the threat or use of force should be employed to end the Milosevic regime's atrocities against the Kosovars. By bestowing upon the permanent members of the Council the power of veto, the framers of the Charter were determined to ensure that the Council would only act when there was unanimity among the major powers. The Security Council had adopted three resolutions under Chapter VII during 1998 that condemned the FRY's violations of human rights in Kosovo. There was

9 Reisman, 'Unilateral Action', p. 5.

10 Higgins, *Problems and Process*, p. 255.

no disagreement in the Council that the Milosevic regime was in violation of basic humanitarian standards, but there was division over the means that should be employed to address this challenge to international norms.

The Danger of Unilateral Humanitarian Intervention

Russia, China and India were the strongest opponents of NATO's unilateral action. These states have challenged the legitimacy of NATO's action on both legal and moral grounds. They argue that it fundamentally erodes the prohibitions against the use of force in the UN Charter, and sets a dangerous precedent that others might follow. At the request of Russia, the Security Council met on 24 March 1999 to debate NATO's action and Ambassador Lavrov opened proceedings by accusing NATO of violating the UN Charter. He argued that there was no basis in the accepted rules of international law to justify such a unilateral use of force. Russia did not defend the FRY's violations of international humanitarian law, but asserted it is only 'possible to combat violations of the law...with clean hands and only on the solid basis of the law'¹¹. Russia was supported by Belarus, Namibia and China. They pressed the point that it was only the Security Council that had the authority to sanction military enforcement action in defence of its resolutions. India, which had asked to participate in the Security Council's deliberations, supported this position arguing that, 'No country, group of countries or regional arrangement, no matter how powerful, can arrogate to itself the right to take arbitrary and unilateral military action against others'¹².

China, Russia and India's opposition to the doctrine of humanitarian intervention is that it represents the West's assertion of a new 'standard of civilization' that will be used to justify intervention against weaker states. These states are not impressed by NATO's claim that the intervention was motivated by humanitarian reasons which they see as a pretext for the pursuit of Western security interests. The problem with this criticism is two-fold. First, the existence of mixed motives should not disqualify an intervention as humanitarian. Rather, what is required is that humanitarian reasons should play a significant role in the decision to intervene¹³. Secondly, it is unlikely that states will be

11 S/PV.3988, 24 March 1999, p. 3.

12 S/PV.3988, 24 March 1999, p. 15.

13 I want to argue that an intervention which lacks any humanitarian motive can qualify as meeting a threshold or minimum requirement of legitimacy provided that the non-humanitarian reasons for action do not

prepared to spend treasure and spill the blood of their military personnel unless there are important security interests at stake. This should be an important consideration in any future framework governing humanitarian intervention.

The disturbing lesson drawn by many non-Western states, including Russia and India, is that the way to avoid becoming a target of future Western intervention is to rely on military strength rather than the authority of the UN Charter. This supports the moral argument that permitting unilateral acts in a legal system undermines the authority of the law.

The Moral Necessity of Unilateral Action

The proposition that NATO's bypassing of the Security Council represents a fundamental blow against the UN system of peace and security is open to the rebuttal that Security Council inaction in cases where atrocities shock the conscience of humankind *equally* undermines, the moral authority of the UN. For supporters of this position, NATO's action was not legal because it breached the Charter's substantive and procedural rules for the use of force, but it was morally the right action to take. Thomas Franck and Nigel Rodley argued in 1974, unilateral humanitarian intervention 'belongs in the realm not of law but of moral choice, which nations, like individuals must sometimes make'¹⁴. There is no case for legalizing humanitarian intervention as an exception to the general prohibition on the use of force (the only current exception is the rule of self-defence) because this would be open to abuse.

In such circumstances, there is an argument for developing a code of mitigation. The latter should be clearly distinguished from an acceptance in principle of the legality of an act. In domestic legal systems, mitigation refers to a situation where an action is judged as illegal, but the justifications invoked in defence of the action are sufficiently persuasive to lead the judge to impose a lesser sentence or even a finding of not guilty. Applying this to the international realm, States might admit that their action is unlawful but justify this on the grounds that it is the only means to prevent or end genocide, mass murder and ethnic

undermine a positive humanitarian outcome. Ideally, humanitarian reasons will play an important part in the decision to intervene, and interventions that are characterised by good intentions deserve greater approval than cases where the humanitarian motive is absent. See Wheeler, *Saving Strangers*, pp. 33-51.

