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# Blame it on the Romans: Pax Americana and the Rule of Law

THOMAS W. McSHANE

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“You may fly over a land forever; you may bomb it, atomize it, pulverize it and wipe it clean of life—but if you desire to defend it, protect it, and keep it for civilization, you must do this on the ground, the way the Roman legions did, by putting your young men into the mud.”

— T. R. Fehrenbach, *This Kind of War*

In the third century before Christ, Roman legions gained control of the region around Rome. Over the next two centuries they conquered the Italian peninsula, defeated the Carthaginians and Greeks for regional domination, and extended their hegemony throughout the Mediterranean. In the end they created the “Pax Romana.”

The Romans were efficient conquerors and superb administrators. More important, their legions set the conditions for centuries of peace and prosperity. Roman roads sped commerce as well as armies. Arts, literature, and education flourished from England to Mesopotamia, and from Germany to North Africa. They built magnificent cities and elevated the quality of life throughout their empire, for Romans and non-Romans alike. They had no peer competitor. And they left us records of their achievements.

Rome’s legacy of a unified, stable world at peace within secure borders proved far more enduring than its empire. The idea, if not the reality, of a Holy Roman Empire lasted well into the modern era. In the 19th century the British Empire established political and military control over a large portion of the planet and amassed both wealth and power. It is no coincidence that this period is remembered as the “Pax Britannia.”

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Since the end of World War II in 1945, America and the West generally have enjoyed peace and prosperity. Despite the Cold War, occasional regional wars, and a variety of local conflicts and revolutions, this era is often referred to as the “Pax Americana” in view of the protection and stability provided by American military and economic power. That power rebuilt Europe and caused the collapse of the Soviet Union.<sup>1</sup>

## *The Pax Americana*

Today, America stands unchallenged as a global power, projecting its economic and military strength throughout the world. American values and ideals form the basis for international discourse. There are those who do not share these values, and others who openly and violently struggle against them. Nonetheless, the Pax Americana is a reality. The question is, where do we go from here? Finding themselves inheritors of the mantle of empire, Americans evince little enthusiasm for the burdens it entails.

Despite American reticence, international efforts at peacekeeping and peacemaking led by the United States enjoyed considerable success in the last decade, along with notable failures and a great deal of frustration. The world remains a dangerous place, even more so since the terrorist attacks of 11 September 2001.<sup>2</sup> Universal peace remains a goal beyond the reach of human nature, but the pursuit reflects favorably on man's nobler ideals.

The subject of this article is the use of military power, particularly American power, to establish and enforce global peace. The focus is on legal considerations of peace enforcement,<sup>3</sup> particularly complicated questions of international law.<sup>4</sup> Critical to this analysis is how the United States and the international community apply evolving concepts of international humanitarian law. Recent experiences with operations other than war, including peace enforcement, will serve to illustrate the challenges confronting international peacekeepers.

Lawyers representing the United Nations, nongovernmental organizations, and military forces are frequently found on the front lines of modern contingency operations. No operation takes place without extensive legal review. Ironically, the legal community, both military and civilian, is often regarded as an obstacle on the road of progress by military colleagues and by the general public. As one respected scholar described it, "The debate between the proponents of nonintervention and the supporters of intervention in defense of human rights is sometimes presented as a struggle between a cadre of reactionary lawyers and au-

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thoritarian rulers on the one hand, and a community of enlightened humanitarians on the other."<sup>5</sup> The reader can determine whether there is any truth in this observation.

Unlike their television counterparts, military lawyers<sup>6</sup> have few opportunities to personally participate in intrigue, adventure, or aerial combat. Determining the state of the law with respect to peace enforcement is more important and equally fraught with danger. Negotiating peace and helping to keep the peace when hostilities end is one thing, but enforcing peace and intervening in the affairs of sovereign, independent states is something altogether different. Consequences involve not only human rights but human life as well.

The task is difficult, but not hopeless. Well-established legal standards and precedents help shape and define the proper course of action. This article will address three important issues encountered in peace enforcement operations. The first involves when the use of armed force is legal under international law. Second, what limits does sovereignty impose on those considering intervention? The third and final issue surrounds the proper application of military power, whether and when it is appropriate to use military force or the threat of force to compel peace.

### ***When Does International Law Permit Armed Force?***

The basic principle is easy. War is legal. Always has been. This is not to say, to paraphrase Michael Douglas's character Gordon Gekko in the movie *Wall Street*, that "war is good." Nor does it imply that war need always be right or "just." Most states believe that all their wars are just wars, but reality often differs. A long and detailed body of international law consisting of treaty law and customary international law prescribes the legal, if not moral, justifications for war or armed conflict.<sup>7</sup> A brief look at traditional and modern notions regarding war follows.

Historically, states resorted to war to acquire territory, to increase populations, to uphold the sovereign's or the state's honor, to gain economic or political advantage, and to defend themselves from aggression. Wars over religion were once common, though the Treaty of Westphalia in 1648 largely eliminated the practice in Western Europe.

