

Michigan Journal of International Law

Volume 19 | Issue 2

1998

Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq

Gavin A. Symes
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Gavin A. Symes, *Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 19 MICH. J. INT'L L. 581 (1998).

Available at: <https://repository.law.umich.edu/mjil/vol19/iss2/9>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

STUDENT NOTE

FORCE WITHOUT LAW: SEEKING A LEGAL JUSTIFICATION FOR THE SEPTEMBER 1996 U.S. MILITARY INTERVENTION IN IRAQ

Gavin A. Symes*

INTRODUCTION.....	581
I. A HISTORY OF THE IRAQI KURDS, EVENTS LEADING UP TO THE INTERVENTION, AND THE AFTERMATH OF THE U.S. ATTACKS	584
II. MILITARY INTERVENTION UNDER INTERNATIONAL LAW: HUMANITARIAN INTERVENTION AND THE IMPORTANCE OF MULTILATERALISM	592
III. HIDING BEHIND THE UNITED NATIONS: THE CHARTER, RESOLUTIONS AND NO-FLY ZONES	602
IV. NATIONAL SECURITY JUSTIFICATIONS: TRUMPING INTERNATIONAL LAW?.....	609
V. THE UNITED STATES AND INTERNATIONAL LAW: ARROGANCE, IGNORANCE, AND AMBIVALENCE.....	613
EPILOGUE: CONTINUED IRAQI DEFIANCE IN CONTEXT	619

INTRODUCTION

Our missiles sent the following message to Saddam Hussein: When you abuse your own people or threaten your neighbors you must pay a price Our objectives are limited, but clear: to make Saddam pay a price for the latest act of brutality, reducing his ability to threaten his neighbors and America's interests.¹

On September 3, 1996 the United States initiated a cruise missile attack on targets in southern Iraq in response to Iraqi military actions in northern Iraq.² In addition, the United States announced a sixty mile extension of the

* J.D., University of Michigan Law School (1998); B.A., Middlebury College (1992).

1. President Clinton quoted in, *Raid On Iraq: Words of Clinton and Saddam Hussein: Fiercely Clashing Views*, N.Y. TIMES, Sept. 4, 1996, at A8.

2. See Steven Lee Myers, *U.S. Attacks Military Targets in Iraq*, N.Y. TIMES, Sept. 3, 1996, at A1 [hereinafter Myers, *U.S. Attacks Military Targets*].

On September 4, 1996, the United States launched a second missile strike against Iraq. See Allison Mitchell, *U.S. Launches Further Strike Against Iraq After Clinton Vows He Will Extract "Price,"* N.Y. TIMES, Sept. 4, 1996, at A1.

no-fly zone in southern Iraq, which had been imposed by the Gulf War coalition in the aftermath of the war against Iraq.³ The United States was responding to the movement of Iraqi ground troops into the Kurdish safe haven and their subsequent attacks on the Kurdish population.⁴ Iraqi forces acted pursuant to a request for assistance by the Kurdistan Democratic Party (KDP) in its ongoing confrontation with another Kurdish nationalist organization, the Patriotic Union of Kurdistan (PUK).⁵ The United States did not seek UN authorization for the intervention, nor did it fully consult with or gain the support of the members of the Gulf War coalition.⁶ Many nations, including Russia, China, Jordan, and France, criticized this unilateral action by the United States.⁷

In the days following the intervention, the U.S. State Department offered various justifications and explanations for the U.S. military action, most of which invoked the legacy of the Gulf War.⁸ The State Department explained that the military intervention was necessary to protect U.S. national security, to contain an Iraqi threat to neighboring countries, to enforce general norms of international law, to protect Kurdish human rights, and to enforce UN Resolutions 688 and 678 and the no-fly zones established to protect the Kurds in the aftermath of the Gulf War.⁹ Re-

3. See Mitchell, *supra* note 2. The Gulf War ended in 1991.

4. See Myers, *U.S. Attacks Military Targets*, *supra* note 2.

5. See Christi Parsons & Storer H. Rowley, *Signs Hint At U.S. Strike Against Iraq; Hussein Pushing Deeper Into Kurds' Safe Zone*, CHIC. TRIB., Sept. 3, 1996, at 1N ("A civil war between the two main rival Kurdish factions in northern Iraq prompted Saddam Hussein to intervene on behalf of . . . the KDP . . . against . . . the PUK.').

6. See Craig R. Whitney, *From Allies, U.S. Hears Mild Applause or Silence*, N.Y. TIMES, Sept. 4, 1996, at A10 ("French officials said . . . the decision to extend the no-flight zone had been made without consulting them . . . Russia called today's American air strikes 'an inappropriate and unacceptable reaction to the latest events in northern Iraq.')."); Nicholas Burns, U.S. Dep't of State, Daily Press Briefing #140 (Sept. 3, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #140] ("The fact is this was a unilateral U.S. military action . . . There was no need for Security Council action.').

7. See Whitney, *supra* note 6 ("The rest of the world, including most of America's NATO allies in Europe, made it clear that the United States was on its own in taking military action against Iraq.')."); Mitchell, *supra* note 2 ("Despite a weekend of diplomatic activity, the Administration drew only limited support from its allies . . . France and Spain said diplomatic action would have been preferable . . . The Arab world was . . . divided and Russia and China were both sharply critical of the move.').

Reports prior to the military attack indicated that the intervention had been scheduled for an earlier date and then scuttled due to a lack of support from U.S. allies. Jordan, for example, refused to allow U.S. warplanes employ Jordanian facilities. See Parsons & Rowley, *supra* note 5.

8. For purposes of convenience in this note, unless otherwise indicated, "intervention" refers to both the U.S. military strikes and the unilateral extension of the no-fly zone.

Interestingly, the U.S. State Department made no official statement clearly outlining the basis in international law for the intervention. Instead, justification were proffered in response to questions from journalists and criticism from foreign powers.

9. The State Department intimated that the transfer of forty to fifty thousand Iraqi troops across the no-fly zone and Saddam Hussein's status as a "criminal" and "international outlaw"

ardless of the rationale offered, military intervention against a sovereign nation¹⁰ is controversial under international law because it threatens to violate the sovereign rights of nations and to expand the traditional definition of acceptable use of military force.¹¹ The litany of justifications offered by the State Department thus deserves careful scrutiny.

In focusing on a single incident between two sovereign nations, this note seeks to illustrate how international law is employed and/or ignored in practice and what this indicates about the efficacy of international law generally. Of particular interest is the actual importance of the principles of international law to countries contemplating military intervention. Compliance with international law and custom is the best indication of the true importance of international law to a nation. Therefore, the legality of the intervention should reveal something about the U.S. view of international law. Determining whether the intervention was wholly unilateral or a multilateral endeavor also is crucial to a legal analysis of the action because unilateral military intervention rarely is justified under international law. This inquiry attempts to discover if the United States obeys the strictures of international law when it acts internationally or if international law is simply an afterthought in the formulation and execution of U.S. foreign policy. U.S. actions are evaluated not just in light of international law, but also in relation to U.S. claims regarding its motives and justifications. An exploration of the relationship between U.S. claims and U.S. actions on the world stage, and the inconsistencies inherent therein, is perhaps the most telling part of the overall analysis.

This note concludes that none of the various legal arguments offered in support of the September 1996 military intervention against Iraq adequately justifies U.S. actions under international law and that in fact international law was never a real concern in planning, implementing, or even justifying the intervention. Part I relates the general history of the "Kurdish problem" and the particulars of the incident under scrutiny. This

justified the U.S. military intervention and suggested that to forestall further attacks Iraq must "stop the brutalization of the Kurdish population." Briefing #140, *supra* note 6. It was also contended that the United States acted because it was in its "compelling, vital national interests" and that the "clear basis for this action . . . is U.N. Security Council 688." *Id.* Resolution 678 also was cited. See Glyn Davies, U.S. Dep't of State, Daily Press Briefing #141 (Sept. 4, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #141]. In addition, the United States acted "to limit the expansionist and aggressive behavior of Saddam Hussein, which is a current threat to his Arab neighbors." Briefing #140, *supra* note 6.

10. Despite the limitations imposed on Iraq's sovereignty in the wake of the Gulf War, the United States has continually affirmed that the sovereign territory of Iraq includes the Kurdish safe havens and no-fly zones. See Briefing #140, *supra* note 6 ("[T]he United States has never questioned the territorial integrity of Iraq."). The intervention thus did violate Iraq's sovereignty.

11. For an overview of the importance of the principle of non-intervention in the internal affairs of sovereign states, see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (Judgment).

Part then goes on to describe the aftermath of the intervention and its failure to achieve any of the stated goals of the United States. Part II addresses the general validity under international law of military intervention in internal affairs of sovereign states, with particular attention to humanitarian intervention, and concludes that the intervention was contrary to international law. Part III explores the UN position on military intervention, conduct authorized under UN resolutions regarding Iraq and the Kurds, and the legal parameters of the no-fly zones in Iraq, concluding that the intervention was not a valid enforcement of UN policies or resolutions. Part IV critiques the apparent U.S. belief that it can override generally accepted norms of international law by defining its concerns as national security issues. Finally, Part V looks to the practical impact of international law in this matter and what the intervention and its aftermath, including widespread condemnation of the U.S. action, reveal about the geopolitical realities of international law.

I. A HISTORY OF THE IRAQI KURDS, EVENTS LEADING UP TO THE INTERVENTION, AND THE AFTERMATH OF THE U.S. ATTACKS¹²

"The Kurds have the twofold distinction of having been, for the past sixty-five years, one of the most heavily repressed minorities and one of the most numerous . . ." ¹³ Since the creation of Iraq, the Kurds have sought independence and autonomy, and Iraqi military forces have brutally crushed every such effort. ¹⁴ The regime of Saddam Hussein has responded to Kurdish resistance to Iraqi rule in a manner all too familiar: in 1988 alone as many as 182,000 Kurds were killed and 4,000 Kurdish villages destroyed by Iraqi forces. ¹⁵ Saddam Hussein's campaign of terror against the Kurds has continued for over fifteen years and has involved the use of chemical weapons and the forced displacement of Kurdish

12. The Kurds are "[a] non-Arab people with distinctive linguistic and cultural characteristics and an undimmed national consciousness . . . [who] have lived in a territory straddling present-day Iraq, Turkey and Iran for over 4,000 years." Navneet Sharma, *Gulf Crisis: Gunboat Diplomacy*, INDIA TODAY, Sept. 30, 1996, available in LEXIS, Asia Library, Indtod File.

13. GERARD CHALIAND, *THE KURDISH TRAGEDY* 3 (1994).

14. See *id.* at 57 ("The history of Iraqi Kurdistan has repeated itself ceaselessly throughout these years: succeeding governments in Baghdad have made concessions to Kurdish nationalists at times of weakness of the central state. Then, as soon as circumstances permit, and because they have been unable to accept a Kurdish autonomy, . . . they take up the offensive once more."). See generally HUMAN RIGHTS WATCH/MIDDLE EAST, *IRAQ'S CRIME OF GENOCIDE* (1995) (detailing Iraqi repression of the Kurds).

15. See STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 1ST SESS., STAFF REPORT ON KURDISTAN IN THE TIME OF SADDAM HUSSEIN 56 (Comm. Print 1991) (primarily authored by Peter W. Galbraith) [hereinafter STAFF REPORT ON KURDISTAN]; CHALIAND, *supra* note 13, at 11; HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note 14, at xv.

villagers.¹⁶ This campaign to eradicate the Kurdish presence in Iraq has been systematic and brutal.¹⁷

At the end of the Gulf War, Kurdish insurrections occurred throughout Iraqi Kurdistan.¹⁸ The Iraqi army brutally suppressed these uprisings.¹⁹ While the Gulf War coalition enforced a ban on fixed wing aircraft in northern Iraq, it allowed Iraq to employ helicopters in its efforts to crush Kurdish resistance.²⁰ As a result of Iraq's military aggression, approximately two million Kurds fled their homes, streaming into Iran and the area near the Turkish border.²¹ President Bush ordered U.S. military forces to enter northern Iraq to address the growing humanitarian crisis.²² The massive humanitarian and refugee disaster caused by the clashes between Iraqi forces and the Kurds prompted the United States and coalition allies to establish safe havens or security zones for the Kurds in northern Iraq.²³ These safe havens were protected by no-fly zones which prohibited Iraqi aircraft from operating in Kurdish areas. The coalition forces claimed authority for the no-fly zones through UN Resolution 688, which condemned Iraq's repression of the Kurds.²⁴

The history of the Kurdish struggle has also been one of bitter dissension between competing Kurdish nationalist groups.²⁵ These struggles have arisen out of both ideological and personal friction.²⁶ As early as 1966, Kurdish factions squared off against each other militarily, with the followers of one group assisting Baghdad in battling another Kurdish group.²⁷ More recently, following a brief period of harmony at the end of the Gulf War, Kurdish factions began skirmishing with one another in northern Iraq in 1992.²⁸ Baghdad's military efforts on behalf of the KDP

16. See CHALIAND, *supra* note 13, at 11. See generally STAFF REPORT ON KURDISTAN, *supra* note 15.

17. See HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note 14, at 4-6 ("With the granting of emergency powers to al-Majid [a cousin of Saddam Hussein placed in control of northern Iraq] in March 1987, the intermittent counterinsurgency against the Kurds became a campaign of destruction.").

18. See CHALIAND, *supra* note 13, at 1-2.

19. See *id.*

20. See *id.* at 2. Eventually the coalition forces banned all Iraqi aircraft from northern Iraq.

21. See *id.*

22. See *id.*

23. See *id.*

24. See *Corrections*, N.Y. TIMES, Sept. 7, 1996, at A2. ("The United Nations did not create the zone and disputes the assertion that the Security Council resolution authorizes one.").

