

【연구논문】

The Obama Administration's Oligopolistic Shift: The Reciprocal Path-Dependence of the US Presidencies and the Interpretive Regime of the UN Charter

Youcheer Kim

(Korea National Diplomatic Academy)

Jeonghun Min

(Korea National Diplomatic Academy)

1. Introduction

During a change of leadership, it is natural for many foreign policy experts to evaluate a leaving president's legacy and predict the next president's foreign policy stance. As Stephen Skowronek, a prominent American political scientist illuminated, the resilience of a predecessor's political coalition and incumbent's political identity mainly determines the political structure of presidential leadership.¹⁾ Foreign policy is not an exception. Analyzing the Obama

1) Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* (Kansas: U of Kansas P, 2011)

administration's legacy in foreign policy is fruitful not only for historical analysis but also for a policy analysis, as any new administration must struggle with the shadow of the past.²⁾ In other words, defining the Obama administration's legacy is a necessary analytical step to predict the future policy course of the Trump administration. For that purpose, this paper examines the Obama administration's legacy in foreign policy, particularly in regards to the interpretive regime of the UN Charter.

When President Obama entered the Oval office, the international diplomatic community was excited about the possibility of a new multilateralism and the role of the international organization. Immediately after the 2008 US presidential election, UN Secretary-General Ban Ki-moon remarked, "we can look forward to an era of renewed partnership and a new multilateralism."³⁾ Considering the systematic crisis of the UN system and the tainted legitimacy of the US foreign policy caused by the George W. Bush administration's unilateral military intervention in Iraq, the aspiration of the Obama administration's political coalition to restore the UN system was understandable. In that regard, the commitment to the UN system and the self-limiting legal norms of military force was a litmus test as to whether the Obama administration would satisfy the expectation of restoring the UN system for his eight-year term.

This article offers a mixed answer, claiming that the Obama

2) For an example of article that evaluates the Obama administration's legacy in foreign policy, see Marc Lynch et al. "Obama's World: Judging His Foreign Policy Record". *Foreign Affairs*. Sep/Oct 2015.

3) Patrick Worsnip. "U.N. looks for better times when Obama takes over". *Reuters*. 30 Nov 2008.

administration made an oligopolistic shift on the issue of UN Charter interpretation. To elaborate, US presidents after World War II generally took one of three positions: (1) the oligopolistic model (2) the self-restraint model, and of (3) the unilateral model. Presidents who embraced the oligopolistic model emphasized multilateral dialogue with other superpowers and preferred the Security Council as the most important forum for decision making. Presidents who embraced the self-restraint model, on the other hand, kept a distance from the excessive activism of the Security Council and occasionally accepted the idea of delegating to the international courts. Lastly, some assertive presidents pushed forward unilateral military actions, which went beyond the legal leverage and the opinions of other P5 in the Security Council. The Obama administration's policy was prudent in the sense that its UN diplomacy was not unilateral, but it was hardly reconstructive since its interpretive scheme on some critical issues broke free from the straight-jacket of legal norms. The Obama administration's policy doctrine and the track records of UN diplomacy during his term clearly shows that he attempted to reformulate or muddle through the legal norms rather than restraining itself to the norms of the UN Charter.

2. Interpretive Regime of the UN Charter and Relevance to UN Diplomacy

In any constitutional order, whether domestic or international, the issue of who holds the ultimate authority to interpreting the supreme

law of a community is a lingering source of contentions. Constitutional clauses usually stipulate individual rights and the separation of powers in abstract language that is open to conflicting interpretations. Although citizens in a democratic country with the strong rule of law traditionally tend to assume that the court monopolizes such authority, the court is merely a passive guardian of constitutional order that can wield an interpretive power only when disputants reach the doorstep of court for the verdict. Furthermore, the judicial review authority-not to mention judicial supremacy-is a practice that emerged only recently, even in many democratic countries. In the case of United States, where the idea and practice of judicial review authority were born, the framers of US Constitution did not clearly confer the judicial review authority to the Supreme Court.⁴⁾ Rather, it was incidentally confirmed in the *Marbury vs. Madison* case (1803), and the practice of judicial supremacy had been continuously challenged by the presidency, as the court-packing plan in the FDR era demonstrates.⁵⁾ Some presidents with reconstructive agendas, even after FDR, believed that three coordinate branches have an equal responsibility and authority to interpret.⁶⁾

Even inside the court, justices frequently approach a pending case

4) See James Madison, "Federalist Paper: No.47,48, 51". *The Federalist Papers*. Ed. Clinton Rossiter (New York: Penguin, 1961). 320-25.

