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The State That Acts Alone: Bully, Good Samaritan or Iconoclast?

Christine Chinkin*

Abstract

The article considers what is understood by the concept of unilateral state action. Through three examples — threatened unilateral sanctions for the cheaper acquisition of medical drugs, Kosovo and East Timor — it examines a range of unilateral acts and suggests that there is no dichotomy between unilateral and multilateral action. Rather the two merge into each other. Many acts are only unilateral in a narrow sense that disregards the disaggregation of the contemporary nation state and what masquerades as collective action or inaction may be manipulated by a state with a particular interest or take on the issue, be dictated by a single strong actor through the threat or use of the veto, or by a single state taking the lead. Such an analysis of unilateral and multilateral acts undermines the task of refining the legal framework. However the article closes with some suggestions with respect to enhancing the transparency and accountability of multilateral decision making.

The concept of unilateral state action has become increasingly fashionable but correspondingly elusive in terms of categorization. How, for example, does a unilateral act differ from the narrower category of unilateral declarations? Are different forms of unilateral action simply a sub-set of treaty law, or of enforcement and implementation, or of countermeasures and coercive action? Is there any sensible way of conceiving unilateral acts as a coherent category, or is the expression an academic construction to impose an artificial order upon widely divergent activities? Can there be any sensible legal regime that encompasses all state activities that can be termed unilateral? The International Law Commission's Special Rapporteur on Unilateral Acts concluded from his review of practice, doctrine and jurisprudence that 'substantive unilateral acts are diverse in their nature and that they may be understood to fall within several categories at the same time, though it is also difficult

* Professor of International Law, London School of Economics and Political Science. This paper was originally delivered as the lunchtime address at the symposium.

to pin them down and place them in a specific category.’¹ He controversially proposed that the International Law Commission should simplify its task by eliminating from its consideration all unilateral political acts, unilateral acts of international governmental organizations and ‘those attitudes, acts and conduct of States which though voluntary, were not performed with the intention of producing specific effects in international law’.² Other members of the International Law Commission disagreed with this proposal.

This contribution attempts to unravel what is encompassed by the concept of unilateral acts by looking at three news items from over the last year.³ The first is a feature article called ‘Hanging on to the Profits from AIDS’.⁴ It is from *The Guardian*, a United Kingdom broadsheet and, I think, captures well some of the British media sentiments about United States’ unilateral actions. It is about South Africa where, it is reported, the AIDS disaster is now overwhelming: 22 per cent of pregnant women in South Africa are HIV positive and at current rates of infection the country’s life expectancy will drop from 59 to 40 within ten years.⁵ Drugs are available that can reduce transmission through pregnancy and reduce the chances of infection, for example for raped women. South Africa also has the highest level of reported rapes in the world. But the drugs are formidably expensive, patented by pharmaceutical companies that are concerned to protect their profits and shareholders’ interests. The South African Government has attempted to address the crisis through legislation to facilitate its acquisition of the drugs more cheaply by allowing its Department of Health either to purchase compulsorily the rights to manufacture the drugs, or to buy them from the country that produces them, under licence, most cheaply. A number of concerned corporations commenced legal proceedings in the United States. The State Department, we are told, has given its assurance that ‘all relevant agencies of the US government . . . have been engaged in an assiduous, concerted campaign to persuade the government of South Africa to withdraw’. Preferential trade treatment for South Africa has been withdrawn and the government told that the United States will impose sanctions if it persists in these attempts to stop the spread of AIDS.

As presented, this is the classic instance of unilateral sanctions threatened by a government to impose its will. It is the act of the bully — the state that imposes its own standards and priorities, disregarding the interests and needs of others and using its power to pursue its goals through threats of deprivation of values of the targeted

¹ V.R. Rodriguez-Cedeno, Special Rapporteur, *First Report on Unilateral Acts of States*, A/CN.4/486, 5 March 1998, Ch. VI, para. 166.

² International Law Commission, *Report* (1998), Ch. VI, para. 119.

³ Each of the examples raises numerous other issues of international law and policy. They are deliberately simplified to illustrate the diversity and range of unilateral acts.

⁴ Monbiot, ‘Hanging on to the Profits from AIDS’, *The Guardian*, 5 August 1999, 18.

