

## EDITORIAL COMMENT

### BEYOND THE CHARTER FRAME: UNILATERALISM OR CONDOMINIUM?

In his January 2002 State of the Union Address, President George W. Bush reiterated the warning that the war against terrorism is only beginning and that the threat against which it is directed remains dire. That threat, he said, includes the terrorists themselves, who are widely dispersed, and states sympathetic to terrorism, particularly those disposed to acquire or further develop weapons of mass destruction.<sup>1</sup>

The subtext of the president's address was that the United States was going to hunt down and eliminate terrorists wherever they might be found, and also prevent states deemed friendly to terrorism from enhancing their capacities with respect to weapons of mass destruction. And it was prepared to act preemptively rather than simply as a response to an actual or imminent armed attack.

What are some of the concrete measures that would seem to fall within this Bush Doctrine? Rather than working through the often slow and unpredictable process of extradition, the United States might parachute troops into countries to seize suspected terrorists or might assassinate them by inserting special forces or employing air strikes. Within Iraq, it might use zones protected by air power to arm and train forces drawn from the Kurd and Shia communities. Then it might launch them, backed by U.S. firepower, against Saddam Hussein's regime in Baghdad. In the case of Iran, it might employ cruise missiles against nuclear reactors or other facilities related to the production of nuclear, chemical, or biological weapons. It might blockade the country to force agreement on international weapons inspections or to prevent importation of dual-use technologies.

After the events of September 11, 2001, the United Nations Security Council, anticipating the U.S. attack on Al Qaeda and the Taliban regime, affirmed the right of the United States to act forcefully in its defense.<sup>2</sup> Since Article 51 of the Charter recognizes an *inherent* right of self-defense, affirmation was unnecessary. In this unprecedented case of a large, well-financed transnational organization with demonstrably great destructive capacity and declared aggressive ends, the right can reasonably be construed to include seizure of suspected Al Qaeda members in states unable or unwilling to arrest and either try or extradite them. But it plainly does not encompass the overthrow of regimes with records of aggressive behavior. Nor does it legitimate the use of force against states deemed unfriendly in order to deny them weapons systems already deployed by other sovereign states or to enforce compliance with treaty obligations.

At this point, there is simply no cosmopolitan body of respectable legal opinion that could be invoked to support so broad a conception of self-defense. It is in fact reminiscent of the notion of strategic preemption that animated German policy in the early years of the twentieth century. Its key idea is the political justification of assaulting another state so as

<sup>1</sup> George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), 38 WKLY. COMP. PRES. DOC. 133 (Feb. 1, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.htm>>.

<sup>2</sup> SC Res. 1373, pmbl. (Sept. 28, 2001), 40 ILM 1278 (2001) (reaffirming that acts of international terrorism "constitute a threat to international peace and security," and additionally reaffirming "the inherent right of individual or collective self-defence").

to block any unfavorable shift, however long-term, in the balance of power. Even tactical preemption—for instance, invading a neutral country in time of war in the belief that one's opponent is likely to do so at some later point—has, since the adoption of the Charter, been deemed illegal. It was unsuccessfully invoked by the Nuremberg defendants in relation to the German invasion of Norway in 1940.<sup>3</sup>

The Bush Doctrine, *to the extent it implies unilateral action*, cannot be contained within the UN Charter norms that have served as the framework of international relations for the past half century. It challenges a root principle of the Charter system—namely, the formal equality of states. For this Bush Doctrine purports among other things to concede to some states (e.g., Israel, France, and India) but not others (e.g., Iran) the right to provide for their defense in whatever manner they deem fit. It also implies the erosion of other core features of national sovereignty, including exclusive authority to exercise police and judicial power within recognized frontiers. It seemingly arrogates to the United States an unfettered discretion to decide to whom other states can give asylum and whom they are obligated to prosecute or extradite. And it claims a right to intervene preemptively.

The normative consequences of 9/11 are likely to depend on the what and how of U.S. action. Despite his declared readiness to act unilaterally, President Bush has been soliciting support from consequential states, including China and Russia. Obtaining it will doubtless require compromise in the application of the Bush Doctrine or compensatory side deals or both. If the president secures the Security Council's authorization for coercive measures to prevent the further proliferation of weapons of mass destruction, *in form* the inherited normative framework survives. For within its broad, if not unlimited, discretion under the Charter to avert threats to the peace by whatever means it deems useful, the Council, on a case-by-case basis, can authorize action that has a discriminatory impact, such as denying weapons to one state even though they are deployed by another. But discrimination authorized perhaps only by bare weighted majorities in the Security Council, particularly if it dialectically elicited hostile majorities in the General Assembly, would begin to look like (but might never become) a substantially transformed normative system that could be characterized as shared hegemony or condominium, with the United States *primus inter pares* with respect to the rest of the small group of owners.