5) Concerning the struggle between the presidency and the Supreme Court over the judicial review authority, see Julie Novkov. *The Supreme Court and the Presidency: Struggles for Supremacy* (Los Angeles: Sage Copress, 2013)

6) Keith E. Whittington. *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton UP, 2007). 29.

from different perspectives and reach contrasting conclusions. The US Supreme Court justices, for instance, take contrasting perspectives on how to interpret statutory laws. While some justices such as the late Antonin Scalia adhere to the plain textual meaning of statutes, other justices like Stephen Breyer broadly takes into accounts the evolution of the statutory scheme and the aspiration of society.⁷⁾ Likewise, a judicial body is not the sole interpreter of the Constitution, and even constituents of courts do not share a uniform interpretive scheme.

Such complexity and fluidity of the interpretation of Constitution makes the concept of interpretive regime useful for the analysis of judicial politics. The interpretive regime can be generally defined as “implicit or explicit distribution of power over the interpretation of Constitution” or “a system of background norms and conventions against which the Court will read statutes.”⁸⁾ Put it simply, the interpretive regime concerns about the issue of whose Constitutional interpretation is binding on other actors in the Constitutional structure.⁹⁾ For the example of U.S. interpretive regime in foreign relations jurisprudence, the horizontally and vertically fragmented interpretive regime in the early period gradually shifted to the centralization of foreign relations powers in the Federal Executive power.¹⁰⁾

The features of the interpretive regime in the international society

7) Stephen Breyer. *Active Liberty: Interpreting our Democratic Constitution* (New York: Vintage, 2010)

8) Glen Straszewski. “The Dumbing Down of Statutory Interpretation,” *Boston University Law Review* 95:4 (2009): 209-78.

9) Keith E. Whittington, *Ibid.* 28-83.

10) G.Edward White, "The Transformation of the Constitutional Regime of Foreign Relations," *Virginia Law Review* 85.1 (1999): 3.

is even more complex and fragmented. To begin with, realists IR scholars might disagree the salience of constitutionalism in the anarchical international society. To dissipate such skepticism, the question of whether a constitutional order really exists in the anarchical international order should be answered. Constitutional order can be roughly defined as “political orders organized around agreed-upon legal and political institutions that operate to allocate rights and limit the exercise of power.”¹¹⁾ In other words, constitutions serve to reduce the ‘returns to power’ and set limits on what states can do with momentary advantages. Conceptually, there are roughly three components of constitutional order: common agreements on fundamental principles and order, authoritative constraints on the use of power, and macro-political system protecting those fundamental principle and orders.¹²⁾

The United States was emerged as a hegemonic power after World War II and aspired to build a rule-based international order, which restrained itself as well as other countries. The US commitment to the constitutional order-mainly consisting of the UN and the Bretton Woods system-legitimized its dominance and had constitutive effects on international society. In that regard, 1945 was a critical juncture as a symbolic constitutional moment. The framers of the UN Charters convened in San Francisco in 1945, enshrined some fundamental principles-e.g., the sovereign equality, the end of colonial history, and limits on the use of military forces-which distinguished the post-war order from the pre-war period.¹³⁾ Furthermore, the Charter stipulated

11) John Ikenberry, *After Victory* (Princeton: Princeton UP, 2001). 29.

12) *Ibid.* 31.

the basic structure of the United Nations and authority given to each organ, analogous to the separation of power in the domestic constitutional structure. Framers, bearing in mind the importance of those fundamental principles, stipulated in Article 103 of the Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail," which is understood as the supremacy clause. In that regard, the year of 1945 was a constitutional moment for the international society.¹⁴⁾

Even if the idea of constitutional order in international society and the supremacy of the UN Charter is acceptable, the question of interpretive regime-whose interpretation of the UN Charter prevails over others- still remains. Realist IR scholars might answer that sovereign countries enjoy unconditional and unlimited interpretive power. In practice, the U.S. stance on international law in general and UN Charter has been ambivalent by occasionally attempting to transform the essential nature and procedure of interpretive regime.¹⁵⁾ For the controversial practice of 'preventive' self -defense, as an illustration, G.W. Bush administration's position was that a sovereign

13) Ruth B. Russell and Jeannette E. Muther. *A History of the United Nations Charter: the Role of the United States 1940-1945* (Washington D.C.: Brookings Institution). 625-930.

14) Bardo Fassbender. "The United Nations Charter as Constitution of the International Community," *Columbia Journal of Transnational Law* 36:1 (1998): 529-618.

15) W. Michael Reisman. "The United States and International Institutions". *American Foreign Policy: Theoretical Essays*, 5th ed. Eds. G. John Ikenberry et al. (Princeton: Princeton UP, 2005)

state should be a main player in the interpretive regime. In contrast, many leaders and international lawyers believed that a loose interpretation of the textual meaning of self-defense could turn the Article 2(4) of the Charter into a dead letter, which prohibits the threat or use of force against other countries. In consistent with it, the UN organs, the Security Council in particular, do not allow sovereign countries' monopolistic interpretation of the Charter. as the Article 25 of the Charter stipulates, "the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." From the theoretical perspective of interpretive regime, such a conflict demonstrates the fluidity and fragmentation of the interpretive regime in international society, which rendered possible significant inequality in its definition and application in favor of a hegemonic state.¹⁶⁾

Aside from the vertical balance between sovereign states and the United Nations, the horizontal balance among the UN organs is also a conspicuous dimension of the UN Charter interpretive regime. When it comes to the organizational structure of the United Nations, making a unanimous legal interpretation is almost impossible since UN is consists of six main bodies and 193 member countries. Then, someone can ask which organ determine the legal voice of the UN? In other words, which organ plays a more crucial rule in the interpretive regime? In theory, the Security Council (SC), General Assembly (GA), and the International Court of Justice (ICJ) share the

16) Nico Krisch. "Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy". *U.S. Foreign Policy: International Perspectives*. Eds. David M. Malone and Yuen Foong Khong (Colorado: Lynne Rienner, 2003). 41-70.