25. See CHALIAND, *supra* note 13, at 60.

26. See *id.* at 56-61.

27. See *id.* at 60.

28. See John Lancaster, *Kurd Chief Warns He May Call Again on Iraq for Help*, SEATTLE TIMES, Oct. 10, 1996, available in LEXIS, News Library, Seattm File ("In the aftermath of the Persian Gulf War, the Kurds . . . seemed to make some progress toward their long-cherished

against the PUK in August 1996 thus fit into a historical pattern. Iraqi military involvement in Kurdish civil strife is a proven means for the central government to divide and repress the Kurdish people. Thus, while the Kurds unified briefly after the Gulf War, they quickly reverted to a tragically customary pattern of division and conflict.²⁹

Since the Gulf War, U.S. involvement with the Kurds has continued, albeit in a more subdued manner, and yet the plight of the Kurds has changed little. The United States assisted in peace talks between Kurdish factions and, with its coalition allies, continued to patrol and enforce the no-fly zones in Iraq.³⁰ Along with other coalition countries, the United States engaged in military strikes against Iraq in 1993 in response, in part, to Iraqi threats to the Kurdish population.³¹ The United States has remained abreast of the situation and portrayed itself as a defender of the Kurds.³²

In the aftermath of the Gulf War the Kurds faced an uncertain future. The wide-ranging Kurdish uprising which followed the war resulted in the establishment of a security zone in northern Iraq by allied forces, but the status of the Kurds remained ambiguous.³³ They were neither sovereign nor citizens. Protected by foreign military might, the Kurdish population's demands for autonomy and independence have been consistently ignored by Baghdad and sabotaged by internal conflict.³⁴

Tensions erupted in August 1996. Iraqi troops were reported to be moving into Kurdish areas in northern Iraq, and the KDP and PUK faced

goal of autonomy in northern Iraq. Then, in 1992 fighting started between the two main Kurdish factions . . .").

29. See *id.*; R.W. Apple, Jr., *How To Slap Iraq?*, N.Y. TIMES, Sept. 2, 1996, at A6.

30. See Apple, *supra* note 29. (The United States has "sought to promote Kurdish unity through sporadic mediation efforts."); Briefing #141, *supra* note 9 (indicating that Great Britain, France and the United States are responsible for enforcing the no-fly zones).

31. See Ian Johnstone, *Aftermath of the Gulf War: An Assessment of UN Action*, INT'L PEACE ACADEMY OCCASIONAL PAPER SERIES 37 (Int'l Peace Academy, New York, NY) (1994). The United States cited an alleged assassination plot by Iraq against President Bush as the primary justification for the 1993 intervention. See Mitchell, *supra* note 2.

32. See Nicholas Burns, U.S. Dep't of State, Daily Press Briefing #145 (Sept. 10, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #145] ("Our very clear intention . . . is to help [the Kurds] mediate their political differences. This is a long-standing commitment by us."); Briefing #140, *supra* note 6 ("We have been in northern Iraq through 'Operation Provide Comfort' for five years in order to continue to protect the Kurdish people."). See generally STAFF REPORT ON KURDISTAN, *supra* note 15 (analyzing the plight of the Kurds after the failed 1991 uprising).

33. See CHALIAND, *supra* note 13, at 3.

34. See *id.* Feuding Kurdish factions reached an "agreement of principle on the status of Iraqi Kurdistan." *Id.* Saddam Hussein did not offer autonomy to the unified Kurds.

off militarily.³⁵ Following several U.S. mediated attempts to establish a cease-fire between the warring KDP and PUK factions in August 1996, the KDP apparently requested that Baghdad intervene on its behalf.³⁶ Happy to comply, Saddam Hussein's troops marched across the boundary of the no-fly zone into northern Iraq.³⁷ Within a week, the U.S. military attacked positions in southern Iraq with cruise missiles.³⁸

The attacks ceased on September 4, 1996, one day after they began, and the United States declared the intervention a success despite the fact that none of the various goals of the September 1996 military intervention presented by the State Department were in fact achieved.³⁹ This note argues that many, if not all, of the U.S. justifications for the military intervention were not genuine and in fact served as pretexts for the true motives of the United States. One means of testing the legitimacy of these proffered rationales for the intervention is to analyze the actual accomplishments of the military action. It seems appropriate to analyze the reasons offered for the intervention in light of the actual achievements of the action. Putting aside all of the explanations, justifications, and rhetoric proffered by the United States as grounds for the September 1996 intervention, the fact remains that little if anything was gained as a result of

35. See Glyn Davies, U.S. Dep't of State, Daily Press Briefing #138 (Aug. 28, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #138].

36. See *id.*; Myers, *U.S. Attacks Military Targets*, *supra* note 2 ("[T]he [Iraqi] Government announced that it had intervened on behalf of the Kurdistan Democratic Party in its struggle for supremacy with the Patriotic Union of Kurdistan.").

37. See Myers, *U.S. Attacks Military Targets*, *supra* note 2.

38. Strikes were carried out on September 3, and September 4, 1996. See *id.*

39. See Nicholas Burns, U.S. Dep't of State, Daily Press Briefing #149 (Sept. 16, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #149] ("We've set up a strategic containment policy to deter [Saddam] from being an aggressor against his neighbors, and we are succeeding in that."); Nicholas Burns, U.S. Dep't of State, Daily Press Briefing #148 (Sept. 13, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #148] ("[I]n the past two weeks we've been able to actually constrain Saddam Hussein's military movements."); Briefing #140, *supra* note 6 (The demonstration of military force "seems to have been highly effective."). See also Jonathan C. Randal, *Iraq Pulls Back, But Fighting Continues*, TIMES UNION (Albany, NY), Sept. 6, 1996, available in LEXIS, News Library, Atmsun File [hereinafter Randal] ("President Clinton has described [the action] as a successful U.S. intervention.").

Justifications for the intervention offered by the State Department include: Iraq's military actions breached the no-flight zones; Iraq breached "international rules" and international law; Iraq took criminal actions against the Kurds; Iraq's actions implicated "compelling, vital national interests" of the United States; Iraq posed a threat to Israel and its Arab neighbors; see Briefing #140, *supra* note 6; Iraq's actions violated U.N. Resolutions 688 & 678. See Briefing #141, *supra* note 9; Iraq's "pursuit of weapons of mass destruction" posed a threat to other nations; see Glyn Davies, U.S. Dep't of State, Daily Press Briefing #147 (Sept. 12, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #147]; Iraq's actions threatened the "stability in the flow of oil" to the United States; see Briefing #148, *supra*.

the military action. In fact, the most significant results did not injure but instead actually strengthened the regime of Saddam Hussein.

The most obvious and immediate result of the U.S. intervention in Iraq was the disintegration of the Gulf War coalition.⁴⁰ Within hours of the initial cruise missile attack, coalition members harshly criticized the action.⁴¹ Differences among coalition members had arisen in the years since the Gulf War; however, a semblance of unity remained. The nearly universal condemnation of the U.S. military intervention in September 1996 was the death knell of the coalition.⁴² Arab nations decried foreign intervention in Iraq and Western allies refused to participate in patrolling the extended no-fly zone.⁴³

Iraq emerged from the conflict of September 1996 as a potentially greater regional threat to peace and stability than it had been only weeks earlier.⁴⁴ Subsequent to the military strikes by the United States, Iraqi forces withdrew partially from the areas they had invaded in northern Iraq.⁴⁵ However, Saddam Hussein maintained a presence in the region, and his exertion of power and influence reestablished Iraqi sovereignty in northern Iraq.⁴⁶ The success of Iraq's military encroachment into northern

40. See Brian Duffy et al., *Back to Iraq: Desert Strike, The President's Decision To Discipline Saddam Hussein May Be The Beginning Of A New Conflict*, U.S. NEWS & WORLD REP., Sept. 16, 1996, at 34 ("[T]he broad coalition that fought under America's leadership in Desert Storm is no longer:").

41. See Whitney, *supra* note 6.

42. "It was American unilateralism that sealed the collapse of the Gulf War coalition because the United States failed to consider the views of the majority of coalition members." Geneive Abdo, *Defense Chief In Turkey To Boost Support: Clinton Says No Confrontation Sought With Saddam Hussein*, THE DALLAS MORNING NEWS, Sept. 17, 1996, available in LEXIS, News Library, Dalnws File (quoting Samia Nkrumah, a political analyst in Cairo, Egypt).

43. See *Arab League Condemns US Missile Attack on Iraq*, AGENCE FRANCE-PRESSE, Sept. 3, 1996, available in 1996 WL 3917344 [hereinafter *Arab League Condemns US Attack*, AGENCE FRANCE-PRESSE]; Randal, *supra* note 39.

44. See John Donnelly, *Stunning Shift: Arabs Want Saddam 'Rehabilitated'*, SUNDAY GAZETTE-MAIL, Sept. 22, 1996, available in 1996 WL 5210619 (suggesting that Iraq's newly gained confidence in its ability to exercise control over its territory and stand up to the United States have led to fears in the Middle East that Iraq will be bolder and more aggressive in the future in the region).

45. See *id.*; Mariam Shahin, *After The Storm: the aftermath of the Sep. 1996 US action in Iraq*, THE MIDDLE EAST, Nov. 1, 1996, available in 1996 WL 13068437 (reporting claims that Iraqi agents were circulating in Kurdistan, killing opponents).

46. See Donnelly, *supra* note 44 ("Hussein hasn't been this strong since before he invaded Kuwait in August 1990. He exercises a semblance of control over northern Iraq again; the opposition is in tatters, and he executed many of his supposed 'assassins.'").

The State Department acknowledged this reality following the intervention. See Nicholas Burns, U.S. Dep't of State, Daily Press Briefing #151 (Sept. 18, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) ("[S]ome of Saddam's security forces remain in northern Iraq, exerting a nefarious influence there."); Briefing #145, *supra* note 32 ("There's no

Iraq and the general consensus that the United States had intervened in an internal Iraqi matter substantially increased Iraq's stature in the Arab world.⁴⁷ Far from feeling less threatened by Iraq, neighboring nations saw Iraq's military endeavor as signaling the return of a strong and aggressive Iraqi military, newly emboldened after its arguably successful confrontation with the United States.⁴⁸

The situation of the Kurds remained unchanged after the U.S. intervention. The indeterminacy of their status and their humanitarian suffering continued unabated, as it had prior to the intervention. Fighting among the KDP and PUK persisted after the United States declared its intervention a success.⁴⁹ In fact, Kurdish leaders contended that foreign military involvement in northern Iraq, including fighting by Iraqi forces, was ongoing after the U.S. intervention.⁵⁰ Within days of the intervention, the Kurds threatened again to seek the assistance of Iraqi forces and decried U.S. inconsistency and ineffectiveness in alleviating the ongoing humanitarian crisis in northern Iraq.⁵¹ In fact, weeks later, through

question that Saddam Hussein ha[s] taken advantage of this window over the last couple of weeks to enhance [his] position in the north.”).

47. See Donnelly, *supra* note 44 (Jordan “called on the United States to start a dialogue with Iraq” and questioned the wisdom of the US military action in the region.); Duffy, *supra* note 40, at 34; Abdo, *supra* note 42.

48. See Duffy, *supra* note 40, at 39 (“[T]he latest episode may very well embolden Hussein.”).

49. See Lancaster, *supra* note 28 (“[I]n a brisk counteroffensive that began on Oct. 10, Talabani’s [PUK] forces recaptured Sulaymaniyah and have since recovered most of the territory they lost last month with the exception of Irbil.”).

The State Department acknowledged that Iraq remained a serious threat to the Kurds. See Glyn Davies, U.S. Dep’t of State, Daily Press Briefing #142 (Sept. 5, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #142] (“[Saddam] introduced a massive security presence in the area under cover of these deployments So his troops remain very much a threat to Iraq’s civilian population in the north.”).

In addition, this internecine fighting among the Kurds sparked a refugee crisis in northern Iraq. Estimates of the number of displaced Kurds were as high as one hundred thousand. See Nicholas Burns, U.S. Dep’t of State, Daily Press Briefing #146 (Sept. 11, 1996) (visited Feb. 11, 1998) (transcript available at <<http://www.state.gov>>) [hereinafter Briefing #146]; Briefing #145, *supra* note 32.

50. See Jonathan C. Randal, *Conflict Spreads in North Iraq As Kurds Battle, Turks Bomb*, WASH. POST, Sept. 6, 1996, at A1 (“Patriotic Union leader Talabani declared at his headquarters here near the Iranian border that 30 Iraqi tanks and 30 armored personnel carriers, along with heavy artillery, took part in Barzani’s assault on his forces near Irbil.”). The State Department acknowledged that Iraq was involved in military actions in the north. See Briefing #145, *supra* note 32 (stating “[w]e believe that Saddam’s forces played a part in this [post-intervention] military offensive [in Sulaimaniya].”).

51. See Lancaster, *supra* note 28 (“Kurdish leader Massoud Barzani warned yesterday that he is considering another appeal to the Iraqi government for help in defeating a rival Kurdish group said to be receiving arms and support from Iran.”); Kurt Schork, *Kurd Chief Finds Fault With West*, ORANGE COUNTY REG., Sept. 13, 1996, available in 1996 WL 7048347 (“The Kurdish militia leader now running northern Iraq said Thursday that the West’s failure to spell

negotiation, the United States was able to achieve what its military intervention utterly failed to accomplish: a cease-fire was brokered between the KDP and the PUK and the fighting stopped.⁵²

Far from protecting petroleum reserves, the U.S. intervention caused substantial turmoil in oil markets.⁵³ Prices rose substantially and continued instability in the region threatened to seriously disrupt the oil market.⁵⁴ This disruption was caused in part by a reduction in supply caused by the scrapping of Resolution 986, an oil for food deal.⁵⁵ Thus, even if its concern over petroleum reserves was legitimate, ultimately the United States initiated the troubles it sought to avoid.

As far as enforcement of UN resolutions and policy are concerned, since the intervention, the United Nations and Iraq have continued to quarrel over monitoring of Iraq's program for weapons of mass destruction.⁵⁶ In fact, on several occasions in 1997 the Security Council

out goals for the Kurds drove him into the arms of Saddam Hussein."); Sharma, *supra* note 12 ("Both the . . . KDP . . . and the . . . PUK . . . blame the US for their present predicament.").

52. See *Discussions on Monitoring of Northern Iraq Ceasefire*, AGENCE FRANCE-PRESSE, Nov. 7, 1996, available in 1996 WL 12176049.

53. See *supra* note 39 (the U.S. claimed it acted in part to protect oil reserves).

54. See *Oil Prices Soar After US Missiles Strike Iraq*, MIDDLE EAST ECONOMIC DIGEST, Sept. 13, 1996, available in 1996 WL 11146452 ("World oil prices rose to levels not seen since the 1991 Gulf War after the US replied to Iraqi troop incursions into the Kurdish-held north of Iraq with a volley of cruise missiles . . .").