¹⁴ Thomas Franck and Nigel Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Force*, *American Journal of International Law*, Vol. 67 (1973), p. 304.

cleansing. The test of collective legitimation would be how far such actions were approved or acquiesced in by wider international society. A recent report by the Danish Institute of International Affairs on *Humanitarian Intervention: Legal and Political Aspects* commissioned by the Danish Government recommended adopting this policy concluding that, 'in extreme cases, humanitarian intervention may be necessary and justified on moral and political grounds even if an authorisation from the UN Security Council cannot be obtained'¹⁵.

Unilateral Humanitarian intervention is morally preferable to inaction in cases of extreme human rights abuses. But the Danish Institute's recommendation is unsatisfactory for two reasons. First, admitting that an action is illegal risks calling into disrepute the whole structure of international legal obligations. Why should a state obey a legally binding Chapter VII Security Council resolution when it sees others disregarding the authority of the Council? As Wil Verwey notes, it is an inherently flawed international legal order that expects law-abiding states to break the law in order to uphold minimum standards of humanity¹⁶. The second problem is that since the Danish Institute's recommendation contains within it the potential to develop into a modification of existing Charter norms for the use of force, why not go the whole way and argue for a right of humanitarian intervention outside of express Security Council authorization to be incorporated into international law? Instead of states arguing that humanitarian intervention is morally but not legally permitted, the better strategy for law-abiding states is to put forward initiatives that develop a new legal framework to govern acts of unilateral humanitarian intervention.

Unilateral Action as Collective Enforcement Action

At no point during the Security Council debates over Kosovo in March 1999 did NATO governments advance the argument that the bombing of the FRY was illegal but morally justified. Whilst accepting that the action lacked an explicit Security Council mandate, the states prosecuting the war emphasized that the action had the backing of international law. The argument here takes the debate over the place of unilateral action in international

15 See *Humanitarian Intervention: Legal and Political Aspects* (Danish Institute of International Affairs, 1999), p. 128.

16 See Wil Verwey, 'Humanitarian intervention in the 1990s and beyond: an international law perspective' in Jan N. Pieterse (ed.), *World Orders in the Making: Humanitarian Intervention and Beyond* (London: Macmillan, 1998), p. 200.

society in novel and challenging directions. Hitherto, unilateral action has been viewed as a challenge to multilateral institutions and law. But the legal defence mounted by the UK Government over Kosovo developed the proposition that unilateral action might be taken by states acting on behalf of the society of states¹⁷.

NATO governments argued that Operation Allied Force was both legal and morally justified because it was aimed at ‘averting a humanitarian catastrophe’, and hence was in conformity with Security Council Resolutions 1199 and 1203 that had demanded Serbian forces stop their violations of human rights in Kosovo. The following reveal the legal and moral arguments justifying NATO’s position. The Canadian Ambassador for example, claimed that ‘[h]umanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned’¹⁸. The Netherlands Ambassador acknowledged that his government would always prefer to base action on a specific Security Council resolution when taking up arms to defend human rights. But if ‘due to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur’. Rather, ‘we will act on the legal basis we have available, and what we have available in this case is more than adequate’¹⁹. Unfortunately, the Dutch Ambassador did not specify what this legal basis was.

It is to the United Kingdom Government that we have to look to find an explicit legal defence of NATO’s action. The Blair Government had taken the lead in late 1998 in arguing within the alliance that there was indeed a legal basis for NATO to use force against the FRY even without explicit Security Council authorization. This reasoning was set out in a Foreign and Commonwealth Office paper circulated to NATO capitals in October 1998. The key sections are as follows:

A UNSCR [Security Council Resolution] would give a clear legal base for NATO action, as well as being politically desirable... But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied:

17 For a discussion from the perspective of International Law addressing this shift in the character of unilateral action, but ultimately rejecting its legality, see Vera Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, *European Journal of International Law*, 11/2 (June 2000), pp. 361-385.

18 S/PV.3988, 24 March 1999, p. 6.

19 S/PV.3988, 24 March 1999, p. 8.

- a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.
- b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved.
- c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim ²⁰.