The world's reaction to the devastation of the two world wars of the 20th century put an end to certain long-held rights of states to wage war. The United Nations Charter publicly renounces the aggressive use of force, and by implication (with apologies to Clausewitz) any use of force by states to achieve political ends: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>8</sup>

States may engage in armed conflict to defend their territory, their citizens abroad in certain circumstances, their allies

by treaty, when directed to do so by the United Nations Security Council, and in other limited circumstances amounting to individual or collective self-defense, including anticipatory self-defense.<sup>9</sup>

The creation of the United Nations in 1945 and the proceedings of the Nuremberg Tribunal immediately following were watershed events. They per-

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manently altered the nature and terms of the debate regarding a state's right to wage war and its treatment of its citizens. Together, they announce to the world that aggressive war will no longer be tolerated by the international community, and that individuals who commit crimes against peace or crimes against humanity, however defined, may be held criminally responsible and accountable for their acts. The coming establishment of an International Criminal Court pursuant to the Rome Statute<sup>10</sup> promises further reinforcement of these principles, and signals that international criminals will be unable to hide behind state borders. These unprecedented developments cannot be overlooked. They reshape our reference points and cause us to think in new ways. They do not, however, vitiate established international law regarding the use of force.

It's extremely important to distinguish between internal and international armed conflict. The United Nations Charter, the Geneva Conventions, their Protocols, and other international agreements regulate international armed conflict between states. The United Nations Charter, for example, restricts only armed conflict involving signatory states. True, the 1977 Protocols<sup>11</sup> to the Geneva Conventions, in particular Protocol II, attempt to regulate internal armed conflicts, that is, those occurring within the borders of states. But all these agreements, including the 1977 Protocols,<sup>12</sup> prohibit outside signatory parties from intervening in internal, or civil, wars. With the limited humanitarian exceptions of common Article 3 of the Geneva Conventions<sup>13</sup> and the 1977 Protocols, international law does not forbid or constrain civil war.

The Cold War in its many forms stretched the principle of nonintervention, one can argue, to the breaking point. From Korea to Vietnam, from Angola to Ethiopia to Nicaragua, the Western powers and the Soviet bloc in effect chose sides in what might otherwise be termed civil wars, internal rebellions, or "wars of national liberation." Fortunately for civilization, none of these conflicts, with the possible exception of the Cuban missile crisis, pushed the world to the abyss of global thermonuclear war. Yet despite these precedents, the principle of nonintervention remains firmly embedded in international law and international institutions. States ignore this principle at their peril.<sup>14</sup>

What has dramatically changed since World War II and the creation of the United Nations, with its emphasis on peaceful resolution of disputes, is the willingness of any state to declare war on another. States display a marked unwillingness to characterize their hostile acts as war, and little inclination to offer a clear statement of their purpose in going to war. It's hard for us today to comprehend the diplomatic formalities of August 1914 and the exchanges of notes between King and Czar, Premier and Kaiser, preceding formal declarations of war by the great powers of Europe.<sup>15</sup>

International dialogue and terms of reference at the start of the 21st century are so different as to be unrecognizable to any statesman of 1914. Wars have become "police actions," or "interventions" undertaken in opposition to "external aggression." Even our terminology is less bellicose. War is not politi-

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cally correct, and this has led to some rather bizarre exchanges. In supporting the US bombing of Iraq in 1998 before a college audience, Secretary of State Madeleine Albright was questioned about the possibility of the United States being trapped in a prolonged conflict. She replied that critics didn't understand: "'We are talking about using military force, but we are not talking about a war,' she snapped."<sup>16</sup>

Unfortunately, while professing politically acceptable goals and objectives, states have exercised little restraint in the means and amount of force they have employed against one another or, for that matter, against their own citizens. One sobering statistic worth reflecting upon is the number of deaths attributed to nondemocratic regimes against their own

citizens, a figure estimated at approximately 170 million people over the course of the 20th century. This figure is two to four times the number of total war dead over the same period.<sup>17</sup> In light of the Holocaust, the Soviet Gulags, the slaughter in Cambodia, and similar dictatorial excesses, the recent temptation to intervene, given appropriate circumstances, is difficult to resist.

Self-defense, on the other hand, appears to be a growth industry. There is no shortage of “victims” of aggression, but, remarkably, no trace of an “aggressor.” When we recall the claims of Nazi Germany that it invaded Poland in self-defense in 1939, this occurrence doesn’t seem so unusual. As previously noted, states may legally use force in self-defense both under the UN Charter and in accord with generally accepted principles of international law. Any attempt to chronicle the application of self-defense and the variations on this theme over the past 50 years would require an anthology. Advocates of aggressive humanitarian intervention regularly invoke self-defense of neighboring states, or collective or regional self-defense, as justification for forcing peace within another state’s sovereign territory. This raises the question whether self-defense trumps the principle of nonintervention, and if so, under what circumstances?

