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RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS

Limits of Law, Prerogatives of Power: Interventionism After Kosovo. By Michael J. Glennon. New York; Hampshire, England: Palgrave, 2001. Pp. x, 239. Index. $49.95; £35.

For the past half century, the international law regime regarding the use of force seemed to take as fundamental the UN Charter's flat and absolute ban on states using force, except in self-defense, against other states. NATO's 1999 bombing campaign to stop the ethnic cleansing by the Milošević regime of Serbia in its province of Kosovo put into question the viability of that Charter-based system. Milošević was directing his bloodletting against inhabitants of his own nation; no one seriously argued that the nations of NATO had to bomb Serbia into submission as a form of literal self-defense. Moreover, the Security Council did not authorize the bombing campaign, and while the campaign's proponents could attribute this failure to crass Russian and Chinese agendas, the absence of Security Council resolutions of authorization even further removed the use of force from colorable legal justification under the Charter.

Some commentators justified this use of force by an expansive doctrine of humanitarian intervention, but even those approving the campaign acknowledged the gap between such a doctrine and the original intent of the Charter.[1] In *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, Michael Glennon of the University of California, Davis, Law School starts by acknowledging this gap and proceeds to conduct "a critical, top-down reassessment of the whole use-of-force edifice" (p. 4). His direct and eminently readable study goes far beyond identifying the irreconcilability of the Kosovo bombing campaign and the Charter. Rather, Glennon effectively scoffs at what the structure of Charter-based use-of-force law has become, labeling it as a fifty-year doctrinal experiment that no longer works, and taking a sharp logical axe to the many attempts at propping up that venerable structure.

Glennon's challenge, further elaborated in his writings since the attacks of September 11, 2001,[2] has major implications both for use-of-force law, in general, and for the United States' own legal stance on the use of force, in particular. If the central post–World War II legal structure designed to contain the dogs of war has been undermined to the point of crumbling, just what confines them now? More specifically, if the United States can make its own decisions on the use of force without constraint by Charter-based law, does anything legally restrain it other than the calculations of *realpolitik*? Glennon adopts the heretical approach of following these lines of questioning to their full limit. His direct, no-nonsense analysis succeeds in stripping away his readers' comforting illusions that the Charter edifice is sufficiently intact to be easily defended. That analysis deserves full elucidation, after which we see how the Charter-based regime, rather than lapsing as Glennon suggests, might be seen as continuing on in a somewhat adapted form.

The starting point for Glennon's substantive analysis is that the Kosovo campaign violated the flat textual prohibition in Article 2(4) of the Charter against "the threat or use of force against the territorial integrity or political independence of any state." He reviews Oscar Schachter's studies[3]

[1] W. Michael Reisman, *Kosovo's Antinomies*, 93 AJIL 860 (1999) ("NATO's action in Kosovo did not accord with the design of the United Nations Charter"); Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AJIL 847, 850 (1999) (acknowledging as "coherent" the "anti-intervention argument" that "the bypassing of UN authority is seen as a devastating constitutional blow to the authority of the Organization, and to the most basic prohibition inscribed in the international law governing recourse to force").

[2] Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. LAW & PUB. POL. 539 (2002); Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, JAN. 28, 2002, at 24.

[3] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 128–29 (1991).

of the Charter's travaux préparatoires—in which Schachter found no exception to the prohibition against nondefensive force, in general, and certainly none for humanitarian intervention, such as in the Kosovo campaign. Moreover, Glennon shreds (as having "scant support") the argument of some commentators[4] that, by a backhanded method, the Security Council "authorized NATO to use force against Yugoslavia" (p. 32).

Glennon rejects the arguments set forth in *Humanitarian Intervention* (particularly its second, 1997 edition) by Fernando Tesón, who used examples of state practice to contend that humanitarian intervention was consonant with the Charter.[5] Glennon debates Tesón over such central examples as the 1971 intervention in West Pakistan (later Bangladesh), the 1979 intervention in Uganda, the 1979 intervention in the Central African Republic, and the United States' 1983 intervention in Grenada. Each, Glennon argues, has problems as a precedent, with respect both to the intervening states' nonhumanitarian motives and the reluctance of responsible officials to cite humanitarian intervention as a justification.

Glennon's challenge to the Charter's use-of-force regime continues with his argument that it has failed, in practice, to achieve its goal. Citing a study of sixty-five international conflicts that produced a total of eleven million deaths between 1945 and 1996, he rejects the theories of Louis Henkin, Thomas Franck, and others that the often pacific contemporary interactions of states are a reflection of a viable, Charter-based legal regime.[6] It is illusory, he argues, to try to fit within the obsolete categories of Charter-based law the extent and diversity of either the use or nonuse of force. The Charter has simply lost its relevance, as (in Glennon's judgment) the Kosovo intervention makes readily apparent.