⁵ Cf. the African Growth and Opportunity Act, HR 434, 106th Congress, 1st Session, s. 19 where the United States Congress finds that ‘The HIV/AIDS crisis has reached epidemic proportions in sub-Saharan Africa, where more than 21,000,000 men, women and children are infected with HIV’.

community. Of course it goes further in the denial of fundamental human rights including the right to life⁶ and the human right to health,⁷ not in any indirect, collateral way as was warned against by the International Committee on Economic, Social and Cultural Rights⁸ but directly and explicitly. It also disregards one of the stated priorities of the World Health Organisation of which the United States is a member.

In light of this, the terms of the African Growth and Opportunity Act are surprising. For example:

Sec. 3 Statement of Policy:

Congress supports economic self-reliance for sub-Saharan countries, particularly those committed to –

(3) the eradication of poverty; and

(4) the importance of women to economic growth and development.

Sec. 4 Eligibility Requirements:

A sub-Saharan African country shall be eligible to . . . receive assistance or other benefits under this Act if the President determines that the country does not engage in gross violations of internationally recognized human rights. . .

The South African commitment to providing affordable access to AIDS drugs fits within the criteria of section 3. This is not an instance of a clash of values, of different understandings of human rights.⁹ It is rather a clash of views on how the objectives should be achieved and on the control of corporate profits. It is an illustration of how the United States considers it appropriate to grade other states' human rights records as a condition for its external actions, but not its own to provide a yardstick for measuring the effects of its sanctioning behaviour. From the viewpoint of unilateralism there is a further perspective. It is only through the fictitious construct of a monolithic state that the threat of sanctions is presented as a unilateral act of the state rather than as a multilateral corporate response. The state's threats are made internationally to promote subnational, sectorial commercial interests that are allowed to masquerade as national interests. State behaviour is influenced by a range of subnational interests that constantly interlock, reinforce or conflict with each

⁶ Human Rights Committee, General Comment 6, Article 6 (16th Session, 1982), UN Doc. HRI/Gen./1/Rev.1 at 6 (1994) accords a broad meaning to the right to life that includes measures to increase life expectancy.

⁷ International Covenant on Economic, Social and Cultural Rights, 1966, Art. 12; Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art. 12; Convention on the Rights of the Child, 1989, Art. 24.

⁸ The relationship between economic sanctions and respect for economic, social and cultural rights, General Comment 8, UN Doc. E/C.12/1997/8, 5 December 1997. See also GA Res. 53/141, 8 March 1999, Human Rights and unilateral coercive measures, which urges states to refrain from adopting or implementing any unilateral measures . . . impeding the full realization of the rights set forth in the Universal Declaration of Human Rights. . . '

⁹ Section 18 is entitled 'Assistance from United States Private Sector to Prevent and Reduce HIV/AIDS in Sub-Saharan Africa'. In January 2000 the United States highlighted the need for multilateral responses through presiding over the Security Council meeting on the situation in Africa — the impact of AIDS on peace and security in Africa.

other. Their exponents exploit the state decision-making mechanisms for pursuit of their own ends, but where the outcome is the imposition of sanctions, other states often do not follow. Accordingly sanctions tend either to apply unilaterally to the detriment of the sanctioning state's own interests, or they are ineffective and thus become a symbol of the sanctioning state's weakness and isolation.¹⁰

The second example is Kosovo where I query what actions are most accurately understood as unilateral. Between 1987 and 1989 Milosevic unilaterally destroyed the autonomous status of Kosovo and Montenegro under the shadow of the central government of the still existing Yugoslavia. These successes provided the power base and rhetoric for his subsequent actions both elsewhere in Yugoslavia and in Kosovo. Despite Kosovo being identified as the defining political issue for the Serb¹¹ the opportunity to take a collective stand, at the Dayton peace negotiations in 1995, was lost because of the importance of Milosevic to that process. The omission of Kosovo from the agenda at Dayton led almost immediately to a worsening of conditions there and ultimately to the 1998–99 crisis.¹² The Contact Group, guided by the United States, brought the Serbian authorities and the leadership of the KLA to Rambouillet and urged acceptance of their 'non-negotiable principles' for the future of Kosovo under threat of NATO military reprisal for rejection¹³ — another example of bullying.¹⁴ After both sides initially did reject the proposals, the KLA was persuaded to accept them. In light of the Serbian refusal and the reality that there was to be no collective Security Council intervention, the stage was now set for the entry of the good Samaritan against the person Madeleine Albright had tagged the Balkan 'schoolyard bully', Milosevic. The NATO bombing of Yugoslavia in the name of humanitarianism¹⁵ commenced in a reappropriation of the powers ceded to the Security Council when the institutional structures failed to authorize the desired behaviour through the threat of veto.¹⁶ But what would the man going from Jerusalem to Jericho have felt had the Samaritan, instead of putting him on his own