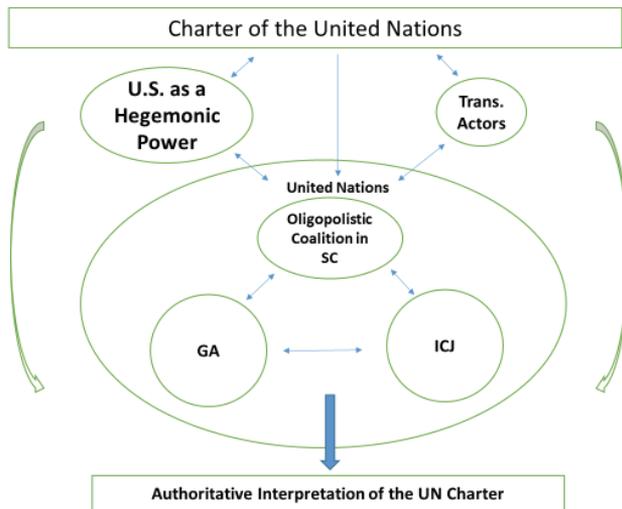
interpretive power. In other words, three organs can have concurrent jurisdiction in critical cases, as a result of the interpretation and application of the UN Charter. In reality, however, the SC enjoys a dominant role backed by the material and diplomatic forces of the five permanent members as long as the consensus among them is viable. In most military operations that have been justified by the interpretation of the Charter, other branches of the UN have no realistic measure to provide checks and balances it, even when the SC's interpretation is controversial.¹⁷⁾

As the Security Council more actively and frequently resorts to Chapter XII and military interventions, some justices and scholars supported the idea of judicial review authority by the International Court of Justice(ICJ). Actually, the UN Charter itself is silent about the issue of judicial review authority the *travaux preparatoires* of the Charter actually shows that the proposal for the ICJ's judicial review authority by the Belgian representatives was rejected in 1945.¹⁸⁾ However, the practices and opinions of the ICJ show that the Court have historically sought to embrace the interpretive role when it can do. Analogous to the contention between the presidency and the Supreme Court in the U.S. constitutional politics, ICJ tried to explicitly confirm its interpretive power while the Security Council surrounded by big powers deny and constrain it in some symbolic cases such as Namibia, Nicaragua, and Lockerbie cases as the next section of article elaborate.

17) Constanze Schulte. *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford UP, 2004). 36-80.

18) Geoffrey R. Watson. "Constitutionalism, Judicial Review, and the World Court". *Harvard International Law* 34.1 (1993): 1-45.

In terms of balance, multiple actors interact in a complex way within and outside of the UN structure to interpret the UN Charter, as illustrated in Diagram 1. Although the SC and the US as a hegemonic power disproportionately wield the interpretive power in UN diplomacy, no single player monopolizes it. Lack of institutionalized judicial review authority also implies that the distribution of interpretive power can be different from period to period. In particular, US stance on UN diplomacy is a critical variable in the interpretive regime since the leverage of the UN's interpretive power is mainly determined by the delegation of the US as a hegemonic power, which merits analytical attention.



<Figure 1> Features of UN Charter Interpretive Regime

3. Typologies of UN Charter Interpretive Regimes and Concurrence with US

Diplomacy

Leadership changes and the reconstruction of party coalitions have substantially impacted the direction of US foreign policy.¹⁹⁾ UN diplomacy has been subject to new leaders' political will to set new courses of policy. Even though the leadership of FDR sought to lock succeeding US leaders into the rule-based international order, some presidents-Republican ones in particular- have adopted totally different worldviews and a conflicting strategies toward the UN in general, as well as the interpretation of the UN Charter. In those conflicts, incumbent presidents have struggled with the legacy of their predecessors in mainly two dimensions of UN diplomacy: whether US should actively participate in foreign affairs and whether respecting the UN structure serves the US diplomatic goals.

