

national community's response to the forces represented by the attacks of September 11. This course of action would better defend the United States than the current policy and would assure the continued strength and viability of the world order system embodied in the United Nations.

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## TERRORISM AND THE RIGHT OF SELF-DEFENSE

Is the United States' use of military force against the Taliban and Al Qaeda in Afghanistan lawful under the United Nations Charter? At a recent conference of primarily German international lawyers,<sup>1</sup> many answered that question in the negative. This may surprise American colleagues, but their doubts need to be addressed seriously for they may be more widely shared.

The following propositions were assayed to demonstrate the alleged illegality of U.S. recourse to force:

(1) It violates the Article 2(4) of the Charter prohibition against use of force except when authorized by the Security Council under Chapter VII.

(2) Self-defense is impermissible after an attack has ended; that is, after September 11, 2001.

(3) Self-defense may be exercised only against an attack by a state. Al Qaeda is not the government of a state.

(4) Self-defense may be exercised only against an actual attacker. The Taliban are not the attacker.

(5) Self-defense may be exercised only "until the Security Council has taken measures necessary to maintain international peace and security." Since the Council took such measures in Resolution 1373 of September 28, 2001, the right of self-defense has been superseded.

(6) The right of self-defense arises only upon proof that it is being directed against the actual attacker. The United States has failed to provide this proof.

### 1. *The Action Violates Article 2(4) of the Charter*

It does not.

While Charter Article 2(4) prohibits the unilateral use of force, the prohibition must be read in the context of Article 51, which recognizes "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." This provision was included in the Charter because the drafters feared that the system of standby collective security forces envisaged in Article 43, to be deployed by the Security Council, might not come into being and that, accordingly, states would have to continue to rely on their "inherent right" of self-defense. That concern was well founded. Article 43 languished and no standby force was ever created, let alone deployed against any of the approximately two hundred armed attacks that have taken place since 1945, leaving states' security in their own hands and that of willing allies.

This interpretation accords with Charter practice. A unanimous resolution, passed the day after the attack on the United States, put the Security Council on record as "[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter,"

<sup>1</sup> Symposium, *The United States and International Law—The Effects of U.S. Predominance on the Foundations of International Law*, Göttingen (Oct. 25–27, 2001).

while condemning “in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001.”<sup>2</sup>

The resolution recognizes a right to respond in self-defense, but it does not—and legally cannot—authorize its exercise since that right is “inherent” in the victim. Under Article 51, self-defense is a right exercisable at the sole discretion of an attacked state, not a license to be granted by decision of the Security Council. How could it be otherwise? Were states prohibited from defending themselves until after the Council had agreed, assuredly there would not now be many states left in the United Nations Organization.

It is true that the International Court of Justice has ruled that the claim of a right to use force in self-defense must be supported by credible evidence of an armed attack and of the attacker’s identity.<sup>3</sup> However, while the production of such evidence is essential to sustaining the right, that emphatically is not a condition precedent to its exercise. This does not leave the field open for bogus self-defenders. Were a state to attack another while falsely claiming to be acting in self-defense, that would constitute an “armed attack” under Article 51 or “aggression” under Article 39, giving both the victim and the United Nations the right to respond with appropriate levels of individual or collective force (see item No. 6, below).

### 2. *Self-Defense Is Impermissible After an Attack Ends*

There is nothing in either the *travaux préparatoires* or the text of the Charter to justify this claim, which also defies logic. The assertion that self-defense requires “immediate” action comes from a misunderstanding of the *Caroline* decision, which deals only with *anticipatory* self-defense. In any event, Osama bin Laden has specifically promised to continue attacks on the United States.

### 3. *Self-Defense Is Only Exercisable Against State Acts*

Al Qaeda is not a state. Nonetheless, the actions taken against the United States on September 11 were classified by Security Council Resolution 1368 as “a threat to international peace and security.” That signifies a decision to take “measures . . . in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Such measures under Article 39 of Chapter VII were, in fact, taken sixteen days later.<sup>4</sup> It is inconceivable that actions the Security Council deems itself competent to take against a nonstate actor under Articles 41 and 42 in accordance with Article 39 should be impermissible when taken against the same actor under Article 51 in exercise of a state’s “inherent” right of self-defense. If the Council can act against Al Qaeda, so can an attacked state.

This intuition is supported by the language of Article 51, which, in authorizing a victim state to act in self-defense, does not limit this “inherent” right to attacks by another state. Rather, the right is expressly accorded in response to “an armed attack” and not to any particular kind of attacker. That, evidently, is why Resolution 1368 reiterates the right of self-defense by a state specifically against “terrorist attacks” (para. 3). The Council clearly identifies “international terrorism[] as a threat to international peace and security” against which “individual or collective self-defence” may be exercised.

### 4. *Self-Defense Is Only Exercisable Against an Attacker*

The September 11 attack was not launched by the Taliban. Does this make U.S. action against that faction illegal?

<sup>2</sup> SC Res. 1368 (Sept. 12, 2001) (emphasis omitted). UN resolutions are available online at <<http://www.un.org>>.