One could, of course, argue that certain signs of such a transformation appeared some years ago when the Security Council began selectively authorizing interventions, albeit for humanitarian rather than counterterrorist reasons. But the cases were, after all, few in number. Moreover, condominium implies agreement on ends and means and active collaboration. In fact, the Chinese merely acquiesced in cases like Somalia and Haiti, declaring them extraordinary exceptions and resisting any effort at codification.<sup>4</sup> And when Kosovo came along, they confirmed the lack of real agreement by joining the Russians in effectively blocking authorization of the NATO intervention. The nub of the matter, then, is that on the eve of 9/11, condominium was little more than a theoretical alternative to a Charter system that had in two original moves reconciled the principle of formal equality with the reality

<sup>3</sup> The International Military Tribunal at Nuremberg rejected defense claims that Germany had acted in self-defense in its invasion of Norway and other countries. For example, defendant Erich Raeder, Germany's naval commander in chief, argued that Germany had occupied Norway as a necessary act of self-defense to forestall Allied landings there. While the Tribunal judges did recognize a right of anticipatory self-defense, the judgment stated, "preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.'" George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 358 (1998) (quoting Nuremberg Judgment, 41 AJIL 172, 205 (1947) (in turn quoting the Caroline case, 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)). The Tribunal found that this was not true for the German invasions of Denmark and Norway. Walker, *supra*, at 358.

<sup>4</sup> For a summary of China's current views, see INTERNATIONAL PEACE ACADEMY, *COMPETING CLAIMS: SELF-DETERMINATION AND SECURITY IN THE UNITED NATIONS* (IPA Conference Report, 2000).

of asymmetric capabilities: it had concentrated enforcement authority in the Security Council; and while giving the permanent members a veto, it had required them to secure the votes of four additional states in order to act.

A process of decision making constitutes a normative system only when those affected believe that in general they have an obligation to obey its results; in other words, compliance with outputs of the process results at least in part from perceptions that it is legitimate. If fear alone secured compliance, I would not call the decision-making process normative, although it might possibly be effective for a time. It seems to me likely that a coalition limited to NATO members plus China and Russia might be able episodically to find the four additional votes needed to authorize intervention and other sorts of coercive activity. But the NATO-plus-two coalition might well prove too narrow to maintain the Council's legitimating authority. The Charter frame would then crack and finally shatter. In other words, the formality of Security Council authorization is not enough to sustain the Charter norms indefinitely in the face of widespread hostility. Condominium as a successor normative system, I believe, would require inclusion of certain additional states such as India, Japan, Brazil, and South Africa, and at least one Muslim state: Iran or Indonesia. It remains to be seen whether the United States is able or willing to secure the requisite coalition.

If the United States is determined to intervene globally but unable or unwilling to do so in partnership with the requisite states, it now has the raw power to intervene outside the law recognized by the majority of states.<sup>5</sup> Thus, in theory it could sustain a policy of wide-ranging intervention in the face of opposition from a majority of states generally, and Security Council members in particular. But if, through its conduct of the antiterrorist war, it catalyzes a hardening of opposition to armed intervention, the political and material<sup>6</sup> costs of intervention would undoubtedly grow. Without access to facilities in Pakistan and other states bordering Afghanistan, U.S. operations would have been much more difficult to sustain. Indeed, without authorization for overflight of adjoining states, it could have done little more than pepper the country with missiles. Overthrowing Saddam Hussein without Turkish and Saudi support and replacing him with a stable and relatively benign alternative would be a very expensive feat. Furthermore, a unilateralist policy might gradually strain relations with France, the United Kingdom, and Germany—countries on which we now rely for help in rebuilding weak or rogue states.

Does the United States have any incentive to institutionalize the sharing of decision-making authority with other consequential states? And do they in turn have incentives, beyond fear of U.S. power and a desire to inhibit its exercise, to accept the restraints as well as the opportunities of condominium? That depends, I believe, on how Washington and the other relevant capitals read the text of 9/11. Before 9/11, the lens apparently used by the United States had a rather narrow angle. At its focal point were places containing groups capable of transnational violence and equipped with an articulated anti-American agenda. Since then, the angle of vision may have widened to include places where prevailing conditions can foster or facilitate terrorism.