To begin with, US administrations have shown different degrees of political will to intervene in foreign affairs. Even though no US administration after World War II has been truly 'isolationist,' some administrations were reluctant to embrace the political costs of being dragged into foreign affairs. President Clinton in his first term, for instance, prioritized domestic economic issues over foreign policy. During that period, the United States turned a blind eye toward "genocidal acts" in Rwanda. Some administrations, by contrast, saved

19) With regards to the taxonomy for American diplomatic history that includes leadership change and party politics, see Stephen E. Peltz. "A Taxonomy for American Diplomatic History". *The Journal of Interdisciplinary History* 19.1 (1988): 259-76.

no political energy to intervene or reformulate the way how the world works. The history of the United Nations shows that the system itself is based upon US dedication to an active role in solving many critical issues of the international society, as FDR's idea of the "five policemen" demonstrates. In that regard, some US administrations' firm conviction that the United States is an indispensable nation fits the vision of the framers of the UN Charter.

Another dimension of the UN Charter interpretive regime is the extent to which US administrations are committed to the legitimacy of the UN Charter. In other words, the degree to which the US delegated to the authority of the UN organs about the interpretation of UN Charter is another dimension of the interpretive regime. The legalistic approach in US foreign policy was obviously the legacy of Democratic presidents-mainly Woodrow Wilson and FDR-whereas Republican presidents tend to restructure the world order through the dominance of power. So, the UN system was a crucial channel of multilateral diplomacy for Democratic leaders while it was a more of a hindrance to some Republican leaders' *realpolitik*. In sum, weak/strong delegation to the UN system over the interpretation of the UN Charter constitutes a dimension of the interpretive regime.²⁰⁾ Figure 2 presents four types of UN Charter interpretive regime.

20) For the analysis of U.S. diplomatic orientation, some scholars make 2X2 matrix by realist/liberal and interventionism/isolationism divide. See, Samsung Lee. *The World and America: Reflection of the 20th Century and Prediction of the 21th Century* (Seoul: Hangilsa, 2001).

		Delegation to the UN system over the Interpretation of Charter	
		Weak	Strong
Degree of Political will to intervene in global affairs	Weak	Type I: Egoistic isolationism	Type II: Self-restraint (LBJ, Clinton I)
	Strong	Type III: Unilateralism (Reagan, G.W. Bush)	Type IV: Oligopolistic Coalition (FDR, G.H. Bush,)

<Figure 2> Typologies of UN Charter Interpretive Regime and Concurrent with US Diplomatic Orientation

Based on the two dimensions illustrated above, US administrations' foreign policy on the UN Charter's interpretive regime might fall roughly into one of four distinctive categories in theory; however, no U.S. administration after World War II has been a Type I regime since abdicating a leading role by pursuing non-intervention and non-delegation simultaneously could wreak havoc on the stability of international order. So, striking a right balance between minimum and maximum level of two dimensions in the UN interpretive regime was a main issue for US leaders. As the result, the other three ideal types characterize US foreign policy in reality: (1) type II: self-restraint (2) type III: unilateralism: (3) type IV: oligopolistic coalition models. To begin with, some presidents restrained themselves to the plain textual meaning of the UN Charter when hard questions of interpretation arose. In general, those presidents were reluctant to project U.S. resources to global affairs, and the self-restraint was a good pretext to control the opposing political

coalition's excessive zeal for interventionism. These leaders were prudent regarding the excessive intervention of the UN Security Council and were cautious about the compatibility of the Security Council's actions, with the interpretation of the UN Charter.

Some presidents falling into type III extended the textual meaning of the UN Charter and manipulated the UN system to coerce other countries by *bandwagoning* its perspectives. If other superpowers or the UN organs opposed to the US interpretation of the Charter, these leaders with unilateral conviction easily neglected weaker actors' backlash and pushed their controversial policy visions forward. On the other hand, even though type IV leaders have demonstrated their strong political will to intervene in global affairs, they substantially took into accounts other great powers' position, particularly in the SC. In that regard, type IV leaders have also substantially delegated their interpretive authority to organs of the UN. Different from type II leaders, type IV leaders regarded the SC as a linchpin of the UN system and were reluctant to delegate their authority to the ICJ.

Historically, the type IV oligopolistic coalition model was a default setting of the UN interpretive regime. FDR's idea of institutionally binding members of the UN system was to prevent a recursive swinging back to the pre-war isolationism and ruthless colonial expansion. Specifically, FDR believed that the five allies of World War II should solve many global issues by reaching political consensus, within a new collective security system, which can be epitomized as the idea of the "five policemen."²¹ Contrary to FDR's

21) Stephen Schlesinger. "FDR's Five Policemen: Creating the United Nations". *World Policy Journal* 11. 3 (1994): 88-93.

intention, however, succeeding U.S. presidents had to shift to either type II or type III since the Cold War confrontation made consultation and joint decision-making with idiosyncratic USSR and PRC highly challenging. While the Cold War structure made it hard to be truly isolationist, some presidents aspired to focus more on domestic issues and utilized the UN system to avoid excessive entanglements in the regions without substantial strategic value. For instance, President Johnson had to exclusively inject his diplomatic and military resources into Vietnam, but multilateralism through the UN was a cost-effective diplomatic measure in other regions; while the Johnson administration signed the ABM treaty with the Soviet Union, he preferred UN diplomacy to solve issues with lower strategic value.