<sup>3</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 119–21, 127, paras. 230–34, 248–49 (June 27).

<sup>4</sup> SC Res. 1373 (Sept. 28, 2001).

The question is an important one that has long exercised international lawyers. In 1944, at Dumbarton Oaks, China included the following element in the definition of aggression it proposed to the conference preparing the draft Charter articles later presented to the San Francisco Conference: "Provision of support to armed groups, formed within [a state's] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection."<sup>5</sup>

China's proposal was not adopted. More recently, the draft articles on state responsibility prepared by the International Law Commission make it clear that a state is responsible for the consequences of permitting its territory to be used to injure another state.<sup>6</sup> Security Council Resolution 1368 makes even clearer, in the context of condemning the September 11 attack on the United States, the responsibility for terrorism of "sponsors of these terrorist attacks" including those "supporting or harbouring the perpetrators" (para. 3). The Taliban clearly fit that designation.

##### 5. *The Right of Self-Defense Is Superseded After the Security Council Invokes Collective Measures*

Article 51 provides that the right of self-defense may be exercised by any state subject to an armed attack "until the Security Council has taken measures necessary to maintain international peace and security." In Resolution 1368 the Security Council recognized the applicability of this right in the context of the September 11 attack. However, on September 28, the Council invoked Chapter VII to require states to impose mandatory controls on the financing of terrorist groups, and to prohibit states from "providing any form of support" to terrorists. Does the imposition of these measures under Chapter VII supersede the attacked state's right to use force in self-defense?

It does not. After the Iraqi invasion of Kuwait, the Security Council, as in the instant case, affirmed the inherent right to use force in individual or collective self-defense.<sup>7</sup> When, almost four months later, it authorized UN members "to use all necessary means" to repel the Iraqi forces,<sup>8</sup> that resolution reaffirmed the Council's earlier affirmation of the victim's right to act in self-defense, clearly implying that Chapter VII measures taken under Council authority could supplement and coexist with the "inherent" right of a state and its allies to defend against an armed attack (Art. 51). This serves to give Article 51 the sensible interpretation that a victim of an armed attack retains its autonomous right of self-defense at least until further collective measures authorized by the Council have had the effect of restoring international peace and security.

The same pattern of authorization was followed more explicitly by the Council in invoking mandatory measures under Chapter VII on September 28. This time, the resolution specifically reaffirmed "the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)."<sup>9</sup> That the Council, in invoking collective measures, should ensure that these not be construed as rescinding the "inherent" right of self-defense is hardly surprising, since these new measures mandated on September 28, useful as they might be, clearly were not intended by themselves to deal decisively with the threat to international peace and security posed by Al Qaeda and its Taliban defenders.

<sup>5</sup> Tentative Chinese Proposals for a General International Organization (Aug. 23, 1944), [1944] 1 FOREIGN RELATIONS OF THE UNITED STATES 718, 725.

<sup>6</sup> International Law Commission, State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, General Principles, pt. 1, Arts. 9, 11, 21, & pt. 2, Arts. 40, 49, 52, UN Doc. A/CN.4/L.602/Revs.1, 2 (2001).

<sup>7</sup> SC Res. 661, pmb. (Aug. 6, 1990).

<sup>8</sup> SC Res. 678, para. 2 (Nov. 29, 1990).

<sup>9</sup> SC Res. 1373, *supra* note 4, pmb.

It is a *reductio ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those measures.

#### 6. *The United States Has Not Provided Proof*

Resolution 1368, in “recognizing” the right of the United States and its allies to use force against what was deemed, clearly, to be an “armed attack” within the meaning of Article 51, and also in recognizing that those who “harbour[] the perpetrators, organizers and sponsors of these acts” are accountable for them, did not specify either the attacker or those who harbored them. In the absence of such clear identification of the perpetrator and sponsor, what authority is there for the exercise of Article 51’s “inherent” right of self-defense? Resolution 1373, too, fails to identify the wrongdoer. It applies mandatory economic, fiscal, and diplomatic sanctions against “persons”—defined as “those who finance, plan, facilitate or commit terrorist acts”—without defining which groups are included in the category. Some critics therefore assert that neither resolution specifically authorizes action against either Al Qaeda or the Taliban.

This critique conflates two related, but separate, challenges. One is directed to the lack of factual evidence of Al Qaeda’s and the Taliban’s culpability. The other argues that, in law, the right to use force in self-defense arises only after the evidentiary test has been met by proof accepted as adequate by the appropriate institutions of the international system.

Critics point out that the North Atlantic Council, the governing body of NATO, on September 12 authorized invocation of Article 5 of its Charter—which states that an armed attack on one member shall be regarded as an armed attack on all—subject to the evidentiary caveat, “if it is determined that this attack was directed from abroad against the United States.”<sup>10</sup> Even if this condition correctly interprets the intent of NATO’s September 12 decision, it is apparent that the evidentiary test has been satisfied. On October 1, NATO Secretary General Lord Robertson reported that the United States had presented to the NATO Council “compelling” and “conclusive” evidence that the attacks were the work of Al Qaeda, protected by the Taliban, and that invocation of Article 5 was therefore “confirmed.”<sup>11</sup> Only at this point did the U.S. military response, supported by the NATO allies, begin to be implemented.