55. "Under [Resolution 986] Iraq would be allowed to sell dlr 2 billion worth of oil for an initial 180-day period to buy food and medicine for its people suffering the effects of six years of U.N. sanctions." Robert H. Reid, *Security Council Considers Response to Iraq's Incursions Against Kurds*, ASSOCIATED PRESS POL. SERV., Sept. 4, 1996, available in 1996 WL 5404461.

56. Iraqi intransigence resurfaced in the fall of 1997. See Farouk Choukri, *Iraq Launches Attack On New UN Disarmament Chief*, AGENCE FRANCE-PRESSE, Oct. 11, 1997, available in 1997 WL 13411890 ("[T]he UN arms inspection team in Iraq on Monday reported to the UN Security Council that Baghdad is continuing to conceal weaponry from the UN inspectors."); Barbara Crossette, *U.S. Fails to Impose New Punishment on Iraq*, N.Y. TIMES, Oct. 23, 1997, at A5 (The United States criticized the fact that "Iraq continued to obstruct efforts to destroy its major weapons systems.").

In November 1997 Iraq declared that all UN weapons inspectors of U.S. nationality would be expelled from the country. In the escalating war of words which followed, the United States made every effort to recognize UN jurisdiction in the matter and gain Security Council approval for an enforcement action. See Neil A. Lewis, *U.S. Will Ask U.N. to Force Iraq to Admit Arms Monitors*, N.Y. TIMES, Nov. 3, 1997, at A1 (quoting Bill Richardson, U.S. delegate to the United Nations) ("This is not a fight between the U.S. and Iraq. This is Iraq confronting the United Nations."); *id.* ("Clinton Administration officials said today that they would ask the United Nations Security Council . . . to take swift and firm action to force President Saddam Hussein of Iraq to allow Americans into his country as members of a United Nations weapons inspection team."); Barbara Crossette, *Iraq Threatens To Shoot Down U.S. Spy Planes*, N.Y. TIMES, Nov. 4, 1997, at A1 ("The Clinton Administration, under pressure from Congress to react forcefully to Iraq, has tried to contain the dispute within the United Nations system, where Washington can count on the backing of the Security Council. Any independent use of force by the United States without Council approval would shatter that unity at this point."). More recent

contemplated imposing further sanctions on Iraq for its failure to cooperate with UN inspectors.⁵⁷ Iraq has become no more compliant or cooperative, nor less threatening on the world stage. The pre-intervention rhetoric of the United States may have played a role in the UN decision temporarily to scuttle approval of Resolution 986, which was to authorize the humanitarian sale of oil for food and medicine for the Iraq.⁵⁸ Regardless of the U.S. role in the decision to delay implementation of Resolution 986, the determination was made prior to the intervention.⁵⁹ In addition, this accomplishment in fact exacerbated humanitarian troubles in Iraq by eliminating a source of humanitarian relief to the long-suffering Iraqi civilian population.⁶⁰

The United States ceased military activity despite widespread belief in the international community that Saddam Hussein was left better off militarily and politically than he was prior to the U.S. cruise missile attacks.⁶¹ Iraqi military and security forces remained a serious threat to Kurds in northern Iraq and Saddam claimed victory over the foreign invaders. At the end of the day, Iraq found itself in closer solidarity with its Arab neighbors than it had been for years by having asserted its sovereignty in northern Iraq, by having succeeded in violently repressing and intimidating Kurdish insurgents, and by having stood up to the United States. Moreover, Saddam Hussein was sufficiently emboldened by his success in northern Iraq again to defy the United States and the international community in 1997 and 1998 by forcing UN weapons inspectors to leave Iraq and demanding an end to the UN weapons inspection program altogether.⁶²

rhetoric by the United States suggests that this new approach to international law and the United Nations was short-lived. See *infra* Epilogue.

57. See Barbara Crossette, *U.S. Fails to Get U.N. Backing To Widen Sanctions On Iraq*, N.Y. TIMES, Oct. 23, 1997, at A5 ("The United States lost its battle to impose new sanctions on Iraq."); John M. Goshko, *Council May Condemn Iraqi Moves; U.N. Draft Drops Wording For 'Serious Consequences'*, WASH. POST, Nov. 12, 1997, at A18.

58. See Briefing #140, *supra* note 6. In any event, the deal eventually went into effect in December 1996.

59. See Myers, *U.S. Attacks Military Targets*, *supra* note 2, at A6 ("[T]he United States called for the suspension [of the oil-for-food deal] as a punitive measure" prior to the missile strikes.).

60. See Sharma, *supra* note 12 ("Many countries find [the U.S. position on the oil-for-food deal] morally repugnant, particularly in view of American protestations about helping the people of Iraq.").

61. See Randal, *supra* note 39 ("[T]he Kurdish-inhabited region of northern Iraq [is] mired in conflict despite what President Clinton has described as a successful U.S. intervention and the reported pullback of Iraqi army armor and artillery.").

62. See Thomas W. Lippman, *Iraq to Back Down, Albright, U.N. Told; Baghdad Says Inspectors Can Return*, WASH. POST, Nov. 20, 1997, at A1; *infra* Epilogue (discussing continuing Iraqi defiance of the UN).

II. MILITARY INTERVENTION UNDER INTERNATIONAL LAW: HUMANITARIAN INTERVENTION AND THE IMPORTANCE OF MULTILATERALISM

The primary justifications for the intervention put forth by the United States were grounded in humanitarian concerns. The no-fly zones upon which the United States relied were set up after the Gulf War as a means of protecting the Iraqi Kurds and UN Security Council Resolution 688 was designed to serve humanitarian ends.⁶³ Furthermore, the actual events which spurred the United States to action threatened the Kurdish minority in Iraq, but did not directly jeopardize other international interests. This was an internal Iraqi matter: no foreign boundaries were crossed and no threat to international peace and security was evident. Thus, unlike other justifications offered by the United States, which seem to fall under the umbrella of U.S. national security interests or rules established by the United Nations, the humanitarian justification deserves independent analysis with an eye toward international law's evolving attitude toward humanitarian intervention.⁶⁴

Ascertaining whether the intervention was multilateral or a wholly unilateral U.S. action is crucial to any determination of its legality as a humanitarian intervention. In this regard, U.S. claims concerning the multilateral nature of the military intervention suggest a blurring of the line between unilateral and multilateral action. This confusion between these concepts may provide insight into the U.S. understanding or misunderstanding of international law generally, not just in the humanitarian sphere.

The independence, autonomy, and authority of nation-states is the foundation of modern international law.⁶⁵ Respect for the territorial and

63. See *infra* Part III.

64. Statements by the State Department indicate that in claiming that the intervention was necessary to enforce international rules, the United States was relying specifically on UN resolutions, national security issues or humanitarian concerns. See *infra* Parts III-IV (exploring these justifications).

65. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 28 (2d ed. 1995) ("The contemporary system of international relations is built on the assumption that the nation-state is the primary actor."); Thomas G. Otte, *Military Intervention: Conclusions and Reflections*, in *MILITARY INTERVENTION: FROM GUNBOAT DIPLOMACY TO HUMANITARIAN INTERVENTION* 193, 197 (Andrew M. Dorman & Thomas G. Otte eds., 1995) [hereinafter Otte, *Conclusions & Reflections*] (arguing that despite an increasingly liberal attitude toward intervention, state sovereignty remains a crucial underpinning of international law as exemplified by the worldwide reaction to Iraq's forcible annexation of Kuwait); J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW*, 7 (9th ed. 1984) ("The modern system of international law . . . remains tinged with concepts such as national and territorial sovereignty, and the perfect equality and independence of states."); John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 *GEO. L.J.* 535, 538 (1993) ("The traditional concept of international law was

political sovereignty of States is a key feature of the international legal order.⁶⁶ The natural and inevitable corollary of this respect for sovereignty is the international legal prohibition on interference by a nation in the sovereign territory or affairs of another.⁶⁷ This prohibition has been a necessary and essential element of the international legal system for centuries.⁶⁸ Efforts by the United States to justify the military intervention in Iraq must be viewed in this context. While never refuting the fact that military intervention generally is prohibited under international law, the United States nevertheless sought to justify the intervention as appropriate and necessary.⁶⁹

While the inviolability of state sovereignty is one of the foundations of modern international law and international relations, this flat prohibition appears to be yielding somewhat to grave humanitarian concerns.⁷⁰

one of law between nations.”); Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990) (book review) (“[T]he basic rule of international law is that a state generally has the exclusive authority to regulate conduct within its territory.”).

Repeated assurances by the United States that it recognized the sovereignty of Iraq over all of its territory, while simultaneously violating that sovereignty, suggest that, at least in theory, sovereignty remains sacrosanct under the U.S. understanding of international law. See *supra* note 11.

66. See LOUIS HENKEN, *HOW NATIONS BEHAVE* 18 (1968) (“[E]very foreign policy assumes the integrity and inviolability of the national territory.”).

67. See Thomas G. Otte, *On Intervention: Some Introductory Remarks*, in *MILITARY INTERVENTION: FROM GUNBOAT DIPLOMACY TO HUMANITARIAN INTERVENTION* 3, 5 (Andrew M. Dorman & Thomas G. Otte eds., 1995) (“Military intervention is . . . a deviation from the internationally acknowledged norm of non-intervention The cornerstone of the Westphalian international order is the principle of state sovereignty.”); *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 9 (Lori Fisler Damrosch ed., 1994) [hereinafter *ENFORCING RESTRAINT*]; Ruth Gordon, *United Nations Intervention In Internal Conflicts: Iraq, Somalia, And Beyond*, 15 MICH. J. INT’L. L. 519 (1994) (“Nonintervention is a fundamental principle of international law.”).

The UN Charter prohibits military interventions in the internal affairs of foreign nations. See UN CHARTER art. 2, paras. 4, 7; *infra* Part III.

68. See *ENFORCING RESTRAINT*, *supra* note 67, at 9 (“[T]he international legal system [is] committ[ed] to a norm against external involvement in internal affairs. The norm originated in unwritten custom . . . and has been codified in the present century in a series of treaties and other documents.”).

69. While the United States attempted to justify the intervention as an enforcement of international law generally or “the rules of the road,” it never elaborated on this explanation. See Briefing #140, *supra* note 6 (“So I think the justification for this is clear. You cannot have agreed-upon rules in the international system flouted by international outlaws.”). These broad statements about the basis for the military intervention are best viewed as vague generalizations of more specific justifications.

70. In support of this, Thomas Weiss states:

In the aftermath of the Cold War, we are moving in fits and starts away from the idea that state sovereignty serves as an all-purpose rationalization for narrowly defined national interests, and lurching towards a world in which states are more accountable

Multilateral efforts designed to address serious violations of human rights can and have overridden the traditional concern for state sovereignty; however, *unilateral* intervention remains highly controversial.⁷¹ The Clinton administration initially recognized explicitly the importance of consensus within the international community and strove to implement a foreign policy agenda "with a multilateral emphasis on deliberations regarding military intervention."⁷² Thus, the increasing legitimacy of humanitarian intervention in sovereign nations has occurred primarily in the context of multilateral action. There are significant dangers inherent in unilateral intervention, such as the possibility that unilateral action will reflect the self-interested action of the intervening nation and multilateralism mitigates these risks.⁷³ In

for their actions, inside or outside of their borders In short, sovereignty is no longer a safe diplomatic sanctuary when aberrant abuses of civilians occur.

Thomas G. Weiss, *The United Nations and Civil Wars at the Dawn of the Twenty-First Century*, in *THE UNITED NATIONS AND CIVIL WARS 193, 196* (Thomas G. Weiss ed., 1995) [hereinafter Weiss].

See RICHARD N. HAASS, *INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD* 13 (1994) ("Today's critique is that intervention, including military intervention by outsiders, is legitimate and even necessary when a government severely represses the human rights of its own people . . ."); ROBERT L. PHILLIPS & DUANE L. CADY, *HUMANITARIAN INTERVENTION: JUST WAR VS. PACIFISM* 19-21 (1996); Gordon, *supra* note 67, at 554 (suggesting that the UN intervention in Somalia was in fact prompted by humanitarian concerns, but that the United Nations was unwilling to state that as the basis for acting).

71. See Gordon, *supra* note 67, at 533 ("[T]he principles governing unilateral State intervention in internal conflicts appear to be moving towards nonintervention."); see also Stephan A. Wangsgard, *Secession, Humanitarian Intervention, And Clear Objectives: When to Commit United States Military Forces*, 3 *TULSA J. COMP. & INT'L L.* 313, 314 (1996) ("The United States must intervene only under multilateral auspices that abide by the principles of humanitarian intervention."); PHILLIPS & CADY, *supra* note 70, at 19 (quoting a report of the Wilton Park Conference on the United Nations in the new World Disorder) (Humanitarian intervention "should be undertaken by the UN . . . and/or by the regional organization to which the state belongs, so as to secure international control and legitimacy."). See generally James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 *DENV. J. INT'L L. & POL'Y* 9 (1991) (discussing alternatives to unilateral humanitarian intervention).

72. Wyn Q. Bowen, *The US National Interest and the Future of Military Intervention*, in *MILITARY INTERVENTION: FROM GUNBOAT DIPLOMACY TO HUMANITARIAN INTERVENTION* 83, 85 (Andrew M. Dorman & Thomas G. Otte eds., 1995) [hereinafter *US National Interest*].

The U.S. government is responsible for protecting the lives and personal safety of Americans, maintaining our political freedom and independence as a nation and promoting the well-being and prosperity of our nation. No matter how powerful we are as a nation, we cannot secure these basic goals unilaterally. Whether the problem is nuclear proliferation, regional instability, the reversal of reform in the former Soviet empire or unfair trade practices, the threats and challenges we face demand cooperative, multinational solutions. Therefore, the only responsible U.S. strategy is one that seeks to ensure U.S. influence over and participation in collective decision-making in a wide and growing range of circumstances.

THE WHITE HOUSE, *A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT* 8 (Feb. 1995) [hereinafter *NATIONAL SECURITY STRATEGY*].