In an even more controversial position, Glennon challenges the legal justifications for the Security Council's authorizations to use force to deal with intrastate violence. In this context, he surveys authorizations "beginning with Southern Rhodesia and continuing with legally questionable interventions in South Africa, Iraq, Somalia, Rwanda, and Haiti" (p. 114). It is not that Glennon disputes the morality or, in most instances, even the wisdom of the interventions. He shares the common horror at "stomach-wrenching atrocities" (p. 141) such as the "mass slaughter of the Tutsi population" in Rwanda, where "the dead numbered 500,000 to one million" (p. 119). But he rejects the conflation of the consensus against genocide with the legal issue of how, in view of the authorized interventions, Article 2(7)'s principle of nonintervention "within the domestic jurisdiction" could still be deemed to be honored—other than in the breach.[7]

Glennon acknowledges that the bloodiest problem of violence today occurs not between organized states, but at less organized levels, ranging from ethnic warfare within failed nations, to terrorism. And he acknowledges the emerging pattern of response by regional organizations and alliances, acting usually (though not always, as in the case of Kosovo) under some degree of Security Council authorization, as in Bosnia, Sierra Leone, Tajikistan, and the former Soviet Union. While recognizing that there is some merit to this "adaptivist" approach (p. 123)—an important concession—he nevertheless sees in it a breakdown of the Charter-based regime because the Security Council, a "creature" of its Charter (p. 126), has been intervening in ways that its creators (that is, states) "would never have agreed to" (p. 135).

In place of what Glennon sees as a defunct Charter-based regime, he does envision the "eventual establishment of a true legalist system to govern use of force" (p. 11). In his judgment, however, that time is decades away, for he sketches vividly an assertedly unbridgeable clash of viewpoints: between the West as supporter of the use of force when necessary, and Russia and China, which fear it; and also between developed nations, which generally might employ humanitarian intervention as a means of bringing order to a chaotic Third World, and undeveloped nations, which view such intervention as smacking of colonialism.

[4] "[T]he United States is not amiss in claiming some measure of legitimacy from Security Council resolutions . . . ." Ruth M. Wedgwood, *Nato's Campaign in Yugoslavia*, 93 AJIL 828, 829 (1999).

[5] *See also* SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996).

[6] *See, e.g.*, LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979); Thomas M. Franck, *Lessons of Kosovo*, 93 AJIL 857, 859 (1999) (commenting on Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, FOREIGN AFF., May/June 1999, at 2).

[7] Various scholars have presented strong arguments that the contemporary meaning of "domestic jurisdiction" must and should reflect the evolution of international law since the time of the Charter. While Glennon respects these arguments, he argues against them on several levels, ranging from an adamantine emphasis on original intent to the unsoundness of an evolving interpretation of the Charter on this particular matter. "The limits explicitly imposed by Article 2(7) . . . constitute express proscriptions. To argue for power to override express proscriptions is, in a very real way, to argue against the rule of law" (p. 128).

Until a new "legalist system" emerges, Glennon credits in practice "the same solution had in Kosovo: Humanitarian intervention by preexisting regional coalitions of democracies" (p. 198), but he does not consider such intervention to be pursuant to a regime of international law based on the Charter (except, in effect, in name only). Thus, as he comments on the Kosovo campaign: "Clearly the *Charter* was breached, but *international law*? Using international law's traditional methods, no one can say" (pp. 180–81).

In newer writings published in the wake of the September 2001 attacks—and while the Bush administration audibly contemplated scenarios in which the use of U.S. force helps topple Saddam Hussein in order to preempt the Iraqi threat of using weapons of mass destruction—Glennon has argued that the UN Charter's proscription of preemptive force can no longer be interpreted, within a contemporary context, as barring such preemptive actions.[8] He therefore asks both commentators and officials today "to make way for the new without remaining wedded to the old" (p. 205). That is, he urges the development of a new international law on the use of force—law based on what states do now and would agree to do in the future, not on an outmoded, Charter-based doctrinal structure based on a superseded vision of the world from half a century ago.

Limits of Law, Prerogatives of Power presents its arresting thesis elegantly and concisely. Glennon deploys a varied array of legal tools with relentless intellectual honesty. He coolly and objectively credits its foreign legal assessments as often being more valid than U.S. ones. He bluntly declares, "There is no question that Russia and China were correct in arguing that NATO's bombing violated the Charter" (p. 29). He reminds us that when told by British Foreign Secretary Robin Cook that the lawyers were having difficulty coming up with justifications for the Kosovo intervention under the Charter-based system, Secretary of State Madeleine Albright responded, "Get new lawyers" (p. 178). Glennon embeds his legal analysis in the history of international relations and the sociology of cultural differences about force. The tone is conversational, and the pace is brisk. Readers seeking a more abstrusely technical treatment can follow, if they choose, the ample footnotes to studies on subjects ranging from the classical Roman doctrine of desuetude, to Web sites on contemporary legal theory.