Does this imply that the Security Council must similarly vote its acceptance of U.S. evidence? There is not a scintilla of evidence to this effect in either the *travaux* or the text of Charter Article 51. Rather, the “inherent right” being preserved in Article 51 is clearly that of a victim state and its allies, exercising their own, sole judgment in determining whether an attack has occurred and where it originated. Security Council Resolutions 1368 and 1373, while deliberately expanding the definition of what constitutes an attack and an attacker, in no way tried to take this discretion away from the victim state.

This reading of Article 51 does not mean that the question of evidence is irrelevant in law. It does mean, however, that the right of a state to defend itself against attack is not subordinated in law to a *prior* requirement to demonstrate to the satisfaction of the Security Council that it is acting against the party guilty of the attack. The law does have an evidentiary requirement, but it arises *after*, not *before*, the right of self-defense is exercised. Thus, if a state claiming to be implementing its inherent right of self-defense were to attack an innocent party, the remedy would be the same as for any other aggression in violation of

<sup>10</sup> NATO Press Release (2001)124, Statement by the North Atlantic Council (Sept. 12, 2001). NATO press releases and speeches are available online at <<http://www.nato.int>>.

<sup>11</sup> Statement by NATO Secretary General, Lord Robertson, Brussels, Belgium (Oct. 2, 2001).

Article 2(4). The innocent party would have the right of self-defense under Article 51, which is exercisable at its sole volition. It could also appeal to the Council to institute collective measures against its attacker under Chapter VII.

Any other reading of Article 51 would base the right of self-defense not on a victim state's "inherent" powers of self-preservation, but upon its ability, in the days following an attack, to convince the fifteen members of the Security Council that it has indeed correctly identified its attacker. As a matter of strategic practice, any attacked state is very likely to make an intense effort to demonstrate the culpability of its adversary, limited only by inhibitions regarding the operational effect of sharing intelligence methods. As a matter of law, however, there is no requirement whatever that a state receive the blessing of the Security Council before responding to an armed attack. Were this not so, how many states would deliberately agree to subordinate their security to the Council's assessment of the probity of the evidence on which they based their defensive strategy of self-preservation?

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### HEGEMONIC INTERNATIONAL LAW

One increasingly sees the United States designated as the hegemonic (or indispensable, dominant, or preeminent) power.<sup>1</sup> Those employing this terminology include former officials of high rank as well as widely read publicists. The French, for their part, use the term "hyper-power." A passage by Charles Krauthammer in *Time* best captures the spirit: "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will."<sup>2</sup>

The idea of hegemony has begun to work its way into the world of international law to the point where a session of the annual meeting of the American Society of International Law in 2000 was dedicated to "the single superpower."<sup>3</sup> A new undersecretary of state, John Bolton, while still at the American Enterprise Institute, wrote in an article entitled *Is There Really "Law" in International Affairs?* that we "should be unashamed, unapologetic, uncompromising American constitutional hegemonists."<sup>4</sup> Since the terrorist attacks of September 11, 2001, the shapers of American foreign policy are showing some signs of second thoughts about the U.S. hegemonic position or at least of thinking of hegemony as a form of leadership rather than command. But it is still appropriate to ask whether there is such a thing as hegemonic international law (HIL) and what it would look like.<sup>5</sup> Bolton answers in the negative, but this Editorial maintains that there can be, and has been, such a thing as HIL. It does not take a position as to whether the United States is or should be a hegemon but merely addresses the lawyer's question of what the legal implications would be if it is.

<sup>1</sup> The term "the indispensable nation" was coined by President Clinton in a White House speech on December 5, 1996, and echoed by Secretary of State Madeline Albright at that time. See White House Press Release, Remarks by the President in Announcement of New Cabinet Offices (Dec. 5, 1996), at <<http://www.hri.org/news/usa/asia/96-12-index.usia.html>>; see also Henry Kissinger, *America at the Apex: Empire or Leader?* NAT'L INTEREST, Summer 2001, at 9, 9 (stating that "the United States is enjoying a pre-eminence unrivaled by even the greatest empires of the past").

<sup>2</sup> TIME, Mar. 5, 2001, at 42. More negative views on hegemony appear in Lewis H. Lapham, *The American Rome: On the Theory of Virtuous Empire*, HARPER'S MAG., Aug. 2001, at 31; William Pfaff, *The Question of Hegemony*, FOREIGN AFF., Jan./Feb. 2001, at 221; G. John Ikenberry, *Getting Hegemony Right*, NAT'L INTEREST, Spring 2001, at 17.

<sup>3</sup> *The Single Superpower and the Future of International Law*, 94 ASIL PROC. 64 (2000); see also Symposium, *American Hegemony and International Law*, 1 CHI. J. INT'L L. 1 (2000).

<sup>4</sup> John R. Bolton, *Is There Really "Law" in International Affairs?* 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000).

<sup>5</sup> For a succinct treatment of HIL, see Konrad Ginther, *Hegemony*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 685 (Rudolf Bernhardt ed., 1995).