73. See *infra* text accompanying notes 88-89.

addition, despite the liberalization of the rules of humanitarian intervention, state sovereignty remains of paramount importance in international law.⁷⁴

The inherent tension between the traditional respect for state sovereignty and recent inclinations to address humanitarian crises is illustrated by recent international responses to traditionally internal or domestic crises. In the case of Somalia, the United States initially suggested it would enter the country unilaterally to provide humanitarian assistance.⁷⁵ This U.S. involvement, however, was ratified expressly by the United Nations.⁷⁶ Such an intervention differed from the 1996 action against Iraq in several ways. As an initial matter, the intervention in Somalia was not explicitly military in the way air strikes are. While military force was an authorized option in the Somalia affair, the goal of the actions was the provision of humanitarian supplies to the civilian population.⁷⁷ Furthermore, the crisis in Somalia was truly extraordinary and exceptional: government had all but ceased to exist and the country was collapsing.⁷⁸ And yet, even in responding to a humanitarian catastrophe in a nation in chaos, the United Nations avoided justifying the intervention on strictly humanitarian grounds for fear of the precedent that might be established.⁷⁹ Perhaps most importantly, the United Nations was involved directly in the crisis and approved and authorized the U.S. action.

Similarly in Bosnia, the United Nations and the United States intervened in a foreign nation for what were widely regarded as humanitarian purposes. In this instance, the U.S. military intervention was authorized by NATO and involved direct cooperation with the United Nations.⁸⁰ As was the case in Somalia, the intervention raised fewer questions of U.S. self-interest because of multilateral involvement in the endeavor. Furthermore, the intervention was classified primarily as a peace-keeping mission necessary to enforce a cease-fire and not as an essentially humanitarian action.⁸¹ Finally, while the intervention in Bosnia involved

74. See Otte, *Conclusions & Reflections*, *supra* note 65, at 197.

75. See Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245, 265-66 (1996).

76. See *id.*

77. See *id.* at 265 ("[I]n Resolution 794 [the Security Council] authorize[d] a United States led coalition to use 'all necessary means to establish a secure environment for humanitarian relief operations.'").

78. See Gordon, *supra* note 67, at 553-54 ("Somalia presented an exception and unique situation [There was an] almost total breakdown of governmental authority:").

79. See *id.* ("[T]he [Security] Council found that there was a 'threat' to the peace Member States did not want this action to be interpreted as a precedent for future situations.").

80. See generally John M. Goshko, *U.N. Answers Critics of Policing Effort in Bosnia*, WASH. POST, Feb. 6, 1996, at A10; THE PRESIDENT OF THE UNITED STATES, ENFORCEMENT OF THE NO-FLY ZONE IN BOSNIA-HERZEGOVINA, H.R. DOC NO. 104-79, at 1 (May 24, 1995) (104th Cong., 1st Sess.).

81. See THE PRESIDENT OF THE UNITED STATES, *supra* note 80.

military forces, such forces were not employed for aggressive military strikes.

With regard to the 1996 intervention in Iraq, if it is to be justified as a humanitarian intervention, it must have been prompted primarily by humanitarian concerns.⁸² Serious human rights violations in fact were perpetrated by Saddam Hussein against the Kurds and the United States appropriately expressed moral outrage.⁸³ However, while the plight of the Kurds was tragic, it was not novel.⁸⁴ Kurdish groups had been warring for years and the United States saw no reason to intervene. In addition, brutal fighting continued after the initial cruise missile strikes, with involvement by Turkey and possibly even Iraq, and the United States took no action.⁸⁵ The inconsistency of U.S. responses to humanitarian crises in Iraqi Kurdistan suggests that the humanitarian justification was not the driving force behind U.S. policy in Iraq. The fact that the State Department offered a litany of non-humanitarian justifications for the intervention, ranging from enforcement of UN resolutions to numerous national security concerns, also calls the primacy of the humanitarian justification into question.⁸⁶ While nations cannot feasibly respond to every humanitarian crisis and necessarily must discriminate among situations amenable to intervention, U.S. conduct in Iraq suggests that the choice to intervene was not in fact based on humanitarian concerns.

Perhaps the clearest indicator that the United States was not prompted by humanitarian motives was the nature of the military strikes themselves. While the Kurds suffered and died in northern Iraq, the United States launched missile strikes in the south.⁸⁷ The nature and the brevity of the attacks seemed almost uniquely ill-suited to address the immediate humanitarian crisis faced by the Kurds in the north. To accept at face value the U.S. contention that it acted out of humanitarian empathy is to ignore

82. See Briefing #140, *supra* note 6 (“[Saddam Hussein] clearly has taken actions against the Kurdish people, actions . . . that are criminal.”); Briefing #141, *supra* note 9 (“The issue is that . . . Kurdish civilians have been victimized by Saddam Hussein.”).

83. See generally *supra* Part I (discussing the plight of the Iraqi Kurds).

84. In 1988, Saddam Hussein employed “chemical weapons as well as massive bombardments” against the Kurds. CHALIAND, *supra* note 13, at 11. The suffering of the Kurds was widely publicized in the West. See *id.*

85. Kurdish suffering at the hands of Saddam Hussein predated the 1996 intervention and continued thereafter. See *supra* text accompanying notes 49–51. See generally *supra* Part I.

86. In the aftermath of the intervention the State Department in fact began stressing non-humanitarian motives as the primary basis for the action. See Briefing #146, *supra* note 49 (“[T]he core of U.S. strategic interests are: to protect Saudi Arabia and Kuwait.”); Briefing #145, *supra* note 32 (avoiding a threat to Iraq’s neighbors in the south “is, of course, the heart of America’s vital interests in that part of the world.”).

87. See *supra* text accompanying note 2.

political reality.⁸⁸ The ambiguity surrounding the humanitarian justification highlights the need for multilateral consensus to form the basis of international efforts in defense of humanitarian interests.⁸⁹

Even if humanitarian motives did prompt the United States to intervene, the action nevertheless was not justified. As a multilateral effort the intervention was illegitimate as there was no multilateral consensus. The State Department appears to recognize the importance of multilateralism in humanitarian military interventions. On numerous occasions it sought to portray the September 1996 intervention as the product of an international consensus regarding human rights violations in Iraq.⁹⁰ These contentions were clearly refuted by the criticism and disagreement expressed by numerous nations which had participated in the Gulf War coalition.⁹¹ Russia criticized the action and the failure to consult with the UN Security Council, France refused to enforce the extension of the no-fly zone and the Council of Arab Foreign Ministers denounced any

88. See Gordon, *supra* note 67, at 521 n.6 ("Unilateral interventions are generally to achieve the national interests of the intervenor."). Because unilateral actions often reflect the national interests of the intervenor, all unilateral military interventions are subject to the same criticism as interventions specifically grounded in national security concerns. The same logic applies to justifications based upon international law and international interests such as humanitarian concerns. See also HAASS, *supra* note 70, at 69 ("Most thoughtful observers of U.S. foreign policy have long since concluded that the 'national interest' concept unfortunately lends itself more readily to being used by our leaders as political rhetoric for *justifying* their decisions and gaining support rather than as an exact, well-defined criterion that enables them to determine what actions and decision to take."). See generally *infra* Part IV (discussing U.S. national security claims).

On at least one occasion, the United States directly revealed the duplicity of its myriad justifications. See Briefing #146, *supra* note 49 ("I think Saddam Hussein has extended his reach in the north [Kurdish territory] -- there's no question about that -- but militarily *where it counts*, he continues to be bottled up by the United States and our allies *where it counts*." (emphasis added)).

89. See PHILLIPS & CADY, *supra* note 70, at 14 ("[T]here will always be a suspicion regarding the motives of the intervener. Is the intervention self-serving? . . . Is there self-deception or just plain deception?").

Unilateral intervention creates the largest risk of self-serving or pretextual humanitarian intervention. Multilateral intervention minimizes the likelihood of such pretextual humanitarian intervention. See *infra* text accompanying notes 101-104.

90. See Briefing #140, *supra* note 6 ("[I]t's very clear to us here in Washington this morning that the international coalition against Saddam Hussein is intact . . . [W]e are satisfied with the consultations that we had with our allies leading up to the decision by the President to strike back at Saddam Hussein."); *id.* ("We are convinced that this international coalition is intact and will continue to work."); *id.* (discussing the extension of the no-fly zones, the State Department contended that "[t]his is an agreement put in place by the coalition partners . . . I believe there is allied unity and unanimity on that question this afternoon."); *supra* note 72 (outlining U.S. policy regarding multilateralism).

91. See Mitchell, *supra* note 2.

interference with the sovereignty of Iraq.⁹² The attack was carried out by U.S. armed forces using U.S. equipment without aid or assistance by any other nation. The intervention simply was not a multilateral undertaking.⁹³

In addition, viewed as a unilateral action, the intervention was unjustifiable because unilateral humanitarian intervention remains suspect under international law.⁹⁴ The State Department at times portrayed the intervention as a unilateral action by the United States justified by humanitarian concerns for the long-suffering Kurds.⁹⁵ Looking to the criticism by, and lack of consultation with, other nations, the portrayal of the intervention as unilateral is clearly accurate; however, that this unilateralism made the intervention unjustifiable under international law is equally clear.

Absent consultation with other concerned or affected nations, or more persuasive evidence that humanitarian motives truly prompted a given military action, humanitarian concern is unacceptable under international law as a justification for unilateral military intervention.⁹⁶ Even legitimate humanitarian concerns for repressed minorities should not serve to justify unilateral military intervention in the sovereignty of a foreign nation unless and until all other avenues of response have been exhausted.⁹⁷ Humanitarian crises are all too frequent in the late twentieth century and, if accepted without challenge as grounds for unilateral military intervention, would give nations carte blanche to intervene at will in a myriad of situations and locations. The frequency of such crises would allow nations to pick and choose which crises to address.⁹⁸ These choices would likely correspond with the national interests of the intervening nation.⁹⁹ Regardless of the actual basis for action, a humanitarian pretext could always be enunciated to justify any unilateral military intervention.

92. See *Arab League Condemns US Attack*, AGENCE FRANCE-PRESSE, *supra* note 43; Randal, *supra* note 39 (France refused to "participate in enforcement of the enlarged portion of the zone.").

93. See *supra* text accompanying notes 40-43 (discussing the demise of the Gulf War coalition).

94. See *infra* text accompanying notes 102-105 (outlining the safeguards provided by requiring that all humanitarian interventions begin with genuine multilateral consensus); see also *infra* Part III (discussing the UN Charter's prohibition on unilateral intervention).

95. See Briefing #140, *supra* note 6 ("The justification for this is very clear. This man was a criminal back in 1990-91 when he invaded Kuwait. He was a criminal when he tried to exterminate the Iraqi Kurds. Someone has to protect the Iraqi Kurds. In this case, the United States has taken upon itself to act in our own interest to do so The fact is this was a unilateral U.S. military action.").

96. See PHILLIPS & CADY, *supra* note 70, at 14.

97. See *supra* text accompanying notes 70-72 (discussing changing the norm against unilateral intervention only in the context of multilateralism).

98. Compare the continuing U.S. involvement in the oil-producing Middle East with its lack of response to the genocide in Rwanda.

99. See PHILLIPS & CADY, *supra* note 70, at 14.

Looking beyond explicit U.S. reliance on humanitarian concerns, the rhetoric of the United States following the intervention suggests yet another explanation for the action against Iraq. Perhaps recognizing the appeal and legitimacy of multilateralism and the difficulties inherent in justifying unilateral humanitarian military intervention, the State Department apparently attempted to split the difference by portraying the intervention as a unilateral action undertaken in the interests of international law and the international community.¹⁰⁰ This notion of implicit or constructive multilateralism, suggesting that the goals of the intervention served the interests of the broader international community even though the action was planned and undertaken unilaterally, represents a potentially dangerous blurring of the distinction between multilateral and unilateral action as well as the line between international and domestic interests.¹⁰¹

100. See Briefing #140, *supra* note 6 ("In this particular instance, because the credibility of the United States and the international community was on the line, we felt it was important to have a quick, decisive and forceful military response from the United States.")

In response to a question regarding the lack of involvement of other coalition members, Mr. Burns responded:

Countries made their own decisions about what they wanted to do, and that I think is just a basic fact about coalitions -- that there will be times when the coalition is absolutely united on all the details, there will be times when perhaps there are some disagreements; but what really matters is, is the coalition still focused on the major goal? The goal is containing Saddam Hussein, protecting the Iraqi Kurds, making sure that international agreements are not being overridden.

Id. Referring to the intervention as a "detail," the State Department suggested that it acted in the interests of the international community with the implicit sanction of that community. See *id.* ("Saddam Hussein . . . has challenged the international community, and the United States has stood up and said, 'No, Saddam Hussein is not going to get away with these actions.'"); Briefing #141, *supra* note 9 ("It's obvious that the United States is acting within an international context here . . ."); see also *infra* Epilogue (arguing that in 1997 the United States was still suggesting that its actions were in the world's interests).

Indeed, all of the U.S. justifications for the intervention based on UN Security Council resolutions regarding Iraq can be seen as attempts to conflate national interest with international relevance and multilateralism. If the United States merely acted to enforce UN resolutions then it is merely enforcing the multilateral international will expressed by the Security Council. See generally *infra* Part III (discussing U.S. claims that it acted to enforce UN resolutions).

101. Multilateral intervention is as much process as result. The nature of the intervention itself, not simply the nature of the interests involved, serve to distinguish multilateralism from unilateralism. As Robert Mandel states:

[C]onsiderable conceptual blurring surrounding key national security distinctions . . . has occurred in the post-Cold War world . . . [making] it harder to divide domestic and foreign policy, or military and economic policy The impact of these blurring distinctions on security policy seems to be generally pernicious, leading either to paralyzed cautious and conservative policy or to chaotic rash and reckless policy.

ROBERT MANDEL, *THE CHANGING FACE OF NATIONAL SECURITY: A CONCEPTUAL ANALYSIS* 12-13 (1994). Confusing national interest with international, multilateral interests can result in reckless unilateral action in violation of international law.