The international community has been less than successful in preventing or resolving armed conflict. Blame it on the Cold War and UN Security Council gridlock if you wish, but the Cold War is over and the problem remains. The causes of unrest, chaos, and conflict are complicated, and they will not go away. Ethnic and religious differences have led to the proliferation of more culturally-

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homogeneous but less economically-viable states. In other cases, particularly in Somalia, ethnic war has resulted in states that exist only in name, the so-called “failed state” phenomenon. Despite well-intentioned efforts, the international community has thus far been unable to outlaw either war or internal armed conflict, and has little prospect of doing so in the future. Some even argue that intrastate conflict must be left to run its course, that it is an internal matter of no concern to others, unless the fighting crosses international borders. In fact, some advocate, civil war may prove beneficial in the long run.<sup>18</sup>

This presents powerful states and international organizations with difficult challenges, as witnessed over the past decade in locations as geographically dispersed as Bosnia, Somalia, and East Timor. In all three cases, internal armed conflict, exposed to the world by a high-tech, omnipresent global media, captured the attention of the international community. Pressure from these sources and from key players such as the United States, the United Nations, NATO, and nongovernmental organizations led to international intervention in all three locations, albeit under UN Security Council auspices.<sup>19</sup>

It’s important to emphasize that each of these cases differed in significant respects. Somalia represented a complete collapse of government and descent into chaos and tribal warfare, a true “failed state.” Bosnia-Herzegovina more resembled a classic civil-war power struggle fueled by long-suppressed ethnic hostilities, with the added element of outside agitation and participation by Serbia. East Timor represented another form of civil war, the attempted secession by an isolated province of Indonesia.

More complicated was the situation facing NATO in Kosovo in 1999. Ethnic differences between Eastern Orthodox Serbians and Muslims of the Yugoslavian province of Kosovo presented issues similar to those found in Bosnia, while the Kosovo Liberation Army’s efforts at secession resembled the situation in East Timor. Yet throughout the crisis, the established government of the Federal Republic of Yugoslavia, a recognized sovereign state of which Serbia, Montenegro, and Kosovo are integral parts, remained firmly in control. All efforts to persuade or coerce Yugoslavian President Slobodan Milosevic to reduce pressure on the Kosovars met with failure. Fears that the Serbs were replicating a pattern of ethnic cleansing, atrocities, and refugee flows observed previously in Bosnia drove the international community in general, and NATO in particular, to seek other solutions. General Wesley Clark, former NATO Commander, writes in his book *Waging Modern War*:

The Western nations, and even the United States, had come to recognize that a NATO force on the ground was essential in precluding a renewed outbreak of fighting in Kosovo, but they also knew that it would require Serb permission to place such a force there. The diplomats once again adopted a “carrot-and-

stick” approach, warning the Serbs that if they didn’t negotiate and accept the proposed agreement, and the NATO-led force along with it, then they would be hit by NATO airstrikes.<sup>20</sup>

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The next portion of this article examines current international law with respect to sovereignty and whether evolving notions of international humanitarian law permit intervention in circumstances previously regarded as an act of war.

### ***What Restrictions Does Sovereignty Impose on Intervention?***

The Peace of Augsburg of 1555 and the Treaty of Westphalia of 1648 serve as important reference points when discussing sovereignty. These peace treaties, marking major demarcation lines in the religious wars of the Reformation, enunciated the basic international state system that exists today. The basic building block of that system was the sovereignty of the ruler and by implication the sovereignty of the territorial state. This principle holds that no power can compel a sovereign state to take any action that it does not wish to take within its territorial boundaries.

Historically, each sovereign state exercised supreme power within its recognized borders, to include the right to regulate commerce, coin money, control the movement of its citizens and non-citizens found within its borders, to wage war, and to defend itself. Unless a state of war existed, no other state or states had any legal authority to send their armed forces across its international borders unless invited to do so.

The United Nations Charter is predicated upon this traditional concept of sovereignty. Article 2, Section 1, of the Charter reminds us that “The Organization is based on the principle of the sovereign equality of all its Members.”<sup>21</sup> The traditional view of international law respecting international agreements holds that states cede portions of their sovereign rights for the limited purposes of, and strictly in accordance with the terms of, a treaty, convention, or agreement. No less and no more. In the case of the United Nations itself, the organization enjoys only those rights and powers which the sovereign states in their collective wisdom have chosen to give to it. As the Permanent Court of International Justice, precursor of the International Court of Justice, stated in the *S.S. Lotus* case in 1927:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>22</sup>

Some would argue that the positivist approach to sovereignty described above is an outmoded concept, that international law has evolved beyond this point. This approach, they claim, enabled the Soviets and the Nazis to slaughter millions of their own citizens and pursue aggressive expansion by force. Surely the creation of the United Nations, the Nuremberg principles, and more than 50 years of subsequent treaty development render obsolete pre-1945 concepts.<sup>23</sup> This line of reasoning stems from a series of international conventions emphasizing the pri-