This paper echoes the views expressed by Anthony Aust, Legal Counsellor to the Foreign Office, when he defended the legality of the 'safe havens' in northern Iraq before the House of Commons Foreign Affairs Select Committee in late 1992²¹. British ministers were quick to invoke this case in late 1998 as a precedent supporting the legality of NATO's threat to use force against the FRY. The government's evolving legal position was publicly set out by Baroness Symons, Minister of State at the Foreign Office, in a written answer to Lord Kennet on 16 November 1998:

There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe ²².

This argument was pressed into service by Secretary of State for Defence, George Robertson, when defending 'Operation Allied Force' before the House of Commons on 25 March 1999. He stated:

We are in no doubt that NATO is acting within international law. Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly exist in Kosovo. The use of force...can be justified as an exceptional measure in support of purposes laid down by the UN Security Council, but without the Council's express authorization when that is the only means to avert an immediate and overwhelming humanitarian catastrophe ²³.

20 Quoted in Adam Roberts, 'NATO's "Humanitarian War" over Kosovo', *Survival*, vol.41, 3 (1999), p. 106.

21 See FCO text quoted in *The British Yearbook of International Law* 1992 (Oxford: Clarendon Press, 1993), pp. 827-828.

22 Baroness Symons of Vernham Dean, written answer to Lord Kennet, *Hansard*, 16 November, 1998, co WA 140.

23 Quoted in Memorandum on 'International Legal Issues Arising in the Kosovo Crisis', submitted by Professor Vaughn Lowe to the House of Commons Foreign Affairs Committee. Cited in Fourth Report, 'Kosovo', 23 May 2000, p. 148.

British Foreign Secretary, Robin Cook, appearing before the House of Commons Foreign Affairs Committee in April 1999 was pressed by Diane Abbot MP on the legal grounds for NATO's action in Kosovo. He replied: '[t]he legal basis for our action is that the international community [sic] states do have the right to use force in the case of overwhelming humanitarian necessity'²⁴. To sustain this line of legal argument, it would have to be shown that there is existing customary law supporting such a right²⁵. However, there are two main reasons for rejecting the United Kingdom Government's claim that the case of the 'safe havens' in northern Iraq establishes such a precedent. First, the justification employed by Baroness Symons in November 1998 was not in fact the one invoked by Western governments to defend the intervention in northern Iraq. Rather, the argument in April 1991 was that Resolution 688, which had not been adopted under Chapter VII, provided sufficient legal authority by *itself* to justify the creation of the safe havens and 'no-fly' zone²⁶. In the case of Kosovo, the existing Security Council resolutions adopted under Chapter VII were not claimed to constitute express Council authorisation; rather, they were adduced as evidence that the society of states recognised an 'overwhelming humanitarian necessity' to act.

The second reason for challenging the view that northern Iraq in 1991 established a precedent is that there has been no *opinio juris* supporting it. I agree with Rosalyn Higgins that new custom requires states to engage in a contrary practice and to withdraw their *opinio juris* as to the normative validity of the old rule. The international silence that greeted the allies' action in northern Iraq should not be interpreted as evidence that the society of states viewed these actions as permitted by international law. Acquiescence does not count as an acceptance in principle of a new rule of customary international law.

Whatever Alliance governments might say to the contrary, their justifications for the use of force in Kosovo lead to the conclusion that NATO was not so much taking existing law into its own hands, as establishing a normative precedent that might itself become the basis of new law²⁷. The novel legal case advanced by British state leaders might be seen as reflecting Bull's contention that unilateral action is legitimate if it can be shown to express

24 Robin Cook's statement is quoted in N.D. White, 'The Legality of Bombing in the Name of Humanity', paper presented at the 1999 BISA conference held at the University of Manchester, 20-22 December 1999, p. 7.

25 This is the argument endorsed by Christopher Greenwood. In his memorandum submitted to the House of Commons Foreign Affairs Committee on 22 November 1999, Greenwood stated that 'In the case of [a right of humanitarian intervention, the logic of the principles on which international law is based and the preponderance of modern practice strongly favours the view that such a right is part of international law'.

26 This claim is developed in Wheeler, *Saving Strangers*, pp. 139-172.

27 This contention is developed further in Wheeler, 'Norm Entrepreneur or Humanitarian Vigilante'.

the collective will of international society. The belief that NATO was articulating a new legal claim over Kosovo is the position taken by the international lawyer Vaughan Lowe who argues that 'there was no clear legal justification for the NATO action in Kosovo, but it is desirable that such a justification be allowed to emerge in customary international law'²⁸. He rejects the position that Kosovo should be treated as *sui generis* on the grounds that this will leave the door open for others to make the same case in the future. His preferred approach is to argue that Kosovo creates a precedent for future unilateral interventions but that what matters 'is to define with some precision the criteria that were considered to justify the NATO action. Better to define a narrow principle and have it invoked by others than to act on the basis of no principle and encourage unprincipled action'²⁹.