The logic suggested by this implicit multilateralism argument is troubling. Simply declaring an issue to be international in scope cannot suffice to justify military intervention. Accepting such an argument would allow nations to declare that an issue has international significance and, based upon this international relevance, presume multilateral interest in, and thus sanction for, intervention. Instead, a true international consensus should be required to define an issue as international in scope.¹⁰² Only then would true multilateralism exist and only then would intervention be appropriate.

It follows that only an international, multilateral perspective can ensure that humanitarian justifications for intervention in traditionally domestic concerns of nations are more than mere self-serving pretexts of interested nations.¹⁰³ In a strict moral sense, repression and suffering in any setting deserve attention regardless of their international impact and influence; however, this instinct to redress suffering must be balanced against the dangers of self-interested military action and violations of national sovereignty. When repression and suffering are used to justify the violation of a nation's sovereignty, the true motives of the intervening party must be exposed to avoid undue interference with state sovereignty. If the international community can be convinced that the situation warrants intervention, it is much less likely that ulterior motives of individual states are being served.¹⁰⁴ Respect for state sovereignty and the need for intervention to address serious humanitarian crises can only be reconciled by a requirement for multilateral consensus.

Multilateralism also serves to limit intervention to those crises which are sufficiently grave and legitimately international in scope. Consensus will not emerge absent compelling circumstances and a sense among the community of nations that the situation in question impacts substantially upon the international community. This preserves the core of state sovereignty by assuring that internal or domestic situations and circumstances which are not of genuine international concern will remain within the

102. See Wangsgard, *supra* note 71, at 322–23 (stating that humanitarian intervention is only appropriate when needed to confront a threat to “international order and security.”).

103. One commentator has suggested that:

[A] healthy skepticism with regard to the humanitarian motivations of state governments is not at all misguided, internationally sanctioned military interventions on humanitarian grounds have clearly become an issue in an international system which is more integrated than ever before . . . International support for a contemplated military intervention is clearly needed; it adds legitimacy to [the] action . . .

Otte, *Conclusions & Reflections*, *supra* note 65, at 197, 201. See Nafziger, *supra* note 71, at 26 (“[M]ultilateral action provides a more reliable consensus of support, checks abuses, and better ensures that intervention is warranted.”); Wangsgard, *supra* note 71, at 322–23.

104. See Weiss, *supra* note 70, at 199 (arguing that the United Nations serves to legitimize intervention); PHILLIPS & CADY, *supra* note 70, at 19; Wangsgard, *supra* note 71, at 323.

exclusive control of sovereign nations. The nations which constitute the international community will, in seeking or failing to seek international consensus on humanitarian issues, decide in the most practical sense which issues warrant an international response.¹⁰⁵

This approach to humanitarian intervention is conservative and would limit the international community's ability to respond to legitimate crises. This is a difficult but necessary trade-off. Respect for state sovereignty and the desire to avoid self-interested action by nations demands such a conservative position. The potential harshness of this view can be mitigated by the increasing influence and effectiveness of non-governmental organizations in responding to international crises. The motives of NGOs are generally less suspect than those of nations and these organizations can respond to situations that the community of nations refrains from addressing.

The situation in Iraq in August and September of 1996 presented the world with a serious crisis as an ethnic minority was threatened militarily. The humanitarian crisis faced by the Kurdish people was significant.¹⁰⁶ The response of the international community is instructive here. While disapproving of Iraq's actions, most nations viewed the U.S. response as disproportionate and inappropriate.¹⁰⁷ Had they been consulted at greater length, these nations may have supported less extreme efforts to address the situation.¹⁰⁸ The international community clearly viewed the situation differently than the United States. This lends credibility to the suggestion that perhaps the United States had interests at stake other than humanitarian concerns. Thus, U.S. attempts to justify the intervention in humanitarian terms exemplify the problems associated with intervention absent multilateral consensus.¹⁰⁹ Nations could act in their own interests while claiming to be responding to an *international* problem. A truly international problem cannot be declared as such unilaterally; the States which make up that community must perceive the situation as warranting a response.¹¹⁰ There are numerous humanitarian crises in the world whose

105. See Weiss, *supra* note 70, at 199–200.

106. See generally *supra* Part I (detailing the experiences of the Iraqi Kurds prior and subsequent to the U.S. intervention in 1996).

107. See Whitney, *supra* note 6.

108. Intervention should be proportional to the threat and used only when it is likely to succeed where other policy options would fail. See HAASS, *supra* note 70, at 70. Many nations complained that greater consultation should have preceded the military action. See Whitney, *supra* note 6.

109. See Briefing #140, *supra* note 6.

110. This suggests a fundamental basis for the nearly universal preference in international law for multilateral intervention; intervention undertaken on behalf of the international community surely must have the support of the intended beneficiaries. The domestic analogue of this is

severity matches that of the Kurdish tragedy in Iraq and an exception to a requirement of multilateralism in responding to these situations could quickly become the rule.

The U.S. intervention in Iraq ignored the models for multilateral intervention provided by the Gulf War. The prosecution of the Gulf War and the preceding military coordination and build-up serve as a model for multilateral international efforts under the auspices of the United Nations, while the subsequent creation and enforcement of the no-fly zones in northern and southern Iraq exemplify the type of multilateral action by a coalition of States to address a humanitarian crisis which is gaining acceptance under international law.¹¹¹ The entirely unilateral extension of the no-fly zones and the military intervention in Iraq by the United States in September 1996 stand in stark contrast to these multilateral, consensus-based actions. The international impact and relevance of Iraq's aggression cannot obscure the fact that the U.S. intervention was wholly unilateral and in violation of international legal norms.

III. HIDING BEHIND THE UNITED NATIONS: THE CHARTER, RESOLUTIONS AND NO-FLY ZONES¹¹²

This Part argues that the United States neglected to consult with the United Nations prior to intervening militarily in Iraq and failed to act in accordance with the requirements of the UN Charter, Security Council Resolutions, or the rules relating to the no-fly zones. The UN Charter does not justify the military action undertaken, and the U.S. intervention was not a valid enforcement of Resolution 688 or 687 or the no-fly zone mechanism.¹¹³ In addition, the United States failed to adequately consult with the United Nations and its Member States under whose auspices any enforcement of UN resolutions must take place.

the national security justification. *See generally infra* Part IV (analyzing national security justifications).

111. *See* JOHN NORTON MOORE, *CRISIS IN THE GULF: ENFORCING THE RULES OF LAW* 351 (1992).

112. As a permanent member of the UN Security Council, it is undisputed that the United States recognizes the legitimacy and relevance of the United Nations in the international arena.

113. The no-fly zones were not established under the auspices of the United Nations. *See Corrections, supra* note 24. This note, however, will discuss the establishment of the no-fly zones as the United States claims the imprimatur of the United Nations for the no-fly zones. The State Department contended that the no-fly zones were "set up pursuant to a UN Security Council resolution." Briefing #141, *supra* note 9. *See also* Duffy, *supra* note 40, at 38-39 ("[T]he troop movement involved no violation of the no-fly zone designated in northern Iraq and no violation of the letter of the United Nations resolutions voted against Iraq at the end of Desert Storm.").

In his "Agenda for Peace," UN Secretary General Boutros Boutros Ghali re-affirmed state sovereignty as a cornerstone of international law.¹¹⁴ As discussed in Part II, international law continues to prohibit military intervention as a means of resolving domestic crises and the UN Charter embodies these principles. Sections 2(4) and 2(7) of the UN Charter forbid intervention by one nation in internal matters of other nations except when required for self-defense.¹¹⁵ While this general prohibition is being moderated as humanitarian disasters exert ever greater pressure for responses from the international community, such liberalization applies only to multilateral humanitarian efforts and does not constitute a license for unilateral endeavors.¹¹⁶ Had the Gulf War coalition remained intact, its multilateral nature might have provided a basis for implying UN approval; despite U.S. protestations to the contrary, the fragmentation and dissolution of the coalition is all too apparent.¹¹⁷

The United States made no attempt to consult with the United Nations or bring its concerns regarding Iraqi actions to the Security Council.¹¹⁸ While purporting to rely on UN resolutions 678 and 688,

114. See Weiss, *supra* note 70, at 201 (discussing Boutros Boutros Ghali's Agenda For Peace).

115. Art.2(4) of United Nations Charter reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

UN CHARTER, art. 2, para. 4. Art. 2(7) reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. at art. 2, para. 7. Chapter VII gives the Security Council the authority to respond to threats to peace. Art. 51 of Ch. 7 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.

Id. at art. 51. It also embodies a conservative understanding of national security and self-defense. See generally Abraham D. Sofaer, *Terrorism, The Law, And The National Defense*, 126 MIL. L. REV. 89 (1989) (discussing the view of self-defense embodied in UN Charter).

116. See generally *supra* Part II.

117. See *supra* text accompanying notes 40-43.

118. See Johnstone, *supra* note 31, at 41 (discussing the 1993 military intervention in Iraq and concluding that some of the "most vocal objections to the January 1993 strikes concerned . . . the lack of consultation among Council members and coalition partners"). Thus, the United

which were the product of unprecedented international cooperation, the United States failed to significantly consult with the United Nations as an organization or with its individual Member States.¹¹⁹ Russia was particularly critical of the U.S. failure to bring the issue before the United Nations.¹²⁰

Nor was the crisis unforeseeable enough to justify unilateral action by the United States without consulting the United Nations.¹²¹ While humanitarian crises may often be unforeseeable and require prompt and rapid responses, the crisis in question was entirely predictable.¹²² The United States had been aware of the rift between the PUK and KDP for years and had helped broker several cease fires between the two factions.¹²³ In addition, a report to Congress from 1991 predicted that a clash was likely between the PUK and KDP.¹²⁴ Given the history of this conflict, it was reasonable to consider the possibility that Baghdad could become involved. The United States had ample opportunity to bring the issues posed by this crisis before the United Nations for consideration of appropriate responses.¹²⁵ Possibly, a multilateral effort could have been

States failed to learn from past mistakes as its allies and UN colleagues had argued in the past for greater multilateralism and consultation when military intervention is considered. Unless the United States was responding to an armed attack as defined in Chapter VII of the UN Charter, enforcement issues should have been submitted to the Security Council.

After the fact, Great Britain introduced a resolution in the Security Council condemning Iraqi actions and demanding a withdrawal of Iraqi troops from Kurdish areas, which was opposed by Russia, China and France. *See Reid, supra* note 55. The resolution was not approved. *See Briefing # 146, supra* note 49. *See generally infra* Part V (discussing the disrespect the U.S. actions indicates for international law).

119. *See generally* Briefing #140, *supra* note 6; Briefing #141, *supra* note 9. The U.S. failure to consult with the Security Council stands in stark contrast to its conduct and rhetoric in a more recent dispute with Iraq. *See supra* note 56 (discussing recent Iraqi defiance and the U.S. reaction). Even more recent rhetoric by the United States suggests that this new approach to international law and the United Nations was short-lived. *See infra* Epilogue.

120. *See Reid, supra* note 55 (“[T]he Russian Mission to the United Nations criticized the United States for the attacks in Iraq and for extending the ‘no fly’ zones over northern and southern Iraq without consulting the [security] council.”).

121. *See Briefing #149, supra* note 39 (“Saddam . . . started the aggression . . . without any warning to the United States . . . There was a premium for a quick response by the United States . . .”).

122. *See Mitchell, supra* note 2 (“White House officials said the Administration began receiving intelligence information two weeks ago about possible Iraqi intervention in fighting between two Kurdish factions.”).

123. *See Briefing #138, supra* note 35 (discussing United States efforts to broker a cease-fire among Kurdish groups); Briefing #145, *supra* note 32 (There are “long held bitter divisions in the Kurdish community.”); Briefing #140, *supra* note 6 (The KDP and the PUK “have lost a major opportunity over the last five years to promote the interests of the Kurdish people.”).

124. *See STAFF REPORT ON KURDISTAN, supra* note 15.

125. *See Briefing #140, supra* note 6 (“We engaged in an intensive two days of diplomacy, consultations with our European allies, with partners in the area, in the Middle East, about what should be done . . .”). Thus the United States appeared to seek a multilateral approach initially. When support was found lacking, the decision was apparently made to act unilaterally. This

cobbled together given sufficient time for consideration of the issues and possible responses. If multilateral support was not forthcoming, perhaps this should have suggested to the United States that military intervention was inappropriate.¹²⁶

Contrary to assertions by the State Department, the U.S. intervention was not a valid enforcement action under UN Resolution 688.¹²⁷ The Resolution, adopted on April 5, 1991 in response to Iraqi repression of the Kurds, contains no enforcement mechanism and does not authorize multilateral or unilateral action against Iraq.¹²⁸ Resolution 688 condemns Iraqi repression of the Kurdish population and demands the cessation of such activities; however, it does not directly authorize military intervention and this suggests that the United Nations is responsible for its implementation and enforcement.¹²⁹ In addition, the Resolution clearly relates to independent Iraqi persecution of the Kurdish minority and not to Iraqi involvement at the request of a Kurdish nationalist group.¹³⁰ Resolution 688 can be viewed as a recognition by the United Nations of a right under customary international law (in this case under UN auspices) to take multilateral action when required to address grave humanitarian crises.¹³¹ This

suggests that the United States had sufficient time to consult with the United Nations, but simply did not like the responses it received from its allies and UN Member-States.

126. See *supra* text accompanying notes 103-104.

127. U.N. Security Council Resolution 688 states in part:

The Security Council, Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas . . . ;

Demands that Iraq . . . immediately end this repression . . . ;

Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

Decides to remain seized of the matter.

S.C. Res. 688, U.N. Doc. S/RES/688 (1991). "The United States has clear authority under U.N. Security Council Resolution 688." Briefing #140, *supra* note 6.

128. The State Department acknowledged this lack of an enforcement mechanism in response to a question by arguing that Resolutions "678 and 688 together . . . form the basis for the action." Briefing #141, *supra* note 9.

129. See S.C. Res. 688, *supra* note 127.

130. See Parsons & Rowley, *supra* note 5 ("[T]he fact that Iraqi troops were, in effect, invited undercuts the American justification for intervening to punish Hussein's forces because the goal of the U.S. and its allies is to protect the Kurds from being oppressed by Iraq, not by each other."); Steven Lee Myers, *U.N. Halts Deal for Iraq Oil Sales As U.S. Pledges Action on Attack*, N.Y. TIMES, Sept. 2, 1996, at A1 [hereinafter Myers, *U.N. Halts Deal*] ("There's some distinction here between invading into Kuwait and engaging in an internal dispute here with the Kurds," Mr. Panetta said."). This argument applies equally as strongly to the intention of UN Resolution 688, the focus of which is on Iraqi oppression, not Kurdish civil strife.