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macy of human rights. They include the United Nations Universal Declaration of Human Rights,<sup>24</sup> the Genocide Convention,<sup>25</sup> the Ottawa Convention on Land Mines,<sup>26</sup> and the Rome Statute creating the International Criminal Court.<sup>27</sup>

Taking these developments and recent instances of humanitarian intervention together, it is argued, reflects an emerging consensus regarding the nature and purpose of international law. This consensus is best described as one emphasizing individual rights over the sovereign rights of states, and requires the international community to enforce legal and humanitarian violations wherever and whenever found. Put another way, states must affirmatively act to enforce human rights whether they like it or not. These basic human rights are universal, the argument continues, and exist independently of states. States can neither grant nor deny these fundamental rights. Any state or groups of states may act to protect and enforce these rights at any time and at any place. It is therefore immaterial whether states have agreed to be bound by agreement to enforce them. Consider this Natural Law with an attitude!

Interpreting international law in this manner casts established notions of jus ad bellum<sup>28</sup> and, to a lesser extent, jus in bello,<sup>29</sup> in an entirely new light. It purports to authorize intervention in the affairs of sovereign states, including the use of force, to either correct or prevent violations of human rights. It serves to support military action taken in Kosovo or elsewhere to coerce or enforce the desired result, even against a sovereign state in apparent violation of the UN Charter and international law as we have known it. The ends justify the means.

One problem with this interventionist school of thought is that it runs counter to the majority view of the international legal community (those reactionary lawyers again). A closer look at the UN Charter and other international agreements discloses no mechanism for enforcement of human rights or of the peace except through the United Nations or the International Court of Justice (Title IX of the Genocide Convention provides a mechanism for compulsory jurisdiction in the International Court of Justice in certain instances). Dr. Yoram Dinstein, international law expert, former President of Tel Aviv University, and currently a fellow at the Max Planck Institute in Heidelberg, Germany, stated in a recent article critical of NATO intervention in Kosovo: “Nowhere does the [Genocide] Convention imply that there exists a third choice of a unilateral air campaign.”<sup>30</sup>

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What then was the legal justification, the jus ad bellum, for NATO’s military campaign launched against Serbia and Kosovo in April 1999? NATO leaders and legal advisors articulated a number of very appealing reasons for intervention, including collective self-defense and regional security under Articles 51, 52, and 53 of the UN Charter. In practical terms, NATO member states envisioned a recurrence of events witnessed years earlier in Bosnia-Herzegovina. They believed Milosevic planned to “ethnically cleanse” the province, to kill and terrorize enough Kosovars to persuade the majority to leave Kosovo and Yugoslavia. If true, this would have turned loose a million or more refugees on the poorest and least stable region in Europe. The potential effects were devastating, and they wouldn’t have spared the NATO countries. Self-defense seemed at least a plausible argument.

Some NATO members determined that intervention was justified based solely on international humanitarian concerns, citing the risks of even greater atrocities if the Serbians were not stopped.<sup>31</sup> While this argument ventured into relatively uncharted legal waters, from a humanitarian point of view it held great appeal. NATO political leaders and lawyers examined the problem from every conceivable angle. American military commanders and their judge advocates at Supreme Headquarters Allied Powers Europe, the US European Command, and US Army Europe pondered the legal basis for and effects of possible military intervention. Neither they nor their counterparts at the Joint Chiefs of Staff, the Department of Defense, or the civilian political leadership articulated a unified American position regarding the legal basis for intervention.<sup>32</sup>

The decision to bomb Kosovo and Serbia became the ultimate decision by committee. NATO’s political leadership at The North Atlantic Council made the decision to intervene. Many of the individual NATO nations articulated reasons for their support of intervention, but no overarching consensus as to why intervention should be pursued was ever reached.<sup>33</sup> The action by NATO is commonly justified on the basis of humanitarian intervention, but the legal rationale is best described as, “It seemed like a good idea at the time.”

### ***When is it Appropriate to Use or Threaten Use of Military Force?***

The third and final issue to be examined starts with the proposition that the military element of national power is a rather blunt instrument, not a precision tool. It doesn’t work in every case, and in fact can make things worse, which compels us to carefully consider other options before applying it.

Many in the American military express strongly held views on the use of American soldiers as peacekeepers or peacemakers. Their views are usually expressed as follows: the Army exists to defend the nation and its vital interests; soldiers are trained to fight wars and must be kept ready and available to defend vital American interests if and when called upon. Peacekeeping and humanitarian intervention missions do not advance American security or vital interests, the argument

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continues, and can in fact have a serious, detrimental effect on the ability of military units to fulfill their basic mission of fighting and winning the nation's wars. This argument has particular relevance to the current war on terrorism.