¹⁰ Huntington, 'The Lonely Superpower', 78 No. 2 *Foreign Affairs* (1999) 35 at 39.

¹¹ See e.g. Hagen, 'The Balkans' Legal Nationalisms', 78 No. 4 *Foreign Affairs* (1999) 53.

¹² S. Troebst, *Conflict in Kosovo: Failure of Prevention? An Analytical Documentation, 1992–1998*, European Centre for Minority Studies No. 1 (1998).

¹³ Weller, 'The Rambouillet Conference on Kosovo', 75 *International Affairs* (1999) 211.

¹⁴ A contender for a unilateral declaration with binding effect is the assurance given to Mikhail Gorbachev in return for his agreement on the reunification of Germany that NATO would not be extended further East. After this assurance was broken, further ones were made — that NATO would be a strictly defensive organization with no military mission and that Russia would be a full participant in European security matters: Mandelbaum, 'A Perfect Failure: Nato's War against Yugoslavia', 78 No. 5 *Foreign Affairs* (1999) 2 at 7. These assurances might well come within the understanding of unilateral declarations in the *Nuclear Tests* cases (*Australia v. France; New Zealand v. France*), ICJ Reports (1974) 253 at paras 43–6; ICJ Reports (1974) 457 at paras 45–9.

¹⁵ There are many statements of this. One example is the statement of the United Kingdom Permanent Representative in the Security Council, 24 March 1999, that the use of force was 'directed exclusively to averting a humanitarian catastrophe'. Cited, *Legality of the Use of Force (Yugoslavia v. United Kingdom)*, Oral Pleadings, ICJ Doc. CR/99/23, para. 17.

¹⁶ United Nations Charter, Art. 27(3). The veto is an example of a unilateral act which is entrenched in the United Nations Charter and for the exercise of which no reason or justification need be given.

beast and taking him to an inn for safety, merely thrown stones at the thieves from his donkey as he passed safely by, which then precipitated murder and sexual abuse because there was no one present to offer the victim effective protection where and when it was needed?¹⁷ In the face of the ensuing onslaught of human rights violations, thousands of individuals expressed their autonomy and identity by fleeing from Kosovo, although it must be noted that they did not go in significant numbers to the lands of the Samaritans. Acceptance or rejection of refugee status is jealously guarded as another unilateral act, despite the expression of common legal standards through the Refugee Convention. The right to control the movement of people into a territory appears more strongly preserved than the movement of missiles out.

The third news item is a 'sad, confusing, ugly [Asian] story'.¹⁸ In 1975 the people of East Timor made the expression of self and identity that is inherent in the concept of unilateralism through their claim to self-determination.¹⁹ They looked to the rules of international law for protection and recognition.²⁰ Recognition is another paradigmatic unilateral act, but one with collective effect. Through recognition existing members of the international community invite a newcomer that looks like them to join their club and thus to benefit from the guarantees of membership, including those of collective security. But of course recognition for East Timor was not forthcoming except from a handful of insignificant actors. Its separate identity was rejected, its entitlement to become a full member of the international community was denied and the unilateral act of force by Indonesia, in defiance of the rules of that club, prevailed. Where bullies can offer sufficient inducements to other actors, or have access to values those others seek,²¹ their actions are condoned. No authoritative arena has been available to challenge the legality of this act because of Indonesia's unilateral assertion of its sovereignty through its refusal to accept²² the jurisdiction of the International Court of Justice.²³

But the East Timorese refused to accept this collective denial of entitlement and

¹⁷ Luke 10, vv. 29–37.