The Afghan narrative as it unfolded in the wake of 9/11 could be read as an exemplary tale for U.S. policymakers and those in other countries as well. Danger, it seemed to say, can incubate in remote places where central authority is weak and permeable and/or inspired by values deeply inimical to those of the neoliberal world. Where the state is weak and the society torn by conflict, groups with transnational terrorist agendas can rent safe havens in which to plan, recruit, and train, and hide following an operation. As their power

<sup>5</sup> See, e.g., Henry Kissinger, *America at the Apex: Empire or Leader?* NAT'L INTEREST, Summer 2001, at 9.

<sup>6</sup> The material costs would increase because it would become harder to find partners willing to lend troops, funds, and infrastructure.

increases or central authority attenuates still further, they may even appropriate part of the territory or colonize the feeble regime. In addition, whether or not there is conflict within them, weak and incompetent and/or profoundly corrupt states impel the evolution of private, clandestine channels for the movement of money, goods, and people. These channels are available to terrorists, as well as ordinary people who need such channels to survive or at least to evade the state's extortions.

This post-9/11 reading of the Afghan text provides a new nonhumanitarian angle for visualizing the U.S. stake in places like Somalia, Sierra Leone, Sudan, Congo, and Liberia. Their relevance to a war against terrorism is not merely theoretical. Sudan, after all, was home to Osama bin Laden for a number of years following his self-conversion to militant anti-Americanism and remained a site for some of his businesses even after he was forced to move. Belief in Al Qaeda's penetration of still-anarchic Somalia inspires U.S. naval patrols off its coast and threats of intervention.<sup>7</sup> Evidence of involvement by Al Qaeda in the illicit diamond trading associated with the grisly conflicts in Congo, Sierra Leone, and Liberia has recently emerged.<sup>8</sup>

Coincidence is imperfect. Several of the recent objects of or candidates for humanitarian intervention have not been weak, poorly organized states. The relative competence of the pre-genocide Rwandan state and the organization of its societal majority made the genocide possible. And the Serbian state, which, through its local dependents, pursued "ethnic cleansing" and perpetrated slaughter in Bosnia and Kosovo, was neither risibly weak nor chaotic. Nevertheless, it is not impossible to develop a counterterrorist rationale for humanitarian intervention in the Balkan and Rwandan abattoirs. In both cases, but more extravagantly in the latter, the internal conflicts together with horrible human rights violations ended up threatening the stability of adjoining states. In fact, the powder train ignited by the Rwandan genocide helped blow what was by then left of the Congolese state virtually out of operational existence. Unfortunately, fear of anarchic conditions might just as easily inspire support for brutish governments and, in the case of civil conflicts, for a quick and decisive victory by the initially more powerful faction, whatever the humanitarian costs.

How, then, should we sum up the normative prospect in the years immediately ahead? *Cautiously!* From this temporal vantage point, a mere half year after 9/11, one sees trails running off initially in several directions. Where they actually lead is considerably less clear. The United States may ride its self-defense claims a while longer and a bit further without alienating the jury of consequential international actors. How long and how far will be influenced to some degree by all four of the following factors: first, Washington's ability to demonstrate previous collusion or current collaboration or even simply harboring Al Qaeda members or the members of other terrorist groups widely perceived to threaten the United States and to have non-negotiable ends; second, its willingness to use force only as a means of last resort for ending collaboration or securing just punishment of Al Qaeda members; third, the extent of its efforts at least to consult with other permanent members and with states likely to be affected by an intervention whether because of their political and economic ties with the object of intervention or their proximity to it; and fourth, the humanitarian effect of the intervention in terms both of collateral damage during the intervention and, conversely, of positive side effects on the condition of human rights in the country. But even where the final three factors are positive, it is hard to see the self-defense claim as independently bearing much weight if the target state cannot be connected to 9/11.

<sup>7</sup> See, e.g., David S. Cloud, *U.S. Navy, Allies Patrol Sea off Somalia, in Search of Fleeing Al Qaeda Fighters*, WALL ST. J., Jan. 4, 2002, at A14; Robert Tait, *U.S. Sets Sights on Somalia's Training Camps*, SCOTSMAN, Nov. 26, 2001, at 7.

<sup>8</sup> See, e.g., Douglas Farah, *Digging up Congo's Dirty Gems; Officials Say Diamond Trade Funds Radical Islamic Groups*, WASH. POST, Dec. 30, 2001, at A1.

So the United States will quickly face a severe choice if, as now appears likely, it proposes to employ coercion for wider strategic purposes. Either it will set about trying to build an authentic and authentically broad multilateral coalition with all the compromises and side deals that this will entail or it will act only with the support of clients. If it chooses the latter course, it will probably be unable (and hence may not even try) to secure the Security Council's authorization. In the regions where it is most likely to act, either there are no regional systems of legitimation or, where they exist, they are as unlikely as the Security Council to endorse U.S. action.