The counterargument is best expressed by a remark that former Secretary of State Albright is said to have made to then-Chairman of the Joint Chiefs of Staff Colin Powell: "What's the point of having this superb military of yours that you're always talking about if we can't use it?"<sup>34</sup>

One can debate the issue at length. Both arguments are compelling and have merit. To choose one course of action over another entails risk; to do both simultaneously, as the United States has attempted to do over the last decade, also has distinct disadvantages. In short, the lively debate reflects the conflict these two positions create. It's not just a choice between doing good and doing nothing. Peace, it would appear, comes with a steep price tag.

Peacekeeping detracts from combat readiness. Units engaged in peacekeeping are largely unavailable for combat deployment six months before and six months after their peacekeeping employment, which usually last six months. Hence for 18 months, the unit is considered unavailable. On the other hand, most observers would agree that American soldiers have been extremely successful at peacemaking, peacekeeping, humanitarian assistance, and other variants of military operations other than war. Reports from the Balkans, Haiti, and elsewhere indicate that commanders and soldiers alike feel they are doing something important, and that they have made a difference. Reenlistment rates in these units tend to run above average. But let's examine the issue again, this time from a lawyer's perspective.

Thespians have an old cliché: "Acting is easy; comedy is hard." Rephrasing it in legal terms: "War is easy; peace enforcement is hard." It is more than the siphoning off of trained combat units. It reflects an environment that is not well-defined and that changes constantly. It isn't war, but it isn't peace either; it's often difficult to tell who the enemy is, if anyone. Rules of engagement become complicated, and even small actions can have international repercussions. All in all, it's a risky business. It's time to reexamine how to go about creating peace where none exists, because intervention may not be the best answer.

The international community uses coercive diplomacy to signal its resolve and to place pressure upon warring factions to restore order; specific methods include embargoes of arms and war materiel, trade sanctions, financial sanctions, and diplomatic sanctions. These measures have been applied with varying success in recent decades. For example, the UN and NATO first imposed arms embargoes to minimize violence in the war-torn Bosnia-Herzegovina in the early 1990s, then found arming the Bosnians and their Croatian allies more effective in bringing the parties to the Dayton peace talks. The United States joined the international community in enforcing trade and economic sanctions against South Africa in the 1980s, and the apartheid regime eventually surrendered

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power. We currently employ diplomatic and economic sanctions against Cuba, North Korea, and Iraq, though with questionable effect.

On the positive side, sanctions generally preclude direct application of military force (occasional sanction enforcement may be required, however, as has been the case with Iraq). On the negative side, sanctions take a long time to work, and don't appear to work very well against dictators, who have no qualms about passing on the burden to their people. Technology now provides potentially better and less-intrusive methods of coercing state conduct short of military intervention, such as satellite surveillance and information operations using the internet and digital technology.

Military force was used as an alternative means of coercing or forcing peace in Korea, Bosnia, Kosovo, Somalia, Haiti, and Iraq, among others. As is true of sanctions, military force does not guarantee success. Saddam Hussein remains in power and remains dangerous despite his military defeat in the Gulf War a decade ago. International peacekeepers will be in Bosnia and Kosovo for years or decades to come. After an initial attempt, the international community ceased efforts to force peace in Somalia, which remains a failed state. Haiti appears little better off today as a result of American intervention in the 1990s.

This analysis indicates that there is a choice to make between two distinct courses of action, neither of which

guarantees success. Given the choice, the decision to apply military force adds an element of risk without a commensurate guarantee of peace and stability. It therefore seems logical to apply other elements of national power initially. Military force, if used at all, should be reserved as a last resort when other means have failed.

In his book, General Clark argues that despite NATO's initial hesitation and lack of preparation to apply military force in Kosovo, the operation must be considered a success. But he calls it a painful success, with painful lessons, and acknowledges that "many were questioning what had been accomplished."<sup>35</sup>

It's appropriate to reconsider now the point raised earlier in another context: Assuming for purposes of argument that international law permits intervention in the affairs of a sovereign state, and considering the Kosovo precedent, when is it advisable to employ military force? Experience teaches that it depends on the circumstances.

Examining recent American interventions in the Western Hemisphere, notably Grenada, Panama, and Haiti, cited justifications for use of American military force include defense of American citizens (Grenada) and protection of vital national interests. Other *jus ad bellum* justifications include the Monroe Doctrine, restoration of democratically elected governments (Panama, Haiti), and international mandates (e.g., resolutions by the Organization of American States [OAS] or the United Nations). Excepting OAS and UN mandates, since those organizations didn't then exist, the same arguments were used to justify American interventions in Haiti from 1915 to 1934 and in Nicaragua from 1927 to 1933.

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Examining overseas interventions in places as diverse as Kuwait, Somalia, and Kosovo, cited justifications include Chapter VII (Threats to the Peace, Breaches, Aggression) and Chapter VIII (Regional Arrangements) of the United Nations Charter, resolutions of the UN Security Council, and concepts such as collective security, regional stability, and humanitarian intervention. The world honors sovereignty at the discussion table, but in practice has often acted as if might makes right. This contradiction ought to stimulate at least a modicum of concern.