¹⁸ P. Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families* (1998) 165 (about Rwanda).

¹⁹ This was a claim to self-determination in its least controversial setting, independence from European colonial rule; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970; International Covenant on Civil and Political Rights, Art. 1; International Covenant on Economic, Social and Cultural Rights, Art. 1.

²⁰ R. Clark, 'The "Decolonisation" of East Timor and the United Nations Norms on Self-Determination and Aggression', in *International Law and the Question of East Timor*, ICCR/IPJET (1995) 65.

²¹ In 1978 Australia recognized the *de facto* annexation of East Timor into Indonesia and in 1979 accorded it *de jure* recognition. This opened the way for the negotiation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Gap Treaty).

²² In the words of the International Court of Justice: 'Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make.' *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, ICJ Reports (1984) 392 at paras 59–60.

²³ *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1990) 90.

instead maintained a long, solitary and bloody struggle until at last the original, legal unilateral assertion of independence was sanctioned through the popular consultation of 30 August 1999, 24 years after their first claim.²⁴ The violence that followed shows again the fragmentation of the state that militates against the concept of a unitary actor. While the Indonesian Government formally upheld its commitment under the 5 May Agreements to convey the election result to its Parliament as the first constitutional step 'necessary to terminate its links with East Timor',²⁵ militia groups, in which elements of the security forces were involved, looted, murdered and destroyed property with impunity within East Timor.²⁶ No Samaritan appeared, despite any humanitarian expectations engendered by Kosovo, just as the liberation of Kuwait was not to be repeated in East Timor in the early 1990s.²⁷ Instead there was an insistence that intervention was impossible, even in a United Nations non self-governing territory, without Indonesia's invitation (preferably), but at the least, consent. This was deemed necessary to preserve Indonesian sovereignty but the allocation of tasks in the 5 May Agreements — UNAMET to organize and conduct elections, Indonesia to have primary responsibility for peace and order — were consequential upon the earlier collective failure to take responsibility for this non self-governing territory and to allow *de facto* Indonesia's unilateral annexation to prevail. No checks or guarantees were demanded from Indonesia. When internal security collapsed in the wake of the results of the popular ballot, there was no back-up. If NATO could be reinvented to operate in Yugoslavia effectively to determine the outcome of a civil war, why could ANZUS not have been reinvented in East Timor to protect against the despoliation of a territory and the terrorizing of a people asserting their international rights? It is only just over a decade ago that the United States invoked the ANZUS treaty against the unilateral actions of New Zealand with respect to the latter's nuclear-free policy: the treaty can be invoked against its parties, but not against an external actor bent on destruction, as in the case of NATO.

²⁴ SC Res. 1246, 11 June 1999.

²⁵ Agreement between Indonesia and Portugal on the question of East Timor; Agreements between the United Nations and the Governments of Indonesia and Portugal regarding the modalities for the popular consultation of the East Timorese through a direct ballot and security arrangements, 5 May 1999, S/1999/513, Annexes I to III.

²⁶ Report of the High Commissioner for Human Rights on the human rights situation in East Timor, September 1999, <http://www.unhchr.ch>

²⁷ S. Marks, 'Kuwait and East Timor: a Brief Study in Contrast', in *International Law and the Question of East Timor*, *supra* note 20, at 174.

The unilateral actions of Indonesia have for 24 years received excessive deference from the organs of the United Nations, including the International Court of Justice²⁸ and the Security Council.²⁹

It seems pertinent to ask whether the Samaritan would have survived in history if on a subsequent journey he had encountered another dying person and had walked by on the other side. Or, to return to Kosovo, if he had then failed to prevent the recovered survivor from inflicting acts of vengeance on the thieves. It seems that humanitarian intervention is a restricted notion, called up in situations where it is relatively cheap, is against a militarily weak nation, operates in a location that is accessible and strategically important, where public emotion is in favour and the intervention does not interfere with other political and economic objectives.³⁰ States apparently wish to be able to justify unilateral intervention on humanitarian grounds, where the claim is contextually feasible, but not to undertake a duty to offer such assistance when objective criteria are satisfied. This is a limited Samaritan, and way of policing the world.