The U.S. stance on the crisis in South Western Africa case aptly illustrates type II leaders' approach to the interpretive regime. The contention over Namibia (called 'South Western Africa' before independence) dates back to the 19th century. Germany controlled this region after the Congress of Berlin in 1878 but had to relinquish it with their defeat in World War I. To reconstruct the post-World War order, the League of Nations passed a mandate that allowing a trusteeship by the Republic of South Africa over the region. Diplomatic contention arose when South Africa claimed the suzerainty over the region after World War II, claiming that the mandate of the League of Nations had expired with the demise of the system itself and merging with Namibia in 1949.²²⁾ On the other hand, U.S.

22) Donald L. Sparks and December Green. *Namibia: The Nation After Independence* (Oxford: Westview P, 1992). 5-22.

representatives and its allies in the UN believed that trusteeship was still valid and UN should monitor the political situations of the region. Type II presidencies, including L.B. Johnson, substantially delegated the interpretive power to the UN system. As a result, consecutive General Assembly resolutions-1514(1960), 2145(1966), and 276(1970) affirmed the people of Namibia's right to independence, and the Security Council reconfirmed the legitimacy of those resolutions by passing the SC resolution 276. As the legal question of LN's continuity was salient for the legitimacy of GA and SC resolutions, the SC referred the case to the ICJ and requested its advisory opinions. The ICJ, in different stages of the Namibia case, repeatedly confirmed the illegality of South Africa's occupation of Namibia and upheld the compatibility of those resolutions with the UN Charter.²³⁾ In a nutshell, Tye II leaders' deep level of delegation to the UN organs even to ICJ in the *Namibia* case made it as the precedent of the ICJ's judicial review authority to some legal scholars.²⁴⁾

The Reagan administration, contrary to the type IV and type II stances of his predecessors, charted a new course for US foreign policy in regard to the Charter interpretive regime. In his controversial covert actions supporting *Contra* rebel groups against the leftist Sandinista regime in Nicaragua, the Reagan administration

23) ICJ, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970).

24) Ken Roberts. "Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review". *Pace International Law Review* 7.2 (1995): 281-325.

unilaterally interpreted the UN Charter and denied the ICJ's review authority. At that time, the United States accepted "the optional clause" of ICJ Statute Article 36(2), which created the automatic jurisdiction of ICJ by Nicaragua's litigation. The Sandinista regime claimed that the U.S. covert actions directly violated Article 2(4) of the UN Charter and requested the indemnity. In response, the Reagan administration denied the ICJ's jurisdiction based on the Schultz Letter imposing reservations on the US acceptance to the Latin American region. The ICJ, however, did not accept the U.S. claims in the admissibility review and confirmed the illegality of US actions in the verdict.²⁵⁾ The Reagan administration simply neglected the ICJ's decision, and further pushed US Congress to pass a bill allowing continuous military aids to the *Contra rebel group*. Likewise, *type III* leaders such as Ronald Reagan muddled through the policy constraints imposed by the UN Charter by unilaterally interpreting rather than delegating it to UN organs.

America's UN diplomacy after the end of Cold War had George HW Bush throttled back to *type IV*. To fight against Saddam Hussein's blatant invasion of Kuwait, the United States invoked Charter 7 by passing SC resolution 660. The successful military operation and the restoration of the *ante bellum* status quo reinvigorated convictions about the collective security. Although the concurrence of US political will to intervene in global affairs and its multilateral UN diplomacy heightened the expectation of the resurgence of FDR's vision, Bill Clinton throttled back US diplomacy

25) Christine Gray. *International Law and the Use of Force* (Oxford: Oxford UP, 2004). 65-69.

to somewhere between types I and type II. Clinton's slogan in his campaign, "It's economy, stupid!" distracted his political energy from the foreign policy at least in his first term. As a result, the Clinton administration turned a blind eye toward the massive killing in Rwanda, while framing it "genocidal acts" in order to avoid military entanglement.

In his second term, Clinton drastically shifted his foreign policy orientation to somewhere between types III and IV. The US leadership in NATO's bombing was a symbolic case that illustrates his policy transition. Faced with Milosevic's ethnic-cleansing, the Clinton administration pursued a tight coalition with its Western allies and conducted a bombing campaign to allegedly implement the UN resolutions without actual authorization of UN resolutions.²⁶⁾ That action was close to type III by bypassing UN structure but similar to type IV by anyhow mobilizing military campaigns through multilateral diplomacy and from the interpretation of the UN Charter. Moreover, the Clinton administration prevented the ICJ from playing a leading role in the interpretive regime by prioritizing the Security Council in the Lockerbie case.