One issue to consider is America's reputation in the world, how others perceive us. This topic enjoys current popularity as a result of 11 September and the cultural and religious overtones of the war against terrorism. Without addressing the clash of cultures between the West and Islam, American efforts at peacekeeping in its own backyard have done little to eliminate the stereotype of the Ugly American, the "gringo" bully from the north. The jury is probably still out on recent efforts in the Balkans, but it may be prudent not to expect too much. Suffice it to say that good intentions do not guarantee good results.

The real question may not be whether intervention is legal, but rather what it is that we hope to accomplish by the use of force that we cannot accomplish by other means. In this regard, soldiers make good peacemakers and good peacekeepers, but lousy nation-builders once peace is restored. International forces struggle with this problem today in Bosnia and in Kosovo. Other skills may be better suited for the task of building a stable society and an enduring peace, although even UN and international experts face stiff challenges in restoring civil society in Bosnia and Kosovo. With regard to the current war on terrorism, many will carefully observe international efforts to rebuild Afghanistan in the post-Taliban era.

At the same time, we must anticipate that military actions may have unintended consequences. Kosovo is a case in point. NATO bombed Serbia and Kosovo to relieve the suffering Kosovars of Serbian oppression and to prevent the possible destabilization of Macedonia, Albania, and even Bosnia. The air war, however, forced Serbian ground troops in Kosovo to disperse and indirectly made it easier for them to drive Kosovars from their homes (there is some debate on the numbers and the timing of this). Inadvertently, the air war may have helped to create the very refugee flow it was designed to prevent. Most sources reporting on conditions in Kosovo after the entry of NATO and Russian forces indicate that the reports of death and destruction which triggered the intervention in the first place had been exaggerated.<sup>36</sup> Nonetheless, NATO forces now occupying that part of Yugoslavia must protect Serbs living there from the revenge of the Kosovars. An end state remains elusive.

It is beyond the scope of this article to speculate whether NATO could have resolved the Kosovo crisis differently. To

be fair, NATO succeeded in evicting the Serbian army from Kosovo under terms of the Military Technical Agreement facilitating NATO's and Russia's entry into Kosovo. Lives were saved and fighting ceased. But short of establishing a UN protectorate within Yugoslavia, or coercing them to grant Kosovo independence (even assuming Kosovo could survive as an independent entity), it's hard to envision a satisfactory endgame.

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In military terms, we need to do a better job of risk analysis before committing military forces to establish peace. This entails weighing the expected benefits to be gained against the costs involved. The cost of military intervention can be high: proponents must establish a legal basis, a *jus ad bellum* for action; they must apply force consistent with the laws of armed conflict and possible mandates of the UN Security Council; the fighting must be controlled both in time and in space; fallout and political reactions must be anticipated; and, lastly, those advocating intervention must expect the unexpected. Murphy's Law applies to all endeavors, especially military ones. Obviously, when the benefits to be gained are human lives and freedoms, some degree of risk is appropriate. Recent events indicate, however, that proponents of intervention habitually overestimate the benefits and underestimate the costs.

### *Pax Americana, International Law, and the New World Order*

In practical terms, the foregoing discussion provides several useful lessons for future intervention in pursuit of Pax Americana. The first is that multilateral intervention is the preferred course of action in most cases. America lacks the political and military strength to go it alone in every instance. US economic and military power can provide the mobility to go anywhere, but coalitions provide additional resources and political support. The second lesson would be to apply diplomatic, informational, and economic elements of national power in the first instance, reserving military force until absolutely necessary. These measures can be extremely effective in many circumstances, and will show the world that all possible courses of action have been exhausted before resorting to military force if that becomes necessary. Finally, every outbreak does not cry out for international intervention. Some problems will resolve themselves; other problems may be resolved by regional powers or regional organizations. Unless international stability is seriously threatened, mobilizing the international community and its resources might be counterproductive.

Analyzing peace enforcement in these terms is not comforting. It leaves the matter largely unresolved—which is as it should be. Wielding force is not easy, and it shouldn't be made easy. Legal and political considerations cannot be ignored. The United States and its allies have learned some harsh lessons since the heady days of 1990 and 1991, of the great coalition forged by President Bush to expel the Iraqis from Kuwait. The new world order promised by the collapse of the Soviet Union and the end of the Cold War has not yet come to pass.

On the other hand, the general prosperity of the last decade and successful multilateral efforts at humanitarian relief, peacekeeping, and peace enforcement offer hope for the future. Globalization is here to stay.<sup>37</sup> Ironically, the new global coalition to fight terrorism is the best evidence that while universal peace remains elusive, the world is more united than ever in defeating and eliminating international aggression. Perhaps it is unrealistic to expect more.