The United States would thus find itself operating flagrantly outside the normative consensus. One, perhaps the most likely, result would be the progressive erosion of the Charter consensus about the use of force and a corresponding loss of normative protection against intervention. But, as I suggested above, the probable international *political* consequences of aggressive unilateralism would heighten the costs of intervention for various purposes. Costs could rise further if the main response to aggressive unilateralism were a reaffirmation of (rather than generalized departure from) Charter norms in an effort to restrain the exercise of U.S. power and limit the threat to sovereignty, whether from the United States or lesser countries.

For humanity, the most sanguine development would be a broad reading of the Afghan text by the Bush administration and by its counterparts in other major states and, indeed, all states that have on balance been adapting successfully to globalization. Ideally, there would grow among them the conviction that the world consists of centers of order that cannot isolate themselves from the centers of disorder. The latter emit poisons of various kinds and will go on doing so until order is "imposed"—not, however, the colonial order of rifle, noose, and theft, in part because an exploitative order will not command support from the peoples of the West, in part because while rulers and conspicuous militants can be hanged or shot, the vast, desperate populations awakened by globalization and set in motion cannot be caged. Order in our time means empowering indigenous figures to replace kleptocracy with political systems that enforce rational laws and distribute essential public goods with reasonable impartiality.

Imposing order will require intervention on a scale certainly not imagined before 9/11. As I implied at the outset of this editorial, until the terrorist attack, the appeal to human solidarity was sufficient only episodically and then only where people were dying telegenically rather than expiring slowly from all the pathologies of powerlessness and immiseration. To bring the latter hope, it will be necessary, particularly in much of Africa but also in Central Asia and spottily elsewhere in the developing world, to reinvent the state and to insert into its now corrupt and palsied limbs both political and technocratic advisers, recruited from the centers of order, with financial and coercive resources at their call. These will be trusteeships, in fact if not in name, brought into being by positive inducements, conditional assistance to local agents, and outright force, and executed by summoning the hitherto repressed or marginalized elements of these dystopias to plan for the liberation previously granted in form but denied in fact. Compensating for the initial costs of this great project will be a long-term enhancement of the security of the centers of order and a vast expansion of participation in the global system of production and exchange.

Up to now, the only operational response to the immense suffering either untouched by globalization or, in certain circumstances, aggravated by it has been very occasional and then often half-hearted humanitarian intervention. Despite all the dispute about its legality and legitimacy, humanitarian intervention if not as conceived, then certainly as practiced before 9/11, served only as a Band-Aid on a few suppurating lesions in a radically diseased body. Perhaps for that very reason, it could be accommodated, albeit with difficulty, within

the scheme of the Charter. To treat the disease, we will have to invent a new scheme of international cooperation, one that, like weapons of mass destruction, has no historical parallel. What Osama bin Laden and his friends may have inadvertently accomplished is to stiffen humanitarianism with the iron of national security and thus to make it interesting to the parochial, narrowly compassionate figures who predominate in the councils of the leading states. Unfortunately, little in their biographies gives grounds for hope that they will face the 9/11 challenge with imagination and generosity no less than fire and sword.

The more probable (but still not predetermined) course of events will be the triumph of the Bush administration's unilateralists—persons determined not to make the compromises and accept the restraints required to effect a concert of states and equally determined to fight terrorism with fire and sword almost alone. Signaling their triumph would be preemptive and punitive acts or threats of force increasingly unrelated to the specific events of 9/11 and endorsement of the unrestrained use of violence by client regimes themselves acting in the name of counterterrorism. Battered by these initiatives and the intense opposition they would induce, the basic force-regulating provisions of the UN Charter, the frame of international relations for the past half century, would break along with the restraints on the use of terror by states against their own populations.

Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths. The Israeli experience could well prove a microcosmic anticipation of the global system's future in this scenario. To sustain its occupation of desired land filled with people it did not desire as fellow citizens, Israel's government coped with increasing resistance by slipping from the normative restraints on a state's tools for safeguarding its security. Collective punishment, hostage taking, escalatory reprisals, riot control with live ammunition, assassinations, and torture combated a resistance that descended the scale of means from occasional violence and demonstrative acts to unrelenting assault on Israeli civilians. Imagining ourselves in the fire-veined darkness on the West Bank of the Jordan, we may then picture on a larger stage the possible results when the frame of order breaks.

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