[8] *See supra* sources cited note 2.

Not many readers will take issue specifically with Glennon's core point: the absence of a smooth legalistic fit between the Kosovo campaign and the UN Charter. In the judgment of this reviewer, however, there is a danger of allowing a hard case (Kosovo) to make bad law—or, in this instance, to nullify a whole body of good law. The Charter marked an enormous and beneficial development beyond the open-ended customary law of war of an earlier era, which allowed some states to view as lawful the "use of force to assert legal rights, to settle disputes."[9] Force is still sometimes used to resolve disputed territorial claims—from Indonesia's occupation of East Timor, to Argentina's invasion of the Falkland Islands, to Iraq's ill-fated invasions of Iran in 1980 and of Kuwait in 1990. But the Charter regime seems effectively to have delegitimated such irredentist acts, very few of which have succeeded in the long run. "In reality, the rules of the game have changed dramatically in the last half-century. The liberty to venture into war, and generally to employ inter-State force, is obsolete."[10]

Glennon is correct that contemporary state practice hardly fits neatly into the Charter's original intent. Still, in both the General Assembly and the Security Council, discourses about the use of force within the framework of the Charter have proceeded over the past half century with some value. The Third World has articulated its expanded exceptions to the Charter in order to permit assistance in conflicts of national liberation, just as the United States has articulated its own preferred expanded exceptions in order to permit reprisals against terrorism (for example, Libya in 1986, and Afghanistan and Sudan in 1998), and also to advance other security interests (Panama, Iraq, and Haiti just in the last dozen years). The resulting legal structure has some of the flaws that Glennon identifies, but few seem to want a reversion to what, before the Charter, appeared in practice to have sunk virtually to the law of the jungle.

One possible problem with Glennon's analysis is that there may be more potential than he acknowledges for developing a sound legal system for collective security, involving roles for both the Security Council and the regional organizations, by evolution from the original institutions and

[9] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 250 (1963).

[10] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 93 (2d ed. 1994).

concepts in the Charter-based system.[11] By creating the Security Council and recognizing a role for regional collective-security organizations, the Charter launched something that amounts to more—legally—than a spot contract between states. The Security Council and regional organizations, as international institutions established with considerably open-ended expectations, contribute to the evolution of law and derive credibility in their collective-security role not just from states' original consent to the Charter itself, but also from states' continuing participation and support.[12] Accepting, as Glennon suggests, that international law founded upon the Charter sometimes seems these days almost as much patch as fabric, it is nonetheless true that patching by institutionalized processes that have independent legitimacy, as well as their original foundation in the Charter, amounts to something more than the lapse and desuetude of the Charter system.

The animosity of Russia and China toward the NATO campaign in Kosovo has given way, since September 11, to at least a temporarily renewed recognition of common security interests among the great powers. Suppose that this concern about security continues and that severe problems, whether potential or actual, stimulate further development of the international regime on the use of force. For example, suppose that the collapse of other states or the actions of internally genocidal regimes threaten to bring whole populations to the fate of Rwanda; or that peaceful national governments suffer replacement by ones with aggressive and destabilizing intentions, as in the former Yugoslavia; or that governments with hostile, aggressive attitudes like those of Iraq show evident capability and intent to unleash weapons of mass destruction. Under such circumstances, the international community may well shift its views toward approval of more interventionist and preemptive approaches to the use of force than the Charter initially envisaged a half century ago. The overpowering suspicion among weaker states regarding the actions of stronger ones—a suspicion that underlay the Charter's narrow view of legitimate use of force—would yield to an acceptance of regionally organized intervention, under the approval of the Security Council, as more legitimate than any alternative.

Recurrent patterns of legally respectable use of force would gradually lead to adjustments in the rules of the past without the clear-cut demise of the Charter-based system.[13] Rather, over time, the adaptation of the existing system would maintain the inherited set of Charter-based institutions as still the best available basis for world discourse about the legitimate use of force. Even the substantive rules regarding the occasions for use of force would still be recognizable, albeit perhaps in an evolved form. Force would continue to be illegal when used without broad multilateral international authorization (generally from the Security Council, though sometimes, as in Kosovo, from other sources), or when used for other than essentially defensive and order-promoting purposes to counter threats to the peace. The shift would be in the definition of what constitutes a threat to international peace and security. These threats—which would provide the basis for collective decisions on the use of force—would increasingly be recognized to include both the internal bloodletting that generates regionally destabilizing refugee streams or ethnic tensions, as Serbia's actions did, and the development of weapons of mass destruction by states with demonstrated aggressive tendencies, as in the case of Iraq. The Charter's original, narrow notion of what constituted a threat to the peace would thereby be broadened, as Glennon ably demonstrates, but the use of force would still be confined to essentially order-promoting and hence security-preserving purposes, and would not extend to humanitarian purposes as such. Meanwhile, the great advance made and codified by the Charter—delegitimating the use of force for state self-aggrandizement, for the resolution of disputes having no collective-security element, and for other purposes unrelated to

[11] *See, e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000).