The legal justification advanced by the UK Government can be seen as a subtle attempt to regulate the circumstances in which states could invoke NATO's action as a precedent. Lowe reminds us that there are two key issues at stake in thinking about a legal right of humanitarian intervention: first, the issue of the substantive criteria that should trigger a right; second, the procedural question of how to determine that the criteria have been met. He argues that the traditional debate has tended to focus on the former, but that NATO's justification shrewdly locked the two issues together³⁰. As he points out, the UK Government's response to the substantive and procedural question was to argue that there has to be a prior determination of the magnitude of the humanitarian crisis by the Security Council acting under Chapter VII. The 'right to act', he writes, is not a unilateral right, under which each and every state may decide for itself that intervention is warranted...The prior decision of the Security Council is asserted as a key element of the justification³¹. In this way it is argued that such a right of humanitarian intervention preserves the primary role of the Security Council as the guardian of international peace and security.

Restricting the right of humanitarian intervention to a prior decision by the Security Council reduces the risk that such a right would become a licence for unilateral interventions that would threaten the fabric of international order. But it also begs the question of what would happen in a future case if there were no supporting Security Council resolutions. Having watched NATO defend the use of force on the basis of three resolutions adopted

28 Lowe, 'Memorandum', p. 149.

29 Lowe, 'Memorandum', p. 149.

30 Lowe, 'Memorandum', p. 148.

31 Lowe, 'Memorandum', p. 148.

under Chapter VII, it is likely that Russia and China will be much more cautious about adopting such resolutions in a context where there is the possibility that Western states will invoke these as justifying the use of force.

This raises the fascinating counter-factual as to whether NATO would have been constrained from intervening in Kosovo in the absence of Resolutions 1160, 1199 and 1203? Were these a crucial enabling condition of the intervention or would NATO have been able to find an alternative plausible legal argument to justify the action? In the absence of a prior determination by the Security Council, NATO could have employed Christopher Greenwood's controversial legal argument that there is a right of humanitarian intervention in customary international law. This might have enabled NATO to act, but it would have been far more difficult to achieve what Vaughan Lowe takes to be the most important legal challenge arising from the Kosovo intervention, namely, 'Controlling the scope of the NATO action as a precedent for future interventions'³².

As I argued above, establishing a new precedent in customary law requires more than acquiescence; it depends upon the vast majority of states withdrawing the old *opinio juris*. The key legal issue at stake over Kosovo is how far the veto power exercised by the permanent members of the Security Council can be overridden in cases of an impending humanitarian catastrophe. NATO acted without an explicit Security Council mandate in March 1999 because Russia and China made it clear that they would veto any draft resolution seeking authority for the use of force. The contention that the veto power should not be exercised in situations of human rights emergency was pressed by the Slovenian Permanent Representative during the Security Council debate over NATO's action on 24 March 1998. The former Professor of International Law implied that Russia and China were abusing the right of the veto invested in the permanent members by their refusal to support military action to protect the Kosovar Albanians. He contended that NATO's action was justified because 'not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security'³³. This argument represented an imaginative response to the Russian charge that NATO was acting contrary to Article 24 of the Charter, which establishes the Council's 'primary responsibility for the maintenance of international peace and security'. The Slovenian Ambassador considered that 'all the Council members have to think hard about what needs to be done to ensure the Council's authority and to make its primary responsibility

32 Lowe, 'Memorandum'. D. 153.

33 See S/PV.3988, 24 March 1999, pp. 6-7.

as real as the Charter requires'. According to this view Russia and China were in breach of Article 24 because the threat of their vetoes had prevented the Security Council from exercising its 'primary responsibility' for peace and security under the Charter.