In both Kosovo and East Timor there have been numerous other unilateral acts, including *inter alia* the actions of brave and committed individuals from international governmental and non-governmental organizations (including within Serbia and Indonesia, and the peacekeeping forces) who have monitored events, lobbied governments, protested, tried to shield people from harm, to negotiate safe passage for individuals and to prevent the onslaught of violence. There have also been those who have raped, murdered and otherwise violated whole populations.

These three events provide diverse examples of unilateral acts. To me they illustrate the incoherence and slippery nature of the concept and the complexity of attempting to unravel the inconsistencies in the various strands. They also demonstrate their richness and role in the functioning of international law.³¹

Unilateral acts may be committed for a variety of motives, as are collective acts. These include for example, reprisal, revenge or punishment for prior illegal acts (real or imagined); to protect a threatened people; to impose a world view upon dissenting states in the name of stability, protecting markets or human rights; to deny access to something (typically weapons) possessed by the sanctioning state; to create a

²⁸ In the *Case Concerning East Timor* the International Court of Justice held that it could not exercise jurisdiction because 'in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent' (1990), ICJ Reports 90 at para. 35.

²⁹ SC Res. 1264, 15 September 1999 was not agreed until Indonesia announced its readiness to accept an international peacekeeping force in East Timor. In the body of the resolution this is termed a 'request'. External military intervention was a high-risk strategy for Indonesia in the context of its own transition to democracy, another issue that had to be factored into the collective decision making.

³⁰ These non-legal criteria are suggested by Ronald Steel, 'East Timor isn't Kosovo', *New York Times*, Sunday 12 September 1999, WK 19. For suggestions of the applicable legal criteria see Nanda *et al.*, 'Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia — Revisiting the Validity of Humanitarian Intervention under International Law — Part II', 26 *Denver Journal of International Law* (1998) 827.

³¹ Skubiszewski, 'Unilateral Acts of States', in M. Bedjaoui, *International Law: Achievements and Prospects* (1991) 221.

bargaining chip; to indicate strength and commitment; to create a legal obligation; to generate change of international policy and thus new law; to remain aloof from a regime negotiated by the majority of states;³² or to assert an entitlement and identity against all the odds. Some of these are commendable, some not and they are not necessarily seen the same way by all involved. There is not always agreement as to what role is being undertaken on any given occasion: bully or Samaritan, leader or sheriff.³³ The perceptions of the different actors may be opposed depending upon their positioning, cultures and the lenses through which they view events. In the words of Huntington, ‘the benign hegemony, however is in the eye of the hegemon.’³⁴ Unilateral acts are committed by those who are powerful enough and are programmed to assert their demands, those that have access to sufficient resources, or are willing to discount the supposedly shared values of the international system.³⁵ They may be the actions of those who created the rules but then find that those rules have evolved in ways that they never intended. On the other hand the actors may be those that consider that the rules have never worked to their advantage, that they remain at the periphery of the international system and have nothing to lose by disregarding the rules and going it alone,³⁶ or, most tragically, those who are desperate but still hang on to the belief that the rules will eventually operate in their favour and that the collective decision must be for their benefit, or that someone will come to their assistance.

There is no dichotomy between unilateral and multilateral acts, rather they merge into each other. Many acts are only unilateral in a narrow sense that disregards the disaggregation of the contemporary nation state, although there can be no assumption that broadening the understanding of the decision-making processes in this way is more democratic. What masquerades as collective action or inaction may be manipulated by a state with a particular interest or take on the issue, be dictated by a single strong actor through the threat or use of the veto, or by a single state taking the lead. Indeed some analysts have defined the apparent collective action in the Gulf in 1990–1991 not as ‘the new world order’ but rather as the high water mark of a unipolar system. In the words of Krauthammer:

True multilateralism involves a genuine coalition of coequal partners of comparable strength and stature . . . What we have today [1991] is pseudo-multilateralism: a dominant great power acts essentially alone, but embarrassed at the idea and still worshipping at the shrine [icon] of

³² E.g. the United States’ refusal to sign the Rome Statute for an International Criminal Court, July 1998 or the United Nations Convention on the Law of the Sea, 1982 even after the renegotiation of Part XI in 1994 to accommodate many of its concerns.