The Lockerbie case was about the US and UK-led Security Council Resolutions for economic sanctions against the Gaddafi regime after the alleged terrorist attack against *Pan Am* air flight 103. As the investigation after the attack found two suspects residing in Libya, the United States demanded their extradition. The Libyan government, however, denied such request as it had satisfied its

26) Adam Roberts. "NATO's 'Humanitarian War' over Kosovo". *Survival* 41.3 (1999): 102-23.

responsibility under the Montreal Convention on civil aviation by prosecuting these two suspects. The US and UK governments led the economic sanctions against Libya through SC resolutions 731 and 748. The Court, in its decision on the provisional measure, rejected the U.S. opinion arguing that the Court lacked jurisdiction. The Chief Justice Oda even rebuked the Resolution 748 as it could intervene in the review process of the Court. Judge Weermantry also clearly indicated that “after an examination of the relevant Articles of the Charter and the *travaux preparatoires* of Article 24(2) and (1) in particular, the opinion concludes that the Court is not debarred from considering matters which the Security Council has considered under Charter 6.”²⁷⁾ Fearful of a diplomatic debacle by the ICJ’s judicial activism similar to the Nicaragua case, the Clinton administration made a political concession to the *Gaddafi* regime.

George W. Bush administration’s UN diplomacy posed an almost existential threat to the UN system itself. Aspiring to succeed in Reagan’s type III legacy, the Bush administration not only unilaterally interpreted the UN Charter but also tried to fundamentally restructure the UN. In the operation of “War Against Terrorism,” the Bush administration unilaterally interpreted the meaning of SC resolution 1441 and extended the meaning of self-defense stipulated in Article 51 of the UN Charter. Defining ubiquitous terrorist groups as a major security threat, the main security and legal advisers of the Bush administration regarded the UN Charter as an obsolete that

27) Vera Gowlland-Debbas. "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case". *The American Journal of International Law* 88.4 (1994): 643-77.

mainly regulated interstate war and weakened sovereign states that were under the threat from terrorist groups.²⁸⁾ Under such circumstances, delegation to the ICJ in major legal problems was almost unthinkable idea, so the United States tried to monopolize the interpretive power.

4. The Obama Administration's Oligarchic Shift: The Dilemma of Type IV Leaders

More than anything, the Bush administration's legacy in domestic and foreign policy marked the starting point of the Obama administration. Obama's landslide victory in the 2008 presidential election and the Bush regime's vulnerability provided a historical opportunity for him to become a reconstructive leader.²⁹⁾ Particularly, the extent to which he could reformulate Bush's unilateral UN diplomacy was a litmus test of his foreign policy. In his speech in Cairo, President Obama remarked, "a new era of engagement has begun, and renewed respect for international law and institutions is critical if we are to resume American leadership in a new global century." With regard to the Middle East policy, he also stated, "No system of government can or should be imposed upon one nation by another. America does not presume to know what is best for

28) John C. Yoo and Will Trachman. "Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations". *Chicago Journal of International Law* 5.2 (2004-2005).

29) Jack M. Balkin. "What it Will Take for Barack Obama to Become the Next FDR". *The Atlantic*. 1 Nov 2012.

everyone,” considered together, implying retrenching back to the type II leadership.³⁰⁾ Aside from some pieces of fragmented rhetoric, other pieces of evidence in Obama’s policy for eight years demonstrates that the Obama administration shifted to the side of type IV, and occasionally showing the conflicting intentions of type III.

To begin with, the Obama administration’s ‘smart power doctrine’ symbolizes its political will to maximize national interests by utilizing international law. Smart power indicates a diplomatic strategy that is “a blend of principle and pragmatism that makes intelligent use of all means at our disposal, including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.”³¹⁾ By regarding international law as a means to achieve ‘power’ and will to project diplomatic resources, the goal and direction of this smart power strategy was clearly distinguished from that of the type II self-restraint model. While the Obama administration preferred externalizing the burden of warfare by reducing troops in the Middle East and facilitating a military technology revolution, it aspired to reinvigorate its commitment to East Asia.³²⁾

Obama administration’s policy stance on the use of military forces, in contrast to his plan of military reduction, also shows its willingness to use force and distance from the blind self-restraint. The 2010 National Security Strategy paper states, “...military force, at

30) BBC News. "Obama reaches out to Muslim world". 4 June 2009.

31) Harold Hongju Koh. "The Obama Administration and International Law". *Annual Meeting of the American Society of International Law*. 25 March 2010.

32) Andreas Krieg. "Externalizing the Burden of War: the Obama Doctrine and US Foreign Policy in the Middle East". *International Affairs* 92.1 (2016): 97-113.

times, may be necessary to defend our country and our allies.”³³⁾ This document *per se* does not show sophisticated condition of ‘necessity’ was suggested in this document, the impact of international legal constraints on the decision-making process in a potential military action could hardly be predicted.³⁴⁾ His acceptance address of the Nobel Peace prize in the previous year gives a clearer tip by asserting, “I believe that all nations – strong and weak alike – must adhere to standards that govern the use of force. I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don’t.”³⁵⁾ In this address, Obama emphasized that the international legal constraints will be taken into account in a potential military action, even though he will neither blindly relinquish the right of self-defense nor turn a blind eye toward human rights crises. These pieces of evidence, considered together, demonstrates that Obama’s stance on the UN Charter interpretive regime shows the characteristics of the type III-principled use of military actions- in the doctrinal level.