It is noteworthy that this explicit legal and moral argument was not advanced by the five NATO governments on the Security Council, and it found no direct support in the arguments of any other states. Supporters of the legality of NATO's action point to the defeat of the Russian draft resolution (co-sponsored by Belarus and India) demanding a halt to the bombing on 26 March by twelve votes to three. However, since five of these states are members of NATO, and of the six non-permanent members who voted against the draft resolution (excluding Slovenia), only three chose to make statements supporting NATO's action, we should not read too much into this vote in terms of establishing a strong legal precedent. Moreover, the three states that spoke against the draft Russian resolution (Malaysia, Bahrain and Argentina) emphasized, with the partial exception of the latter, the moral and political arguments justifying NATO's action³⁴.

The normative claim that the exercise of veto power in the Security Council should not be allowed to block humanitarian intervention was not properly tested over Kosovo. Two reasons explain this: first, NATO could point to existing Chapter VII resolutions, and for lawyers like Lowe, this must be the crucial precondition for the exercise of any future right of humanitarian intervention. On the one hand, this suits the Western powers because they can always veto resolutions that might be invoked as future legal justifications by states acting contrary to Western interests. But it also risks paralysing Western military action because veto power has been exercised at an earlier point to deny Western states the vital enabling condition for intervention that existed over Kosovo. Thus, it is the legitimacy of the exercise of veto power itself that has to be addressed³⁵.

The second reason for doubting the value of Kosovo as a legal precedent is that the society of states was not given the possibility of judging the merits of NATO's legal claims. The Alliance could have strengthened its claim to be acting on behalf of the 'international community' by another route, namely placing the issue before the General Assembly. Nigel White has been the most prominent advocate of this position. He argues that the General Assembly has legal competence under the Charter to recommend military measures when the Security Council is unable to exercise its 'primary responsibility for maintaining

34 For a fuller discussion of this Security Council debate, see Wheeler, *Saving Strangers*, pp. 275-281, 289-293.

35 For an examination of recent contributions on this theme, see Nicholas J. Wheeler, 'Humanitarian Intervention after Kosovo: emergent norm, moral duty or the coming anarchy', *International Affairs*, January 2001.

international peace and security', and that the 1950 'Uniting for Peace' Resolution could have been invoked for this purpose. Adopted at the height of the Cold War this Resolution was a way of bypassing the Soviet veto in the Security Council³⁶.

NATO could have placed a draft resolution before the Security Council authorising it to use force against the FRY in the event that the Milosevic regime and the Kosovar Liberation Army (KLA) continued to fail to comply with Council resolutions. At this point, a Russian and Chinese veto would have publicly exposed these states as the ones opposing intervention to end the atrocities. Even if Russia and China had cast their vetoes, NATO would then have been able to put a procedural resolution forward requesting that the matter be transferred to the General Assembly under the 'Uniting for Peace' resolution (the right of the veto does not exist in relation to procedural resolutions). This possibility leads White to argue that had NATO 'won both a procedural vote in the Security Council and a substantive vote in the General Assembly [requiring a two-thirds majority of the Assembly], NATO then would have had a sound legal basis upon which to launch its air strikes'³⁷.

The UK Government claims that it did not go down the 'uniting for peace' road because the General Assembly lacks the legal competence to determine enforcement action of the kind undertaken against the FRY. Addressing the question before the House of Commons Foreign Affairs Committee on 18 November 1999 as to why the UK did not press for General Assembly authorisation, Mr. Emyr Jones Parry, Political Director of the FCO, replied that a legal justification for NATO's action 'could only have come from the Security Council'³⁸. However, this legal argument belies the fact that there was little confidence among NATO governments that the Alliance would secure a two thirds majority in the Assembly recommending military action. Western governments were not even prepared to risk putting a draft resolution before the Security Council authorising the use of force, and this is a body that they can be much more confident about controlling than the General Assembly.

Requiring a two-thirds majority in the General Assembly for humanitarian intervention in cases where the Security Council has found a threat to the peace but is unable to act because of the use of the veto establishes a high threshold of legitimacy, and it would

36 White, 'Legality', pp. 10-11. For a sceptical analysis of this legal basis for humanitarian intervention, see Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), pp. 297-304.

37 White, p. 14.

38 See the testimony of Mr. Emyr Jones Parry, Political Director of the Foreign Office, to the House of Commons Foreign Affairs Committee, Fourth Report, 'Kosovo', 18 November 2000, p. 67.

certainly minimise the risks that states would abuse this right. The idea that the General Assembly is the appropriate place for judging the collective will behind humanitarian intervention finds support in the proposals for reform advanced by the *Kosovo Report* produced by the Independent International Commission on KOSOVO³⁹. They argue ‘that the veto right is superseded by a [two third] or better majority determination...that humanitarian catastrophe is present or imminent’⁴⁰.