³³ The parable of the sheriff in a ‘standard American morality play’ appears in Reisman, ‘Coercion and Self-Determination: Construing Charter Article 2 (4)’, 78 *AJIL* 642 (1984). See also Huntington, ‘The Lonely Superpower’, *supra* note 10.

³⁴ Huntington, *ibid.* at 42.

³⁵ E.g., North Korea’s unilateral withdrawal from the International Covenant on Civil and Political Rights.

³⁶ Acts of secession in defiance of the principle of *uti possidetis* might be said to come within this category, e.g. Bangladesh.

collective security, recruits a ship here, a brigade there and blessings all round to give its unilateral actions a multilateral sheen.³⁷

Actions against Iraq have shifted from pseudo-multilateralism to pseudo-unilateralism, while in Kosovo the reverse has been the case. In common, the dominant actor takes it upon itself as competent to act as interpreter, determiner of the application and execution of the rule, and, where it can, as the filter through which public perception of the events is shaped. Such acts provide no viable, objective standards for predicting future behaviour as was discovered by the people of East Timor. They also tend to lack the potential for transformative action. They typically do not address the underlying situation in the targeted states nor provide the modalities for change but are dictated primarily by the interests of the actors. Even where purportedly acting with humanitarian motives it is as defined by the interveners not the assisted, and consequential tasks such as reconstruction and peace-building also proceed not necessarily in accordance with the latter's wishes.³⁸ The Samaritan did not assume to control the future life of the man whom he had assisted; he gave money and went on his way. It is inherent in the concept of humanitarian intervention that a more lasting presence will be needed, but there can be no guarantees of the victim's ready acquiescence.³⁹

Such an analysis of unilateral acts defies the notion of articulating any limiting framework. I will therefore conclude with some general comments.

First in any community of autonomous individuals there will be disagreement within the group and where mechanisms for dispute-resolving break down, or do not exist, the only response might be to go it alone. This does not necessarily weaken or signify the end of the normative order. Indeed if enough others come round to the same way of thinking, the group's expectations may evolve and change accordingly. The United States' and United Kingdom's withdrawal from UNESCO and the ILO did not cause those agencies to collapse and some internal scrutiny ensued. Similarly, the United States has never been an active member of human rights regimes such as the Inter-American Convention on Human Rights and various United Nations human rights treaties. These have evolved effectively in its absence and perhaps have even benefited from the space accorded by United States' absence. The Law of the Sea Tribunal is also beginning to do so. What is to say that the International Criminal Court will not do likewise?

Second, it is too easy for states to ignore the obligations that remain undiminished

³⁷ Krauthammer, 'The Unipolar Moment', 70 No. 1 *Foreign Affairs* (1991) 23 at 25.

³⁸ Mandelbaum, *supra* note 14, points out that the Albanians were fighting for independence while NATO insisted on Kosovo's autonomy within national boundaries. Therefore NATO intervened in a civil war, defeated one side but embraced the position of the side it had defeated.

³⁹ The Kosovo Liberation Army 'nearly derailed' negotiations with NATO and the United Nations about the nature of the force that will replace the KLA and its access to weapons. The KLA did not share Western officials' view that the Kosovo Protection Force will be civilian and succeeded in negotiating acceptance of many of their demands; Carlotta Gill, 'Kosovo Rebel Leader Basking In Warmth of Deal's Reception', *New York Times*, 22 September 1999, A8.

by unilateral action, as well as responsibilities that flow directly from those actions. These include the legal obligation to ensure and respect human rights in undertaking such acts; the responsibility to ensure that the actions taken are appropriate to achieve the objectives sought; the responsibility to ensure the reliability of information acted upon;⁴⁰ the responsibility of governments to seek ways of balancing the domestic demands of non-state actors against the state's international obligations; the responsibility to attempt non-coercive methods of dispute settlement.