131. At least one commentator has taken such a position:

The argument for a right under customary law to enforce the no-fly zone rests on the evolving and controversial doctrine of humanitarian intervention. The doctrine holds that such nonconsensual intervention is legal in cases of extreme humanitarian need,

argument, relying on Resolution 688 to justify military intervention under certain conditions, is questionable under the best of circumstances, but in this instance the fact that the United Nations expressly declined to authorize military enforcement of Resolution 688 makes such an argument untenable.¹³²

In addition, the United States failed to consult with the United Nations regarding enforcement of Resolution 688. As the implementing body, the United Nations was ultimately responsible for enforcement of Security Council resolutions, including Resolution 688. As such, the United States, absent an express delegation of enforcement power from the United Nations, was obliged to seek authorization from the Security Council prior to any enforcement action.¹³³ Given the absence of any enforcement provisions in Resolution 688, the U.S. failure to consult with the United Nations was counter to the clear mandate of that Resolution. Unilateral enforcement, without even consulting the United Nations, was inappropriate and contrary to the language and intention of the Resolution.

U.S. reliance on Resolutions 678¹³⁴ and 687¹³⁵ was also misplaced. Resolution 687 established the cease-fire that officially ended the Gulf War hostilities. It explicitly incorporates the authorization of the use of

especially when the humanitarian crisis threatens international peace and security. Resolution 688, even if not enforceable in itself, could be used to support the customary law claim.

Johnstone, *supra* note 31, at 38 (addressing the 1993 military intervention).

132. See *id.* at 38–39 (“The weakness of this argument is that it treats as insignificant the fact that the Council specifically refrained from authorizing military action on behalf of the Kurds and Shiites.”) (addressing the 1993 military intervention).

133. See *supra* note 56 (discussing recent Iraqi defiance and the U.S. reaction). The U.S. eagerness in 1997 to consult with the United Nations regarding enforcement of Security Council resolutions regarding Iraq suggests a belated recognition that enforcement is properly channeled through the United Nations.

134. Resolution 678, adopted Nov. 29, 1990, states in part:

“*The Security Council, . . . Authorizes Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.*”

S.C. Res. 678, U.N. Doc. S/RES/678 (1990).

135. Resolution 687, adopted Apr. 3, 1991, states in part:

The Security Council, Recalling its resolutions 660 (1990) . . . ;

Affirms all . . . resolutions noted above, except as expressly changed below to achieve the goals of this resolution . . . ;

Demands that Iraq and Kuwait respect the inviolability of the international boundary

S.C. Res. 687, U.N. Doc. S/RES/687 (1991). The requirements of the resolution are concerned solely with territorial integrity, settlement of claims and monitoring of Iraqi arms. No reference is made to the protection of the Kurdish population or human rights.

force found in Resolution 678, which permitted the coalition to “use all necessary means” to restore Kuwait’s sovereignty.¹³⁶ Any such incorporation, however, retains the context given in Resolution 660: the initial UN Resolution addressing and condemning the Iraqi invasion of Kuwait.¹³⁷ Resolution 660 was concerned solely with restoring the sovereignty of Kuwait and does not mention the Kurds at all. There is nothing in Resolution 687 to justify applying the authorization for the use of force contained in Resolution 678 to Iraq’s repression of the Kurds within its boundaries. The U S suggestion that Resolution 687 authorizes unilateral enforcement by military intervention of any preceding or subsequent Resolution regarding Iraq is not supported by its text, logic, or the history of UN action in this area.¹³⁸

Use of force appears to be justified under Resolution 678 as a means only of restoring the territorial integrity and sovereignty of Kuwait.¹³⁹ Among the many justifications offered for its intervention, the United States failed to mention the restoration of the territorial integrity of Kuwait. Nor would there have been any justification for such a claim. Baghdad’s intentions, while nefarious, were clearly not aimed at the sovereignty of Kuwait. Thus, the U.S. intervention was not justified under Resolution 687 even if the authorization for use of force contained in Resolution 678 is implicitly extended to the terms of Resolution 687.¹⁴⁰ The specific terms of Resolution 687 demand only that “Iraq . . . respect the inviolability of the international boundary” between the nations and makes no reference to the Kurds, internal conflicts or other tangential

136. *Id.*

137. Resolution 660, adopted Aug. 2, 1990, states in part:

The Security Council,

Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq . . . ;

Condemns the Iraqi invasion of Kuwait.

S.C. Res. 660, U.N. Doc. S/RES/660 (1990). The Resolution is concerned solely with the invasion of Kuwait and the restoration of Kuwait’s sovereignty and territorial integrity.

138. See Johnstone, *supra* note 31, at 39 (discussing “[t]he legal argument for the military action . . . that Resolution 678 was suspended by Resolution 687 only insofar as Iraq remained in compliance with the terms of the cease-fire.”). The author goes on to suggest that “the silence in the [Security] Council after the [1993] military strikes suggest an attitude of passive acquiescence” justifying claims that the actions were in fact justifiable enforcement of UN Security Council Resolutions. *Id.* at 40–41. Even if this argument was valid in regard to the 1993 military intervention in Iraq, the widespread condemnation of the 1996 intervention, criticism of which was expressly vociferous from Russia, a Security Council permanent member, indicates that the same “passive acquiescence” argument fails as regards the September 1996 military action by the United States.

139. S.C. Res. 678, *supra* note 134; S.C. Res. 660, *supra* note 137.

140. S.C. Res. 678, *supra* note 134; S.C. Res. 687, *supra* note 135.

issues related to the regime of Saddam Hussein.¹⁴¹ Moreover, a justification of this sort could create a dangerous precedent as it would allow for unilateral military intervention by any UN Member State whenever Iraq failed to precisely comply with the requirements of the Gulf War cease-fire.¹⁴²

U.S. reliance upon the violation of the no-fly zones by Iraqi ground troops to justify the military intervention was similarly unwarranted. The zones were set up pursuant to the consensus of the Gulf War coalition.¹⁴³ Such a multilateral effort did not anticipate unilateral enforcement by way of military strikes or unilateral extension of the zones.¹⁴⁴ In addition, the no-fly zones, as is suggested by the term, have generally been understood to prohibit flights only, making them inapplicable to the movement of ground troops.¹⁴⁵ Any implicit UN acceptance of the validity of the zones was certainly contingent upon their multilateral nature, and, as a result, UN consent cannot justify unilateral U.S. enforcement of the zones, unsupported by the members of the coalition.¹⁴⁶

The specific legal and factual bases of the UN-based justifications for the intervention offered by the U.S. were never clearly enunciated by the United States. Looking to the express language of the resolutions, however, it is clear that under any formulation adopted by the United States, they did not contemplate or authorize unilateral military action in response to internal conflict in Iraq. No international boundary was violated by Iraq's actions in August and September and no legitimate threat to international peace and security was evident.¹⁴⁷ Iraq's aggression was not in direct violation of the conditions imposed on Iraq by the Gulf War cease-fire or even of the no-fly zones. U.S. reliance on past UN actions and statements regarding Iraq provided a convenient pretext for its unilateral intervention. They do not, however, stand up under careful scrutiny as legal grounds for unilateral military action or enforcement.

141. S.C. Res. 687, *supra* note 135.

142. See Johnstone, *supra* note 31, at 40 ("[This] position would leave to any state cooperating with Kuwait the right to take unilateral military action based on a particular violation of the cease-fire conditions, even though not all instances of noncompliance represent a threat to international peace and security").

143. See *Corrections*, *supra* note 24.

144. The United States acknowledged this in stating that "in point of fact, that 'no-fly' zone is a matter between the United States, France, the U.K., and those are the countries that are enforcing the 'no-fly' zone that have set it up." Briefing #141, *supra* note 9.

145. See Duffy, *supra* note 40, at 38-39.

146. See Johnstone, *supra* note 31, at 38.

147. S.C. Res. 678, *supra* note 134; S.C. Res. 687, *supra* note 135.

IV. NATIONAL SECURITY JUSTIFICATIONS: TRUMPING INTERNATIONAL LAW?

“[N]ational interest” has become so elastic and ambiguous a concept that its role as a guide to foreign policy is highly problematical and controversial. Most thoughtful observers of U.S. foreign policy have long since concluded that the “national interest” concept unfortunately lends itself more readily to being used by our leaders as political rhetoric for *justifying* their decisions and gaining support rather than as an exact, well-defined criterion that enables them to determine what actions and decisions to take.¹⁴⁸

The State Department’s reliance on U.S. national security as a justification for ignoring international law and intervening militarily in Iraq reflects an understanding of national security which is at odds with international law and custom.¹⁴⁹ National security issues and international legal principles necessarily conflict and overlap and the inherent tension between the two is especially evident in U.S. statements regarding the 1996 intervention in Iraq.¹⁵⁰ The national security of the United States as enunciated by President Clinton encompasses a range of issues which, if accepted at face value and understood as grounds for military action, serve to override any limitations international law places on a nation’s right to act unilaterally on the world stage.¹⁵¹ Even if such a view of national security was legitimate under international law, the specific national security justifications offered in support of the September 1996 intervention are unconvincing on their own terms.¹⁵²

The traditional definition of national security is predicated on self-defense, as is evidenced by the UN Charter’s prohibition on military intervention except in response to armed attack; however, this narrow view is giving way to a broader definition.¹⁵³ Without reference to the

148. HAASS, *supra* note 70, at 69.

149. See Briefing #140, *supra* note 6 (“[W]e have the compelling, vital national interests of the United States in our favor.”).

150. See, e.g., Sofaer, *supra* note 115 (indicating that terrorism is a national security issue which clearly impacts on international law).

151. In January 1993, President Clinton appears to have recognized this to a certain extent in stating, “there is no clear division today between what is foreign and what is domestic.” *US National Interest*, *supra* note 72, at 85.

152. See Donald M. Snow, *Peacekeeping, Peace Enforcement, and Clinton Defense Policy*, in CLINTON AND POST-COLD WAR DEFENSE 87, 90 (Stephen J. Cimbala ed., 1996) (“No important American security interests in any traditional sense are involved in any possible outcome in Kurdistan . . .”).

153. See AMOS A. JORDAN & WILLIAM J. TAYLOR, JR., *AMERICAN NATIONAL SECURITY POLICY AND PROCESS* 1 (1981); Sofaer, *supra* note 115, at 96 (seeking to expand the definition

constraints of international law and ignoring common understandings of self-defense, the Clinton administration defines U.S. national security to include humanitarian, economic, political, and military concerns.¹⁵⁴ This expansion of the concept of national security has blurred substantially the line between national interests and international concerns.¹⁵⁵ While national self-defense arguably should be and has been expanded to include acts short of armed aggression, accepting an ever-expanding definition of national security, with its concomitant ever-expanding justification for unilateral military action, goes too far.¹⁵⁶

In the post-Cold War world, a broad array of issues do impact on U.S. national security; however, the question remains which threats to national security warrant a military response.¹⁵⁷ In conjunction with a broad view of national security, the United States has outlined an expansive subset of interests which "can merit the use of our armed forces" and which include interests that effect "the character of the world in which we live."¹⁵⁸

of self-defense to allow military responses to terrorist threats); *supra* note 115 (quoting U.N. Charter, art. 2, ¶4 and art. 51); *supra* text accompanying notes 114-115.

154. This follows a pattern recognized by some scholars:

[I]n the current era the perceived sources of danger to national security have . . . significantly widened. There is new emphasis on subnational and transnational threats, such as the security challenges from subnational ethnic strife and transnational terrorism [and] . . . nonmilitary threats, such as that posed by Japan to the economic security of the United States and Western Europe.

MANDEL, *supra* note 101, at 29. See HAASS, *supra* note 70, at 69 (defining national security interests to include "strategic, political, moral, humanitarian, economic [and] environmental" threats); NATIONAL SECURITY STRATEGY, *supra* note 72.

155. See MANDEL, *supra* note 101, at 12-13

156. The very fact that the use of military intervention to respond to terrorism remains somewhat controversial underlines how the Clinton administration's definition of national security pushes the envelope of justifiable military action in defense of national security. See generally Sofaer, *supra* note 115.

157. See Weiss, *supra* note 70, at 199 ("Intervention is not a single phenomenon. It is generally understood as constituting the spectrum of possible actions intended to alter internal affairs elsewhere."); Otte, *Conclusions & Reflections*, *supra* note 65, at 201 ("[M]ilitary intervention is a highly inflexible instrument.").

158. Three basic categories have been recognized as meriting a military response:

The first involves America's vital interests, i.e., interests which are of broad, overriding importance to the survival, security and vitality of our national entity—the defense of U.S. territory, citizens, allies and economic well-being

The second category includes cases in which important, but not vital, U.S. interests are threatened. That is, the interests at stake do not affect our national survival, but they do affect importantly our national well-being and the character of the world in which we live. In such cases, military forces should only be used if they advance U.S. interests

The third category involves primarily humanitarian interests. Here, our decisions focus on the resource we can bring to bear by using unique capabilities of our military rather than on the combat power of military force.

Relying on this expansive array of national security concerns to justify unilateral military intervention in foreign nations would eviscerate international law. Military intervention would become a standard diplomatic tool. Nations must not be able to justify a greater role for military intervention in the domestic affairs of other States simply by re-defining and expanding the notion of national security.¹⁵⁹ International law places constraints on the military actions of nations and compliance with these constraints is crucial. Merely invoking "national security" cannot serve to excuse a nation from the strictures of its international legal obligations.