The problem with this prescription is that it makes state practice the acid-test of legitimacy. Making General Assembly approval a precondition for intervention poses the same question by analogy that Kofi Annan asked the General Assembly in September 1999 in relation to the issue of Council authorisation: should a group of states stand aside if they cannot secure the necessary votes in the General Assembly in cases where massive and systematic abuses of human rights are taking place?

If we think back to the classic cases of humanitarian intervention in the 1970s, then had India, Vietnam and Tanzania relied on General Assembly resolutions to legitimise their interventions, the victims of state terror in East Pakistan, Cambodia and Uganda would have been left to their fate.

Beyond unilateral action towards new procedural rules?

The challenge facing humanity’s representatives at the UN is to close the gap between legality and morality that opened up over Kosovo. On the one hand, it is important to consider what can be done to repair the damage to great power relations that was intensified by NATO’s bypassing of the Security Council. I disagree with Robert H. Jackson’s recent contention that NATO was behaving recklessly in risking stable relations between the great powers to save the Kosovars⁴¹. On occasions, military intervention to end gross violations will have to be ruled out because of considerations of order, but it is often the case that justice can be promoted without undermining order. This was the case in Kosovo. Jackson exaggerates the fragility of order because he overlooks the dominance of Western power in the global arena. It was this preponderance of power that enabled NATO to go to war against the FRY without risking war with Russia.

39 *Kosovo Report*, pp. 185-198.

40 *Kosovo Report*, p. 194.

41 Robert H. Jackson, *The Global Covenant* (Oxford: Oxford University Press, 2000), p. 291.

The danger is that NATO's unilateralism over Kosovo will lead Russia and China, and aspiring regional hegemons, to accept less restraints on their own use of force in the future. To guard against this prospect, it is important that a new consensus is forged at the UN on the principles that might govern a legal right of humanitarian intervention. Russia, China and India are currently opposed to any doctrine of humanitarian intervention outside of express Council authorisation, but it remains to be seen whether they will continue as 'persistent objectors' to any new consensus that might develop in the future. How many states have to validate a new norm before it can be said to have acquired the status of a new customary law? And what if some of the objectors to a new rule are among the most powerful states in the world? Michael Byers makes the important point that where there is only one case of past practice in support of a new rule, states can easily nullify it by acting against it in future instances⁴². Given the record of state practice against a rule of unilateral humanitarian intervention, it will certainly require additional cases to the Kosovo one where state practice and *opinio juris* support a new rule before a judgment can be made as to how far there has been a lasting change in the legitimacy of humanitarian intervention in the society of states.

What is required in the aftermath of the Kosovo intervention is that the society of states begin a genuine dialogue on the substantive rules that justify states using force for humanitarian purposes in cases where the Security Council is unable to act because of the power of the veto. Without NATO's intervention in Kosovo, the merits of this moral and legal argument would be confined to scholarly enquiry. However, as a consequence of NATO's action, this claim is at the forefront of public policy debate. In this respect, the importance of NATO's unilateral action is that it challenged existing norms and may well serve to catalyse normative change in the society of states.

Even if it is possible to devise a new framework agreement at the UN for humanitarian intervention, there is the question of whether it will prove possible to reach a consensus on the legal procedures for deciding when these criteria have been met. And since arguments over these procedural rules are likely to be the most fiercely contested in any future dialogue over the legitimacy of humanitarian intervention, disagreement here could easily undermine the whole process of achieving a new framework agreement.

Yet if it proves possible to reach agreement on the substantive and procedural rules for triggering intervention outside of Council authorization, there is the question of what happens if these new procedural rules cannot be satisfied in the future. If the UN Charter

⁴² Byers, *Custom*, p. 159.

is amended to make the General Assembly the site of collective authorisation, the problem of unilateral action will not disappear. Instead, it will remerge if there are cases where the new procedures are failing to protect minimum standards of humanity, and where individual states believe there is a duty to act. New procedural rules are urgently needed to bring ethics and law into harmony with each other, but one day the practices supported by these rules might conflict with the same moral imperative. Resolving this conundrum between unilateral action, moral ends and international law remains a fundamental challenge to the disciplines of both International Relations and International Law.