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It may be more precise to say that the problems with peace enforcement lie more with the means than with the ends. Few states considering themselves influential players on the world stage would publicly renounce peacekeeping. This particularly applies to the Chinese and to the Russians. One problem frequently encountered is determining when and how to intervene. The United States wrestled with this problem in Rwanda and later in Bosnia. No nation, even the United States, can afford to intervene militarily everywhere. Thus the Clinton Administration struggled with the humanitarian concerns in Rwanda, balancing the need to do something against military capabilities and political concerns at home and abroad. For several years prior to the Dayton Agreements, the United States and NATO appeared at odds over a course of action in Bosnia-Herzegovina.

The same arguments resurfaced with respect to Kosovo. Lacking a UN Security Council Resolution authorizing intervention<sup>38</sup> because of anticipated Chinese and Russian veto, NATO struggled to resolve the conflict without military force. Diplomatic efforts at Rambouillet came close but eventually collapsed.<sup>39</sup> When this coercive diplomacy

failed, NATO was forced to justify military intervention where no clear precedent existed.

The danger here lies in that precedent. Although one action does not necessarily establish customary international law, it makes it more difficult the next time around. If NATO acts to force peace in Kosovo, why not in Chechnya? Why not in Tibet? If the Chinese assert human rights violations against ethnic Chinese minorities in Southeast Asia, does Kosovo justify Chinese military intervention? Using military force without a clear basis in international law weakens the force and the effect of international law, and encourages states to interpret it as they wish, ignoring the United Nations, international agreements, and customary international law in the process.

Ample basis exists under international law for peace enforcement in appropriate circumstances, as this article has pointed out. Almost any armed conflict that spills over international borders will trigger an international response. A wide range of tools is available to contain violence and associated human rights violations without launching air strikes. In isolated instances nothing short of military force will work, and in many of them international law will support intervention. In other instances, stretching the rule of law to justify intervention is like trying to fit a square peg into a round hole—it may go in, but it isn't designed to.

International law resembles in many respects a slow-moving iceberg with 90 percent of its volume below water. But icebergs move and icebergs melt, and international law does change. There is growing recognition of a conditional right to intervene in internal armed conflicts to enforce peace, to aid in self-determination of peoples, to stop human rights violations, and in other circumstances not expressly authorized by international law. UN authorization is helpful but not essential. Multilateral and regional intervention by coalitions and organizations such as OAS, the Economic Community of West African States, and NATO are scenarios likely to repeat themselves. Individual rights will con-

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tinue to compete with state sovereignty as a fundamental operating principle of international law. We can't impose criminal sanctions against individuals for war crimes and crimes against humanity without at least considering why we cannot impose similar sanctions against states that deliberately and systematically violate the human rights of their citizens.<sup>40</sup>

International organizations, for legal and political reasons, often lack the necessary tools to enforce peace. Peace enforcement is greatly dependent upon American leadership; if the United States renounces the Pax Americana and reverts to an isolationist philosophy, significant momentum will be lost. This possibility appears unlikely at present. Recent history and all objective factors indicate a strong international bias toward intervention, with American wealth and arms providing the overarching structure. We're not there yet, and we may never arrive at the destination. But we're a long way down a path that looks suspiciously like a Roman road.

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## NOTES

1. See Eliot A. Cohen, "Military Power and International Order," in *Managing Global Chaos*, ed. Chester A. Crocker & Fen Osler Hampson with Pamela Aall (Washington: United States Institute of Peace Press, 1996), p. 223.
2. While some reference to the current war on terrorism is inevitable, the subject exceeds the scope of this article. Operations against terrorists rest on clearly defined legal grounds of self-defense and international piracy. Peace enforcement is, in essence, much more complicated and controversial.
3. Peace enforcement as used in this article refers to the concept outlined in Chapter VII of the United Nations Charter.
4. International law is established by international agreement and by practice. Agreements take various forms, and may be referred to as treaties, conventions, protocols, and statutes, among others. Practice of states, both internally and externally, may form a basis of international law. Customary international law is behavior by states reflecting their belief that a certain course of action is required by the international community or by practice among states. It may be based on agreement, but need not be.