The specific national security concerns raised by the United States to justify the intervention remain unconvincing regardless of the validity of its overall national security strategy. The United States expressed concerns regarding the stability of petroleum reserves in the Middle East in justifying its military intervention, suggesting that Iraq sought to sabotage oil production.¹⁶⁰ This economic rationale is more sound in principle than others proffered, as the flow of foreign oil is crucial for the well-being of the United States. However, whatever the legitimacy of this national security argument in theory, there is little factual basis for it. Iraq's military actions were undertaken at the request of the KDP for the purpose of subjugating the followers of the PUK.¹⁶¹ While the undertaking was wrong and morally repugnant, it did not place the flow of oil to the United States in any danger. Iraq is situated in an oil-producing region of the world, but this cannot serve to paint all of its decisions and actions as inextricably linked to the flow of oil to the West. The petroleum scenario is precisely the kind of pretext for military action that poses a real threat to national sovereignty.¹⁶²

The claim that humanitarian concerns prompted the U.S. action is the most compelling of the various national security claims presented; however, except under the most liberal of definitions, it is difficult to view this as a true national security interest of the United States that justifies unilateral military intervention.¹⁶³ Repression of the Kurds has gone on for

NATIONAL SECURITY STRATEGY, *supra* note 72, at 12.

159. If all actions by nations are recast as domestic or national security undertakings, then respect for state sovereignty over domestic concerns would make international law obsolete.

160. See Briefing #148, *supra* note 39 ("We have vital national interests in the Middle East, in the secure flow of oil from the Persian Gulf, and we're going to act to defend our own national interests.").

161. See Parsons & Rowley, *supra* note 5.

162. See PHILLIPS & CADY, *supra* note 70, at 14. In fact the intervention succeeded in delaying the entry of Iraqi oil into the petroleum market as a UN food-for-oil-deal with Iraq was scuttled after the intervention. See *supra* text accompanying notes 54-55.

163. See generally *supra* Part II for a fuller discussion of the humanitarian justification for the intervention; Briefing #140, *supra* note 6 ("Someone has to protect the Iraqi Kurds. In this case, the United States has taken upon itself to act in our [sic] own interest to do so.").

years and has continued after the intervention, and yet the United States has been content to ignore it.¹⁶⁴ In addition, humanitarian crises continue throughout the world, and the United States has declined to intervene. Again, the fact that such a myriad of justifications was offered suggests that the humanitarian claim may be pretextual.¹⁶⁵

The protection of Arab allies from Iraq also appears to be a national security concern as defined by the Clinton administration.¹⁶⁶ This justification would likewise make a mockery of international legal constraints on military intervention. As mentioned above, such a vicarious or implicitly multilateral justification for force allows a single nation to violate the sovereignty of a foreign nation at will. Since military intervention undertaken to protect nations other than the intervenor by definition implicates international law and the rights of sovereign nations, such interventions must be undertaken in compliance with international law and after consultation with the nations of the world.¹⁶⁷ Iraq's actions were aimed at the Kurds.¹⁶⁸ Neighboring countries that the United States sought to protect never felt threatened.¹⁶⁹ In fact, the Council of Arab Foreign Ministers, representing the countries the United States viewed as threatened by Saddam Hussein's actions, denounced foreign interference in Iraq.¹⁷⁰ There is no foundation for the U.S. claim that it acted to forestall a threat to Iraq's Arab neighbors.

The most egregious expansion of national security is represented by the claim that "maintain[ing] a sense of peace and stability in northern

164. See generally *infra* Part I.

165. See Briefing #140, *supra* note 6 (listing U.S. justifications for the intervention).

166. See Briefing #146, *supra* note 49 ("[T]he core of U.S. strategic interests are: to protect Saudi Arabia and Kuwait."); Briefing #141, *supra* note 9 ("[O]ne of the reasons [for the intervention is] . . . to remove some of his military capability so that he doesn't pose as great a threat to his neighbors.").

The State Department's argument that the intervention was justified by the U.S. need to protect Iraq's neighbors from aggression is another attempt to define U.S. interests as coextensive with the interests of the international community as a whole. The near absence of support for the intervention from allies and countries neighboring Iraq thus severely undermines any such justification for the U.S. actions. If the very nations whose sovereignty the United States sought to protect, condemn the intervention, it is difficult to view that intervention as an expression of any general international will to action. Again, multilateralism is the only assurance that intervention to remedy an international problem truly addresses a situation deemed important, relevant and international in scope by the nations of the world. See generally *supra* Part II.

167. See *supra* text accompanying notes 102-103.

168. See *supra* text accompanying note 5.

169. See Briefing #141, *supra* note 9 ("Have we picked up a particular signal that Saddam Hussein is marching off in a direction to cross Iraq's international borders? I can't confirm that."). In fact the United States was concerned generally with the threat Iraq posed to regional stability and this concern was unrelated to the events of August and September of 1996. See *id.* ("The bottom-line answer . . . is Saddam is a standing threat to his neighbors."); Briefing #147, *supra* note 39 (demanding that Iraq "cease to be a threat regionally").

170. See *Arab League Condemns US Attack*, AGENCE FRANCE-PRESSE, *supra* note 43.

Iraq" is a national security interest of the United States.¹⁷¹ This claimed national security interest threatens to obliterate entirely the distinction between international issues and domestic matters. If national security is defined this broadly and serves as a valid basis for unilateral military action throughout the world, then virtually any military intervention by the United States anywhere in the world could be justified under international law.¹⁷² The Clinton administration expressly has recognized a right to the unilateral use of force in defense of national security interests.¹⁷³ Coupled with a definition of national security that incorporates the peace and stability of foreign nations and regions, this policy on the proper use of force would permit intervention at will in the name of any vague or tangential national security interest, ignoring the strictures of international law and custom. In addition, the U.S. military intervention did not in fact create or restore peace and stability in northern Iraq.¹⁷⁴

Claims of national interest cannot be used automatically to shield from scrutiny actions which would otherwise be unacceptable under international law. The breadth of issues and circumstances covered by the Clinton administration's definition of national security is awesome. In combination with a willingness to back up these interests with military force, national security would render international law wholly irrelevant to the United States in virtually all matters of international significance. Utilized this way, the Clinton administration's domestic policy conflicts directly with the international agreements and obligations of the United States.

V. THE UNITED STATES AND INTERNATIONAL LAW: ARROGANCE, IGNORANCE, AND AMBIVALENCE

Under generally accepted notions of international law, the U.S. military action against Iraq was unjustified and likely unjustifiable. The missile strikes were militarily ineffective against Saddam Hussein and politically damaging only to the United States itself. In the end, after being criticized roundly for its actions, the United States appeared to simply

171. See Briefing #140, *supra* note 6

172. See generally NATIONAL SECURITY STRATEGY, *supra* note 72; Les Aspin, *Challenges to Value-Based Military Intervention*, Keynote Address at the Managing Chaos Conference (Nov. 30 1994), in U.S. INST. OF PEACE, KEYNOTE ADDRESSES FROM THE MANAGING CHAOS CONFERENCE 1 (Feb. 1995). Both documents define national interests broadly and neither document contains a single reference to international law in their discussions of when the United States may intervene militarily abroad.

173. See *supra* text accompanying note 158.

174. See generally *supra* Part I.

walk away from the continuing difficulties in northern Iraq.¹⁷⁵ The United States felt little obligation either to seek international support prior to the intervention or to offer a sound legal justification for its conduct after the fact. Instead, the Clinton administration was willing and able to take unilateral military action against Iraq.¹⁷⁶ This may indicate that international law is practically ineffective insofar as it seeks to proscribe unilateral intervention in sovereign nations;¹⁷⁷ however, the international outrage which followed the intervention demonstrates that the strictures of international law are not wholly devoid of meaning. It is also interesting to note the significant, if less than convincing, efforts that the United States made after the fact to justify the intervention in terms of international law and national security as well as its dramatically different approach to Iraq in a recent weapons inspection crisis. In the end, the intervention in Iraq failed, and it is perhaps best understood in that context: as a U.S. foreign policy blunder.

International law and custom may have succeeded in creating an environment in which even those countries that flout its precepts feel obliged to seek legitimacy through them. In its initial explanations for the intervention, the United States proclaimed that the Gulf War coalition remained intact and served as the basis for the intervention.¹⁷⁸ Thus, the United States sought to cloak the action in the mantle of multilateralism, seemingly recognizing that multilateral intervention in the affairs of a sovereign nation is more defensible than unilateral action.¹⁷⁹ This suggests that the United States did have some concern for international opinion and hoped to be seen as acting legitimately and lawfully. The cracks in the coalition were too obvious to ignore, however, and soon a myriad of justifications for the actions was offered.¹⁸⁰ The sheer breadth of the defenses again is indicative of a real desire and felt need by the United States to be

175. See generally *supra* Part I.

176. See Briefing #147, *supra* note 39 ("Any further action that the United States takes, if we need to protect our interests, we'll take it unilaterally."). See generally NATIONAL SECURITY STRATEGY, *supra* note 72.

177. See Weiss, *supra* note 70, at 195.

178. See Briefing #140, *supra* note 6.

179. See Shahin P. Malik & Andrew M. Dorman, *United Nations and Military Intervention: A Study in the Politics of Contradiction*, in *MILITARY INTERVENTION: FROM GUNBOAT DIPLOMACY TO HUMANITARIAN INTERVENTION* 161, 165 (Andrew M. Dorman & Thomas G. Otte eds., 1995) ("[T]he end of the Cold War has seen an upsurge in humanitarian intervention and concern for human rights matched to a continuing Great Power desire to have UN support to justify their actions to their own population."). See generally *supra* Part II.

180. See Briefing #140, *supra* note 6.

seen as acting appropriately and legally.¹⁸¹ The United States ignored international law, but refused to admit as much.¹⁸²

Efforts by the United States to justify the intervention under international law are susceptible to further interpretation. Far from indicating underlying respect for international law or recognition of its importance, the feebleness of the multi-faceted and inconsistent rationales offered to justify the intervention may signify a fundamental and deep-rooted disrespect of, and disregard for, international law by the United States. Its belated and unpersuasive efforts to justify the intervention under international law indicate that the United States failed to consider international legal rules and principles prior to acting. Instead, the State Department sought to manufacture a plausible rationale for the intervention after the missile strikes. International law clearly was an afterthought in the U.S. decision to intervene militarily in Iraq. In addition, the explanations which were offered by the State Department to justify the intervention were inconsistent and unconvincing.¹⁸³ This suggests that despite widespread criticism of its actions, the United States was wholly unconcerned, both before and after the intervention, as to whether its actions were in accordance with international legal norms and customs.

Because both the intervention in question and a similar intervention in 1993 have not resulted in any substantial repercussions for the United States, there exists the possibility that a precedent for unilateral military intervention has been set. Over time this precedent may coalesce into customary international law. If this occurs, nations other than the United States could justifiably intervene militarily in the affairs of other

181. See Oscar Schacter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 123 (1986) ("[F]or virtually every use of force, the responsible state has sought to justify it under the accepted [United Nations] Charter rules."); Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 272 ("[S]tates . . . scramble to portray their uses of force in terms that are legally justifiable.").

182. Some of this ex post facto concern for legal niceties was no doubt prompted by the criticism of the international community at large and allies in particular; however, since much of the criticism was grounded in beliefs regarding international law and custom, the conclusion remains valid.

183. See Briefing #140, *supra* note 6 (listing rationales for the intervention). U.S. uncertainty, ambivalence and ignorance regarding the intervention's validity under international law is illustrated by the following statement made during a State Department briefing:

I think you'd have to look at 688 in conjunction with, I believe 687, if I have it right. There are several UN Security Council resolutions that are relevant here. I'm sorry, 678, which says that all necessary means to uphold and implement Security Council resolutions should be employed to restore peace and security. That's a paraphrase. That's not a direct quote. But 678 and 688 together, I think, form the basis for the action we took.

Briefing #141, *supra* note 9.

nations. U.S. unilateralism thus bodes ill for the application and enforcement of international legal rules of intervention and customary respect for sovereignty.¹⁸⁴ If statements made in the aftermath of the intervention are any indication, criticism by other nations has not prompted the United States to abandon unilateral military intervention as a foreign policy option.¹⁸⁵ The precedent set by this action, especially with regard to the massive extension of the concept of national security, would permit unilateral military intervention in a myriad of situations. If law consistently yields to raw military and political power, then the validity of the international doctrine of non-intervention is necessarily undermined.

It may be, however, that the United States, commonly identified as the sole remaining world superpower, is a singular exception to the norms of conduct and compliance under international law.¹⁸⁶ The power and influence of the United States may create a kind of superpower prerogative allowing it to ignore strictures which other nations must follow. This might explain the failure of the United States to offer, even after the fact, a coherent legal justification for its actions.¹⁸⁷ It might also explain why much of the language used to explain the intervention suggests a marked ambivalence regarding international law.¹⁸⁸

While it may seem anti-climactic, the political and military failure of the intervention also suggests that U.S. unwillingness to consider and follow international legal norms stems in part from an inability to formulate a consistent and rational foreign policy or national security

184. While the Gulf War and UN resolutions regarding Iraq created a unique context which arguably legitimizes, in part, actions against Saddam Hussein, U.S. statements regarding unilateral military intervention and reliance on national security interests suggest that such a context is mere happenstance and not a prerequisite for unilateral military action. *See infra* text accompanying note 199; Epilogue (suggesting that U.S. ambivalence toward international law is ongoing).

185. Events which unfolded in fall of 1997, however, suggested that the stinging criticism which followed the 1996 intervention may have made the United States more hesitant to brazenly exercise its military might on the world stage, at least as regards Iraq. *See supra* note 56 (discussing recent Iraqi defiance). However, in acknowledging the authority of the UN Security Council to enforce its resolutions against Iraq, the United States again reserved the right to act unilaterally. *See* Steven Erlanger, *Gulf War Alliance: 6 Years Later, Seams Fray*, N.Y. TIMES, Nov. 5, 1997, at A6 ("[I]t's harder and harder to sustain support as memories of the gulf war fades [sic]. And because people know at the end of the day they can count on the United States to defend *the world's interests* versus Iraq . . ." (emphasis added)). This seeming moderation of the U.S. stance on Iraq was not evident in a still more recent crisis with Saddam Hussein. *See generally infra* Epilogue.

186. *See* Weiss, *supra* note 70, at 195.

187. Most of the justification came out over time and in response to challenges from journalists and foreign nations. No single comprehensive statement justifying the attack was issued by the State Department.