How about the actual practices? A crucial test for the Obama

33) White House. “National Security Strategy”. 22 May 2010. (https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, Retrieved on 3 May 2017)

34) Christian Henderson. "The 2010 United States National Security Strategy and the Obama Doctrine of Necessary Force". *Journal of Conflict and Security Law* 15.3 (2010): 403-34.

35) Barack H. Obama. “Nobel Lecture”. 10 December 2009. Nobelprize.org, (https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html, Retrieved on 3 May 2017)

administration's stance on the UN Charter interpretive regime was the human rights crisis and subsequent military operation in Libya. Contrary to his position of disengagement from the Middle East, the Arab Spring reinvigorated the will of intervention for building democracy in the region. When the bloodshed deepened, President Obama remarked in his April 2011 speech, "a genuine transition from dictatorship to an inclusive constitutional process has begun," and that "in order for that transition to succeed, Colonel Gaddafi must go, and go for good."³⁶⁾ The Obama administration, in implementing that declared message, preferred mobilizing the oligopolistic coalition of Western allies and passed the SC resolution 1970(2010), which imposed an asset freeze, an arms embargo, and referred General Gaddafi to the International Criminal Court. Security Council also adopted Resolution 1973, which authorized countries to use "all necessary measures" to protect civilians in Libya. The Obama administration also invoked the emerging legal norms of "Responsibility to Protect (R2P)" to trump the principle of non-intervention in domestic matters enshrined in Article 2(7) of the UN Charter. Inside the Obama foreign policy team, a strong proponent of humanitarian intervention such as Samantha Power played a substantial role in many decision-makings and in Libya case. Even though the Secretary of State Hilary Clinton and the Secretary of Defense Robert Gates were skeptical on the military operations against the Libya, Obama pushed the military intervention internally and externally.³⁷⁾

36) Ian Dunt. "Libya letter prompts demands for recall of parliament". politics.co.uk. 15 April 2011.

The challenges that ensued from such reformulation included the extent to which it was legally compelling and politically correct. While ten council members voted for the resolutions, five members-Brazil, China, Germany, India, and Russia- abstained on the Resolution 1973.³⁷⁾ The ambassador of Arab league also expressed the deep reservation and skepticism over the legal grounds of the UN resolution and the Obama administration's justification for the intervention.³⁸⁾ A renowned legal scholar evaluated the Resolution 1973 and following military operations showed that "a more muscular liberalism is indeed on the rise again in international law...and the Obama administration, like its predecessor, will comply with international law where possible, yet is prepared to disregard it where international law conflicts with a key national security interest."⁴⁰⁾ Likewise, the Obama administration imposed its legal interpretation by taking actions and pursuing the consensus of selected group of countries, rather than restraining itself to the narrow meaning of UN Charter or waiting for the unlikely unanimous voices on the new practice.

Despite its assertiveness, the Obama administration's military intervention in Libya resulted in right consequences is not necessarily

37) Ryan Lizza. "Obama: The Consequentialist". *The Domestic Sources of American Foreign Policy: Insights and Evidence*. Eds. James M.McCormick et al. (London: Rowman & Littlefield, 2012), 429-27.

38) John R.Crook. "Contemporary Practice of the United States Relating to International Law". *American Society of International Law* 105.3 (2011): 568-611.

39) Hussein Hassouna. "Arab League Reaction to Libyan Action". *American Society of International Law Annual Meeting*. Washington D.C., 2011.

40) Pierre Thielbörger. "The Status and Future of International Law after the Libya". *Goettingen Journal of International Law* 4.1 (2012): 11-48.

clear-cut. Some security experts indicate that Libyan protesters were armed and violent from the starting point of the uprising. In the initial stages, government forces responded with a non-lethal force like rubber bullets.⁴¹⁾ Although the Gaddafi regime's brutal suppression in the later stage attracted international concern, the situation could have been more of a typical limited internal war pervasive in many authoritarian regimes. Obama even confessed that his decision to take military action in Libya was the biggest mistake of his presidency. If the Obama administration had consistently made efforts to establish R2P as an emerging practice, it should have intervened in other countries with similar conflicts. However, that consistency test was not fulfilled in Syria as the instability and continuous limited warfare filled the vacuum of a dictator in Libya.

		Delegation to UN System over Interpretation of Charter	
		Weak	Strong
Degree of political will to intervene in global affairs	Weak	Type I: Egoistic Isolationism	Type II: Self-restraint (LBJ, Clinton I)
	Strong	Type III: Unilateralism (Reagan, GW Bush)	Type IV: Oligopolistic Coalition



<Figure 3> Shift of U.S. Diplomatic Policy during the Obama Administration

41) Alan J.Kuperman, "A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign," *International Security* 38.1 (2013): 105-36.