[12] *See e.g.*, John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?* 35 TEX. INT'L L. J. 129 (2000); Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM J. TRANSNAT'L L. 201 (1994). Events and politics of the last decade (as with the 1994 Somalia intervention) have reduced the legitimacy accorded domestically in the United States to the use of force having only Security Council approval, but have increased such legitimacy when NATO has also given its approval. Charles Tiefer, *Adjusting Sovereignty: Contemporary Congressional-Executive Controversies About International Organizations*, 35 TEX. INT'L L. J. 239, 254–57 (2000); Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 14–15 (1999).

[13] Other commentators who have recently pursued a similar line of analysis include, in these pages, Jonathan Charney in his 1999 editorial on the Kosovo intervention. *See* Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AJIL 834, 838–39 (1999).

threats to international order—would continue, as modified, to be respected.

The rest of the world would better tolerate the actions of Western states, and of the United States in particular, if those states stretched, but acknowledged, the existing system of the use of force in this way rather than simply acting as if there were no legal constraints at all on the use of their weaponry. It is one thing for the United States, as in the Kosovo campaign, to transgress the Charter's original rules—as Glennon usefully clarifies that it did—while at the same time also relying upon other multilateral sources of legitimacy. It is quite another thing for the United States to claim freedom from well-established standards when taking military actions solely because it deems them to be in its own self-interest.

Whatever may be the potential for such an adaptive and evolutionary path, *Limits of Law* illuminates the powerful contradictions in today's law on the use of force, and engages its readers in tough-minded analysis of the import of those contradictions. Has the world drifted so far from the UN Charter of 1945 that the old rules continue only as figments of diplomatic double-talk? Do the de facto practices today depart so much from the norms as to render Charter-reading legal advisers the priesthood of a defunct cult? Glennon's analysis may well come to be seen as one that disclosed the necessity of substantial replacement—at least for large components of the original Charter-based regime regulating the use of force, if not for the regime's whole set of institutions and principles. By the same token, his analysis has prepared the way intellectually for the reoriented legal regime that must eventually emerge—by one process or another—to handle the changing problems and perils of collective security.

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Law and War: An American Story. By Peter H. Maguire. New York: Columbia University Press, 2000. Pp. xii, 421. Index. $30.

The destruction of the World Trade Center, President George W. Bush has repeatedly declared, constituted an attack not only on the United States, but on all states and peoples. It was not, therefore, simply the equivalent of an act of war; it was a crime against civilization. What follows, the president has further affirmed, is that all states should support the efforts of the United States to hunt down and punish the perpetrators; for in so exerting itself, America is acting on behalf of the international community, as well as its own national interest. In brief, the president sees the United States acting in this instance as enforcer of the global order's basic norms and as executor of raison d'état. By the same token, in pursuance of the national and the human interest—that is, in making war on terrorism—the president sees the United States adhering to the letter and spirit of the laws governing the initiation and conduct of war, thereby distinguishing itself from its enemies.

As Peter Maguire demonstrates in his well-timed book, *Law and War*, this most recent effort to surround U.S. war making with an aura of legality has a long and decidedly problematic pedigree. For most of American history, he argues, this emphasis on legality distinguished the United States from the leading European states, which insisted on visualizing war as an incident of sovereignty, or in Clausewitzian terms, as the continuation of politics by other means—means that have no natural limits. For Maguire, the exemplar of the worldly European perspective was the Second German Reich before its extinction in the convulsive aftermath of World War I.

German and American perspectives first clashed nakedly at the 1898–99 Hague Conference, convened at the instance of that determined autocrat, Czar Nicholas II, to promote peace. The Germans and other Europeans proved willing to endorse rules—on subjects such as flags of truce, the treatment of prisoners, and armistice—designed to mitigate gratuitous suffering in the event of war. But "American statesmen wanted to go further . . . [and] reform statecraft itself"[1] by securing agreement on compulsory recourse to arbitration —in the event that interstate disputes could not be resolved by diplomacy. Exemplifying the American elite's imagination of itself and of what distinguished the United States from the great powers of Europe, Joseph Choate, the chief U.S. representative at the conference, spoke of war as "an anachronism, like dueling or slavery, something that international society had simply outgrown" (p. 49). Although the U.S. proposal would have encompassed only those "differences" that were "not of a character compelling or justifying war," it was still too much for the Germans, who believed that "treaties to limit arms and provide for 'neutral' arbitration of disputes negated [Germany's] most

[1] CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE 15–16 (1975) (quoted in *Law and War* at p. 48).