Third, what perhaps most undermines the international normative order is the blurring of unilateral and multilateral action in ways that lets the United Nations off the hook by allowing it to abdicate its obligations under the Charter. Increasingly the role of United Nations agencies has been reduced to one of peacekeeping/humanitarian assistance during, or in the aftermath of, crisis, sometimes tragically delayed (East Timor, Rwanda), sometimes confusing the appropriate recipients (focus upon the refugee camps in Zaire rather than on the Tutsi victims of genocide),⁴¹ sometimes compounding the disaster (safe havens in Bosnia). In the somewhat desperate words of Kofi Annan after Kosovo the United Nations is still 'indispensable', but one must ask for what? Mopping up, rubber-stamping peace deals put together elsewhere, and providing some legitimacy. While not denying the value of these services for those who are left alive, they reduce the role of the United Nations to a sideshow. Professor Tom Franck has maintained that the most decisive factor for the United Nations in containing a civil conflict is the degree of United States' support. 'When American support is steadfast, UN efforts tend to achieve their objective, as in El Salvador. When it is weak, as in Somalia and Rwanda, the world body fails.'⁴² In addition to the 'terrible price paid in Rwanda, the broader costs of paralysis can be seen in the reaction by some African governments, especially in the Great Lakes region, to marginalize the United Nations from political involvement in the region's affairs'⁴³ — the smashing of the icon of universal collective responsibility for maintaining international peace and security. This may have some benefits, for example by enhancing regional responsibility, but this will not always be readily accepted. NATO intervening in European problems may fall on the right side of the 'thin red line';⁴⁴ Africa resolving African problems allows the West to continue to ignore Africa's needs, but the Commonwealth of Independent States resolving those of Eastern Europe might not be viewed with equanimity by the West.

One avenue for enhancing collective action is to explore ways of making the Security Council accountable for its action and non-action and its decision making

⁴⁰ For example the United States bombing of the El Shifa pharmaceutical factory in Sudan in 1998 believed to be active in the manufacture of chemical weapons. See Chesterman and Byers, 'Has US Power Destroyed the UN?', *London Review of Books*, 29 April 1999, 29.

⁴¹ Madeleine Albright condemned the use of humanitarian aid 'to sustain armed camps or to support genocidal killers'. Cited Gourevitch, *supra* note 18, at 350.

⁴² Franck, 'Sidelined in Kosovo? Break It, Don't Fake It', 78 No. 4 *Foreign Affairs* (1999) 116.

⁴³ Report of the Secretary-General on the work of the Organization, S/1998/318, 13 April 1998, para. 30.

⁴⁴ Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999) 1.

more transparent. Richard Butler for example has proposed developing a workable understanding between the permanent members with respect to the appropriate exercise of the veto.⁴⁵ Other possibilities might be more frequent open meetings⁴⁶ or the development of an institution comparable to the Inspection Panels of the international financial institutions for scrutiny of the Council's conformity with its own policies and international law.⁴⁷ Such proposals would not be easily accepted and it would require leadership, perhaps from the United States or perhaps from other permanent members of the Security Council, in building a genuine partnership within the Council and regional bodies. But it is bullies that deny social responsibility. President Clinton in his address to the General Assembly in September 1999 echoed Kofi Annan and also described the United Nations as indispensable, thus rhetorically affirming that his administration at least does not wish to smash the icon.⁴⁸ The oft-quoted words of James Madison from *The Federalist* retain some force in the very different international context:

An attention to the judgement of other nations is important to every government for two reasons. The first one is that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy.

The second is that, in doubtful cases, particularly where national councils may be warped by some strong or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.⁴⁹

⁴⁵ Butler, 'Bewitched, Bothered and Bewildered: Repairing the Security Council', 78 No. 5 *Foreign Affairs* (1999) 9.

⁴⁶ Portugal's calls for a public debate by the Security Council on East Timor were not heeded until 11 September 1999. The activities of the Security Council were shrouded in secrecy and rumour for many days while people died. Public debate in the Security Council is now unusual.

⁴⁷ Orford, 'A Radical Agenda for Collective Security Reform', *Proceedings of the Second Annual Meeting of the Australian and New Zealand Society of International Law*, Canberra, Centre for International and Public Law (1994) 71 at 81.

⁴⁸ Words of Clinton: 'Three Resolutions for the New Millennium', *New York Times*, 22 September 1999, A16.

⁴⁹ Wills, 'Bully of the Free World', 78 No. 2 *Foreign Affairs* (1999) 50 at 53.