Obama administration's shift to the oligopolistic coalition was also confirmed by its political formula for the Syrian crisis. Encountered with the massive civilian killing by chemical weapons, the Obama administration planned an airstrike against the Assad Regime and sought a Congressional approval.⁴²⁾ Unlike in the case of intervention in Libya, however, the Obama administration faced with tougher oppositions in the international level. Particularly, Russia was clearly signaled to wield its veto power in the Security Council. President Putin even published a column in the *New York Times*, which indicated how a planned military strike is inconsistent with international law and called for a cool-off between US and Syria.⁴³⁾ Mediated by President Putin, the Obama administration agreed with the political deal exchanging Assad regime's signing of the Convention against the Chemical Weapons Convention, even though US enjoyed the luxury of superior power to for the unilateral intervention. Likewise, all pieces of evidence considered together, the oligopolistic coalition best characterizes Obama administration's UN diplomacy and the UN interpretive regime.

In terms of balance, the Obama administration made a foreign policy shift from the Bush era's Type III to Type IV. When the Obama administration tried to establish new practices of R2P, active diplomacy in the UN Security Council and coalition-building with traditional western allies were the main strategic actions to achieve that goal. The flip side of Obama's UN diplomacy was that some

42) Peter Baker and Jonathan Weisman. "Obama Seeks Approval by Congress for Strike in Syria". *New York Times* 31 Aug. 2013

43) Vladimir V. Putin. "A Plea for Caution from Russia". *New York Times*. Sep. 2013.

merits of the type II self-restraint tradition such as enhanced legitimacy by delegating to the objective third party judicial organ-were not inherited by the Obama administration. The Obama administration's UN diplomacy was prudent in general but occasionally ambitious beyond its capacity, which created some inconsistency in retrospect.

5. Conclusion

The UN Charter has been accepted as an organizing principle of anarchical international relations. Franklin D. Roosevelt, to break the recursive and vicious circle of destructive wars, established a legal order that prohibited the use of military threat towards other countries and imposed strict conditions for an exceptional military action to be allowed. However, the founders of the UN Charter were silent on the crucial question of who holds the ultimate interpretive power?" At the same time, the founders assumed that a strong political will to intervene in global affairs and the solidarity of an oligopolistic coalition within the UN structure might be sustained. In that regard, FDR's idea falls into the category of type IV. Succeeding presidents, however, shifted their orientation on UN diplomacy to either Type II or Type III. Some presidents- such as LBJ and Clinton in his first term- tried to focus more on domestic issues and substantially delegated the interpretive authority to the UN organs, even to the ICJ. On the other hand, some presidents-Reagan and GW Bush-unilaterally wielded the interpretive power and almost paralyzed other

actors in the interpretive regime. In summary, US administrations' policy orientation toward the UN Charter interpretive regime has swung back and forth like a pendulum, and such shifts have mainly determined the features of the UN Charter interpretive regime.

President Obama inherited the legitimacy crisis of U.S. diplomacy created by the Bush administration's unilateralism. While a policy shift to either type II or type IV were viable options for him, his 'smart power doctrine' and decision-making in the case of Libya demonstrates that type IV shift was his ultimate decision. Even though such a shift restored the reputation of the United States and the reliability of UN diplomacy, the Obama administration could not overcome the dilemma of type IV UN diplomacy, which occasionally caused the a legitimacy crisis. As the Obama did not inherit some merits of the self-restraint model, international society's support for the military operation in Libya and to the emerging norms of R2P was limited. In that sense, the Obama administration's UN diplomacy and its role in the UN Charter regime were praiseworthy but far from reconstructive or perfect.

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Abstract

**The Obama Administration's Oligopolistic Shift:
The Reciprocal Path-Dependence of the US
Presidencies and the Interpretive Regime of the
UN Charter**

Youcheer Kim

(Korea National Diplomatic Academy)

Jeonghun Min

(Korea National Diplomatic Academy)

This paper examines and evaluates the Obama Administration's policy stance on the interpretive regime of the UN Charter, in comparison to previous administrations. Historically, the policy stance of U.S. administrations on the U.N. Charter can be roughly classified into three typologies: (1) oligopolistic (2) self-restraint, and (3) unilateral model. With regard to the potential conflict of Article 2(7) and Chapter 7, the framers of the UN Charter granted the supremacy of political will of P5 in the Security Council. However, some U.S. administrations were extremely cautious about a broad interpretation of the Charter 7 and even accepted the delegation of critical cases to the International Court of Justice (ICJ). Moreover, some US administrations went far beyond the plain meaning of UN Charters and muddled through the opposition from other P5 members in crucial military operations. The Obama administration's track-record of the UN Charter interpretive regime was not necessarily reconstructive.

Key Words

UN Charter, the Obama Administration, Interpretive Regime, Foreign Policy, Oligopolistic Shift