5. Draft paper by Dr. Douglas T. Stuart, "Reconciling Non-Intervention and Human Rights," presented for discussion at an informal colloquium at Dickinson College, Carlisle, Pa., on 24 April 2001.
6. "Judge advocate" refers to the uniformed attorneys of the Army, Navy, Air Force, and Coast Guard. The senior lawyer of each service is The Judge Advocate General (JAG), hence the term "JAG Corps." The Marine Corps employs the term "Marine lawyer."
7. The term "Law of Armed Conflict" is used interchangeably with the term "Law of War."
8. United Nations Charter, Chapter I, Article 2, para. 3.
9. *Ibid.*, Chapter VII, Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."
10. *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998). Hereinafter *Rome Statute*. The treaty enters into force on 1 July 2002. As of this writing, 139 nations have signed, and 66 have ratified. President Clinton signed the Rome Statute on behalf of the United States on 31 December 2000. While reservations against certain procedural aspects of the Court's exercise of jurisdiction threaten to delay Senate ratification indefinitely, the United States has supported the creation of an international criminal tribunal as a necessary adjunct to the international rule of law since the Versailles negotiations following World War I. How the International Criminal Court may affect peace operations is a legitimate question but outside the scope of this article.
11. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 12 December 1977, 16 *I.L.M.* 1391.
12. *Ibid.* Article 3, paragraph 2 of Protocol II states: "Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."
13. *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949*, 75 *U.S.T.S.* 31, 32-34; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949*, *id.* at 85, 86-88; *Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949*, *id.* at 135, 136-38; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949*, *id.* at 287, 288-90.
14. See, for example, the International Court of Justice's decision in the case of *Nicaragua v. United States*, 1986 *ICJ* 1 (Judgment of the Court of June 27), which supports the principle of nonintervention in ruling against US support of the Contra rebels. The case is a Cold War relic and differs factually from the situation in Kosovo.
15. See John G. Stoessinger, *Why Nations Go to War* (Boston: Bedford/St. Martin's Press, 1998), ch. 1.
16. Quoted in Andrew J. Bacevich, "Policing Utopia: The Military Imperatives of Globalization," *National Interest*, No. 56 (Summer 1999), p. 7.
17. See John Norton Moore, "Opening Comments," 149 *Mil. L. Rev.* 7 at 10 (1995). Professor Moore, Director of the Center for National Security Law at the University of Virginia School of Law, made these opening remarks at a symposium on "Nuremberg and the Rule of Law: A Fifty Year Verdict" at the US Army Judge Advocate General's School, 17 November 1995.
18. See Edward N. Luttwak, "Give War a Chance," *Foreign Affairs*, 78 (July/August 1999), 36-44.

19. In the case of Bosnia, the *General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP)* (initialed in Dayton, Ohio on 21 November 1995 and signed in Paris, France on 14 December 1995), commonly referred to as the Dayton Agreement, provided the actual basis for a peace settlement predicated on subsequent employment of United Nations peacekeeping forces.
20. Wesley K. Clark, *Waging Modern War* (New York: Public Affairs Press, 2001), p. 162.
21. United Nations Charter, Chapter I, Article 2, Section 1.
22. *SS Lotus*, (Fr. v. Turk.), 1927, *P.C.I.J.*, (ser. A), No. 10, at 18-19 (7 September).
23. See Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, 18 September 1999, p. 49. Annan, Secretary-General of the United Nations, wrote: "State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa."
24. *Universal Declaration of Human Rights*, United Nations General Assembly, 10 December 1948.
25. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 *U.N.T.S.* 277, art. VI.
26. *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction*, Ottawa, Canada, December 1997.
27. *Rome Statute*.
28. From the Latin meaning "justice toward war." Often used in discussing reasons for going to war, and often related to discussions of just war. See Martin J. Cook, "Ethical Issues in War: An Overview," *US Army War College Selected Readings, Academic Year 2001* (Carlisle Barracks, Pa.: USAWC, 2000), p. 230.
29. From the Latin meaning "justice in war." This is usually associated with discussions regarding the laws of war, use of force, treatment of prisoners of war, noncombatants, lawful targets, etc.
30. "The Thirteenth Waldemar A. Solf Lecture in International Law," 166 *Mil. L. Rev.* 93 at 101 (2000).
31. For example, the United Kingdom supported intervention as an exceptional measure under international law to avert a humanitarian disaster. Remarks by Christopher Greenwood, QC, Professor of International Law, London School of Economics and Political Science at the United States Naval War College, Newport, Rhode Island, 8 August 2001.
32. Personal discussions by the author with colleagues and legal advisors for various American and NATO headquarters, April 1999.
33. *Ibid.* For a detailed analysis of legal arguments for intervention, see Michael E. Smith, "NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?" *The Army Lawyer*, February 2001, p. 1.
34. Andrew J. Bacevich, "Policing Utopia: The Military Imperatives of Globalization," *National Interest*, No. 56 (Summer 1999).
35. See Clark, p. 417.
36. Personal discussion with American judge advocates entering Kosovo immediately after the Military Technical Agreement between Yugoslavia and NATO entered into effect.
37. See Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Anchor House, 2000).

38. UN Security Council Resolution 1244 (10 June 1999) was passed only after the bombing campaign was successful. It focused on the occupation and rebuilding of Kosovo.

39. See Clark, p. 162.

40. See the *Rome Statute*. The International Criminal Court will, like the International Criminal Tribunal for former Yugoslavia (ICTY), have jurisdiction over individuals for crimes against humanity, genocide, and war crimes. Jurisdiction is universal, and any state may arrest suspected violators. Ironically, no similar provision permits states to take unilateral action against governments which commit the same crimes.

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