188. Justifications under international law are ambiguous and intermingled with national security justifications and simplistic generalization regarding international law. *See* Briefing #140, *supra* note 6; Briefing #141, *supra* note 9.

strategy, a problem which has plagued the Clinton administration. The superficiality and inconsistency of the justifications proffered by the United States suggest that the initial decision to intervene was hasty and ill-considered: arising from an ideological or political knee-jerk reaction.¹⁸⁹ Once the costs began to increase in terms of international condemnation and the possible risks of continued military engagement, the United States may have recognized that it had no vital interest in the area. Such a haphazard national security and foreign policy strategy has been seen by many analysts as a hallmark of the Clinton administration.¹⁹⁰ This analysis also explains the inability of the State Department to formulate a consistent, thoughtful legal justification for the intervention.

The shortcomings of the Clinton Administration's foreign policy generally are in turn linked to U.S. ambivalence and ignorance regarding international law.¹⁹¹ This might explain why an intervention which failed to achieve any of the stated U.S. goals, strengthened Saddam Hussein, and incurred virtually unanimous disapproval among the nations of the world, was undertaken at all. Coupled with the arrogance that comes from

189. At least one country suggested that President Clinton ordered the intervention with an eye toward the upcoming U.S. elections. See Robert J. Caldwell, *Confrontation in Iraq: Saddam Sends a Message to Clinton, Dole*, SAN DIEGO UNION-TRIBUNE, Sept. 22, 1996, available in 1996 WL 12565972 (reporting that France viewed the United States action as politically motivated).

190. See Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2432 (1994) (discussing the confusion and mistakes which define U.S. policy in Haiti); Michael Dobbs, *CAMPAIGN '96: Despite Risks, Intervention Boosts Clinton*, WASH. POST, Oct. 14, 1996, at Sec. A. ("There has been a trial-and-error quality about the Clinton administration's approach to foreign policy . . .").

In light of recent developments this trial-and-error quality is even more apparent. In a recent confrontation between the United States and Iraq, the United States consulted at length with the UN Security Council and sought express authorization for any enforcement action. See *supra* note 56 (discussing recent Iraqi defiance). If, as this note argues, the 1996 intervention was unwarranted and mishandled, then these events suggest that the United States may have learned how properly to proceed as a result of the earlier fiasco. When asked about developments in Iraq, former Secretary of State James Baker, in an apparent reference to the failed 1996 U.S. intervention, commented: "[Y]ou don't lob a few tomahawk missiles into downtown Baghdad . . . then you really would lose your coalition." *James Baker, Morning Edition* (National Public Radio, Nov. 5, 1997) (available in <www.npr.org/programs/morning/archives/971105.me.03.ram>). However, the latest crisis in Iraq indicates that any moderation in the U.S. willingness to act unilaterally has dissipated. See *infra* Epilogue.

191. The inconsistency of the justifications offered for the intervention and the muddled understanding and explanation of international law exhibited by the State Department further evidence the shortcomings of U.S. national security and foreign affairs policies. See Briefing #140, *supra* note 6.

Another indication of U.S. ambivalence regarding the United Nations is its failure to pay its UN dues. See Barbara Crossette, *The 7-Year Gnaw: Iraq Sees Sanctions Backers Straying*, N.Y. TIMES, Jan. 23, 1998, at A6 [hereinafter Crossette, *7-Year Gnaw*] ("Washington is crippling the United Nations financially by not paying its dues, a measure of the low priority the Clinton administration has put on the need for international support there, many United Nations officials and diplomats say").

economic and military dominance, the U.S. failure to clearly define national priorities and strategies may result in arbitrary exercises of power lacking clear justifications or goals. Viewed in this light, the U.S. intervention in Iraq becomes easier to explain and understand.¹⁹² Saddam Hussein is an enemy and he did something the United States did not like. For various reasons, from Iraq's constant battles with UN weapons inspectors to its humanitarian record and the international community's increasing willingness to lessen sanctions against Iraq and allow it to sell oil, the United States decided it was once again time to send a message to its favorite bad guy.¹⁹³ The legal justifications were simply meant to assuage the United Nations and foreign nations, they did not reflect reality. This also explains the U.S. failure to follow-up its military strikes when it became clear that its declared goals had not been achieved. If the intent was to send a message to Saddam to behave himself, the United States could confidently declare its action a success once the cruise missiles found their mark, without reference to the plight of the Kurds, the status of the oil market, or Iraqi cooperation with the United Nations.

192. See Schork, *supra* note 51; Scott Peterson, *US Move to Protect Gulf Allies Shows Stateless Kurds Play Second to Oil*, CHRISTIAN SCIENCE MONITOR, Sept. 6, 1996, at 7 (indicating that U.S. actions are wholly inconsistent with U.S. claims regarding to the Iraqi Kurds).

193. See *supra* text accompanying note 1 (quoting President Clinton); Briefing #141, *supra* note 9 ("The idea is . . . to send a message to Saddam Hussein—a very direct message—that the aggression that he embarked on could not go unanswered."); Briefing #142, *supra* note 49 ("The response we chose . . . was meant . . . to send [Saddam] a message."); Myers, *U.N. Halts Deal*, *supra* note 130 ("[S]enior officials insisted that the Administration's focus would remain on punishing Mr. Hussein.")

Thus, the cruise missile attack was simply another element of the erratic long-term U.S. policy towards Iraq. The Iraqi actions against the Kurds merely served as a convenient pretext for a military action intended to further general U.S. policy objectives in the Middle East. See Briefing #140, *supra* note 6 ("The targets selected by the Pentagon were designed to make it hurt, to make Saddam hurt; to devalue part of his military machine; to increase, we hope, the lack of confidence that is clearly present in many parts of the Iraqi leadership, both the military and the civilian leadership."); Briefing #141, *supra* note 9 (In detailing U.S. demands of Iraq following the intervention, the State Department stated that "[Saddam] continue[d] to drag his feet in the face of the various demands that the international community has laid out."). The following exchange at a State Department Briefing illustrates the indistinguishability of the U.S. military intervention in September 1996 from overall U. S. policy in Iraq:

Q: What is the increased threat that is causing the United States to react in such a way? . . .

MR. BURNS: [O]ur efforts against him is a long-term effort. It's already been underway for five years, and if it takes another five years to keep it in place, we will . . . Look at the airstrikes that we launched against him last week. Why did we choose the air defense targets in the south? We chose that in order to cripple him militarily, so that in the future he could not engage in any offensive military capability, and that was the reason for extending the 'no-fly' zone in the south.

Briefing #148, *supra* note 39.

The international outrage prompted by the U.S. unilateral military intervention resulted in large part from the perception of U.S. arrogance and unfettered use of force in handling the situation as opposed to legitimate opposition to the substantive need for action.¹⁹⁴ Given the foreseeability of the humanitarian crisis in northern Iraq and the magnitude of Kurdish suffering, a truly international response likely could have been put together to address the situation in northern Iraq. A multilateral response in all likelihood would have been more responsive, effective, and ultimately successful than the unilateral intervention undertaken on September 3, 1996.¹⁹⁵ Had it truly been interested in resolving the crisis and addressing the humanitarian and political issues raised by Saddam Hussein's actions in northern Iraq, the United States likely could have achieved its goals multilaterally, under UN auspices and in accordance with international law.

International law did not act as an effective bar to unilateral self-interested action by the United States; yet, to the extent that widespread condemnation of the unilateral intervention prompted the United States to discontinue its military adventure or caused the Clinton administration to alter its foreign policy in future dealings with Iraq and other nations, the intervention and its aftermath indicate that the principles of international law are relevant to relations between States and do impact upon the conduct and reputation of nations. If, however, the Clinton administration learned nothing from its failed missile strikes against Iraq and the intervention serves as a model for future unilateral U.S. military action, then the influence of international law, at least as it relates to the world's sole remaining superpower, will be severely undermined.

EPILOGUE: CONTINUED IRAQI DEFIANCE IN CONTEXT

Since the 1996 U.S. military intervention, Iraqi defiance of the United States and the United Nations has grown more frequent and pronounced. Saddam Hussein ordered UN weapons inspectors of U.S. nationality to leave Iraq in October and November of 1997.¹⁹⁶ As of this writing in

194. Russian "Foreign Minister Yevgeny Primakov accused the United States of usurping the UN Security Council by taking on the role of the world's policeman." AGENCE FRANCE-PRESSE, Sept. 4, 1996. The State Department provided a perfect example of U.S. arrogance in the international arena. See Briefing #140, *supra* note 6 ("The United States reserves the right to take whatever action necessary in any situation."); see also Erlanger, *supra* note 185 (The United States frequently purports to speak for and represent, by its unilateral actions, the views, opinion and policies of the entire world.).

195. Given the fact that the intervention actually strengthened Iraq, almost any response other than what occurred would have produced better results. See generally *supra* Part I.

196. See *supra* note 56 (discussing continued Iraqi defiance).

February 1998, Iraq was unilaterally setting deadlines for the termination of UN sanctions, denying UN weapons inspectors access to numerous sites in Iraq, and all but daring the United States to attempt another military solution.¹⁹⁷ In response to Iraq's defiance and ongoing campaign of invective against the United States and the United Nations, the United States deferred to a quiescent UN Security Council through the end of 1997. Short of statements of support for the mission of the UN Special Commission, the Security Council has been unable or unwilling directly to confront Iraq over its intransigence. Over time, the ineffectiveness of the Security Council led a clearly frustrated Clinton administration to issue threats of unilateral U.S. military action against Iraq.¹⁹⁸

Thus, the recent U.S. stance toward Iraq, while initially suggesting a new-found respect for the United Nations and international law generally, has again begun to reflect the arrogance and ambivalence regarding international legal norms that was evident in 1996. Recent pronouncements indicate that the Clinton administration would "prefer" to act in conjunction with the United Nations.¹⁹⁹ This suggestion that acting in accordance with international law is merely a preference speaks volumes about the U.S. view of international legal institutions and regimes generally.²⁰⁰

The most recent crisis in Iraq relates solely to UN weapons inspections.²⁰¹ The situation is potentially far more serious than prior squabbles with Iraq and seemingly demands a response from the international community. In comparison to the events of 1996, the situation is relatively unambiguous and uncluttered. There is no specific humanitarian crisis and Iraq has made no recent aggressive moves which might pose a threat either to international peace and security generally or other Arab nations in particular. The only matter in question is Iraqi compliance with UN requirements on weapons inspections. This fact should make the case for an aggressive international response to Iraq much stronger. The fact that the United States remains unable to persuade former Gulf War coalition

197. See Crossette, *7-Year Gnaw*, *supra* note 191, at A6 ("President Hussein declared that Iraq was in a state of jihad - holy war - with the United States.").

198. See Tim Weiner, *Clinton's Warning to Iraqis: Time for Diplomacy May End*, N.Y. TIMES, Jan. 22, 1998, at A6 (Clinton stated "[w]e have to be prepared to move alone.").

199. See *id.* (Clinton stated, "I far prefer the United Nations But if they really believe there are no circumstances under which we would act alone, they are sadly mistaken.").

200. U.S. arrogance regarding international law was highlighted by Secretary of State Albright's remark, in regard to a diplomatic trip, that "I am not going anywhere to seek support . . . I am going to explain our position." Steven Lee Myers, *Albright Says U.S. Could Act Alone Against Baghdad*, N.Y. TIMES, Jan. 29, 1998, at A6 [hereinafter Myers, *Albright Says U.S. Could Act Alone*]; see Crossette, *7-Year Gnaw*, *supra* note 191 (discussing the U.S. failure to pay its UN dues).

201. See generally Myers, *Albright Says U.S. Could Act Alone*, *supra* note 200.

members and allies to support its call for a military response to Iraq is even more striking than its analogous failure to muster support in 1996.²⁰²

With the current situation in Iraq, the United States is in a dilemma of its own making. The U.S. failure to gain UN support for a military response to Iraqi transgressions of express UN mandates might suggest that the United States is justified in acting on the world's behalf by unilaterally enforcing UN resolutions and international legal norms.²⁰³ This view of the current impasse would, however, ignore the role of U.S. unilateralism in bringing about the current stalemate. If U.S. recklessness in intervening militarily in Iraq in 1996 shattered the Gulf War coalition and destroyed Arab trust in the United States, then the present inability of the United States to muster support for its position within the international community is unsurprising. Saddam Hussein is fully aware of the demise of the coalition and the general hesitance in the international community to follow the U.S. lead. His increasing displays of contempt for the United Nations are directly related to the perceived weakness of the coalition and United States' inability to persuade other nations to support its policy toward Iraq. Under this analysis, the United States is faced with an international crisis of inaction that its arrogance and willingness to defy international opinion by acting unilaterally helped to bring about.

Past conduct by the United States in Iraq, specifically in 1996, has helped to create a situation in which the United Nations is paralyzed and the Gulf War coalition is nonexistent. As a result, the United States may feel it has no choice but to act, with or without the sanction of international law or the United Nations. By acting unilaterally the United States would confirm the worst fears of the international community about U.S. arrogance and disrespect for international law. By acting within the confines of the UN Security Council, the body responsible for enforcing UN resolutions, and refraining from intervening in Iraq, the United States may allow Saddam Hussein blatantly to disregard international law. While following the lead of the Security Council might bolster U.S. standing in international legal circles, continuing Iraqi defiance would surely weaken both the UN and international law generally. The continuing U.S. inability to gain support for its current stance toward Iraq is, at least in part, a consequence of its prior unwillingness to abide by international legal norms. At least in this context, then, international law does matter and

202. Ironically, humanitarian concern for the long-suffering Iraqi civilian population underlies much of Arab hesitation to support a military response. See Douglas Jehl, *On The Record, Arab Leaders Oppose U.S. Attacks on Iraq*, N.Y. TIMES, Jan. 29, 1998, at A6.

203. See *supra* Part II (discussing the blurring of the line between unilateralism and multilateralism suggested by U.S. claims that its unilateral action is in the interests of the international community).

does have real world consequences, even for the world's only remaining superpower.

In the end, the United States in 1996 may have set a precedent for unilateral action which made future international consensus on Iraq impossible and may now require further unilateral military action by the United States. This paradox perfectly illustrates the dangers posed by unilateral intervention to the international legal order; unilateralism begets mistrust and suspicion of the intervening nation, which makes future cooperation and consensus unlikely, which in turn increases the likelihood of stalemate when the next crises arises. The frustration of stalemate leads again to unilateral action.