

LEGAL AND LEGITIMATE
USE OF FORCE:

The UN Charter and the Neoconservative Challenge

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Background Paper no. 1 of the initiative

Ethics in a Violent World:
What Can Institutions Do?

CARNEGIE COUNCIL

*The Voice
for Ethics in
International
Policy*

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EXECUTIVE SUMMARY

Within the past few years, a number of international lawyers, mostly from the United States, have argued that Charter norms purporting to regulate the use of force have become so inconsistent with state practice that they can no longer be deemed legally binding. These “Charter skeptics” (as I call them) do not appear to be claiming that practice has modified the original interpretation of those norms. Their claim rather is that practice has demonstrated the collapse of the inter-state consensus, assuming a real one ever existed, necessary to sustain the Charter normative scheme. Although their focus has been on the norms explicitly connected to the use of force, implicitly they are dismissing the broader Charter principles of nonintervention and the sanctity of sovereignty from which the use-of-force norms stem.

Precisely what legal conclusions follow from their notionally empirical observation is unclear. One possible conclusion is that the question of when a state can employ force, overt or covert, has become entirely political in character. Hence, it is possible to condemn particular uses of force only on the grounds that they are immoral or imprudent, and not on the grounds that they are illegal. An alternative possibility is that certain broad

legal prohibitions persist, in particular the preclusion of force where its only justification is to impose the value system of the aggressor or to increase its wealth and power. Or, to put the test in slightly different terms, the use of force is legal whenever it can be plausibly characterized as a good faith defense of vital interests of the force initiator or in defense of core Charter values like basic human rights.

Are these chroniclers of the supposed demise of the use-of-force regime telling a true story? If so, where can we go from here, and how do we get there? I approach these questions from the baseline of what I call “the original understanding,” by which I mean the interpretation of Charter restraints on the use of force that enjoyed wide, but by no means uniform, support in the early post-Charter years within the community of academic international lawyers and among ministries of foreign affairs.

In what follows, I lay out the terms of the original understanding and its many ambiguities, and then proceed to discuss the neoconservative challenge to it. I conclude by suggesting ways in which the original understanding can be kept largely intact, while still meeting the new security and other threats of the post-September 11 world.

PART I: THE ORIGINAL UNDERSTANDING OF THE UN CHARTER

At the birth of the United Nations, a majority of legal scholars and probably of governments subscribed to the view that taking into account the language and structure of the Charter, in particular Articles 2(4) and 51 in conjunction with Chapter VII as a whole, and taking account also the document's negotiating history, it should be read as dividing the universe of cross-border military coercion and intervention into three categories. Category 1 is self-defense against an armed attack. Category 2 is force or the threat thereof authorized by the Security Council under Chapter VII to prevent a threat to the peace, a breach of the peace or an act of aggression. The domain of the ille-

Claims of humanity might trump the principle of nonintervention.

gal is Category 3, call it the default category, which is occupied by every act of state-initiated or tolerated cross-border violence

that does not fall into the first two categories. However, it was not long before states with the capacity to project force across frontiers began proposing additional categories, based in part on curious readings of the Charter that happened to legitimate their uses of force, or discovered unexpected elasticities in the existing ones. They invariably found some scholars who sympathized with their claims. What follows is a sketch of the areas of ambiguity and contention that marked the Cold War years.

1. What constitutes an "armed attack" for purposes of activating the right of individual and collective self-defense?

- a. Do activities short of launching troops, planes, or missiles across a frontier—for instance, giving material assistance to an insurgency in another state or a terrorist group—ever trigger the right of self-defense?

Composed as it is of mostly distinguished judges and scholars from the various world regions, the World Court's opinions, at least when they are nearly unanimous, are the closest thing we have to authoritative inter-

pretation of the Charter.

During the Cold War, primarily with respect to the guerrilla wars against pro-Western regimes in Latin America and southeast Asia, the U.S. argued that where State A provided weapons or training to opponents of the recognized government of State B, the latter and allied states could treat that assistance as an armed attack. With one dissent (by chance the American judge) in the case brought by the government of Nicaragua (represented by a formal legal advisor to the Department of State) against the United States, the World Court rejected this claim insofar as it purported to justify U.S. acts of war within Nicaragua.

While the U.S. government refused to appear and argue the merits on the grounds that the Court lacked jurisdiction, in the forum of public opinion the Reagan Administration claimed that its own clandestine operations inside Nicaragua and its financing, arming, and training of Nicaraguan insurgents were legitimate acts of collective self-defense in response to Nicaraguan aggression against the government of El Salvador, an ally under the Rio Treaty of Mutual Defense. The acts deemed constitutive of that aggression were various forms of assistance to the indisputably independent Salvadoran insurgents. This was not a new argument for the United States. It had earlier been marshaled against Cuba for its encouragement and support of insurgency in various Latin American countries and against North Vietnam for its support of the insurgency in South Vietnam. In retrospect, Vietnam was the stronger case for the argument, since it now appears that at least by the time the U.S. became openly involved in combat, Hanoi was exercising substantial, if not total, strategic control over the Vietcong.

- b. At what point, if any, do activities that could reasonably be construed as preparations to launch an armed attack justify preemption?

Perhaps because of the fact that, on a number of occasions during the Cold War, mechanical and electronic

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devices erroneously signaled the launch of nuclear missiles, some have argued that preemption should never be allowed and that self-defense requires a prior and actual border crossing. But efforts by the Soviet bloc at the UN to secure a definition of aggression focusing exclusively on first recourse to force failed. The more generally prevailing view was that if the behavior of State A is such as to lead a reasonable government in State B to believe that an armed and substantial attack is imminent and cannot be averted by means other than force, State B may preempt.

Most scholars have regarded *imminence* as the key criterion. Without it, measures plausibly intended for defensive or, in the case of nuclear weapons, deterrent purposes could be construed, hypocritically or otherwise, by another unfriendly state as preparations for an attack justifying a first strike. That is, remove the requirement of imminence and it becomes very difficult to distinguish aggression from self-defense.

- c. Can forms of coercion other than military ones constitute an armed attack?

Developing states have sometimes argued that economic coercion threatening their political independence should be regarded as an attack. The United States seemed to imply the same during the Arab oil boycott following the

1973 Middle East War. In the West, there has been little if any scholarly support for this view, and efforts by some Third-World states to include economic coercion in the definition of aggression has failed.

2. Does the Security Council have authority under the Charter to authorize coercive measures including the use of force in cases where (a) the threat to international peace and security is not imminent or (b) the “threat” consists of massive violations of human rights within a country but with little immediate spillover effect to other states?

With respect to (a), two views once competed for dominance. Some commentators argued that the Council was an organ with jurisdictional authority strictly limited by the language of the Charter and that the Charter’s grant of authority under Chapter VII to deal coercively with “threats” had to be read in the light of Chapter VI authorizing the Council to employ noncoercive measures like mediation in cases where a situation could develop into a threat. In other words, the Charter itself distinguishes in so many words between immediate and potential or longer-term threats and gives the Council authority to employ force only in the latter case. So while it has authority to employ force, or to authorize force by states acting as its proxy, at a somewhat earlier point than an individual state can under Article 51, that authority does

UNAUTHORIZED HUMANITARIAN INTERVENTION MAY BE LEGAL WHEN:

- * A massive crime against humanity is imminent or has begun to be executed
- * Either there is no time for recourse to the SC if the crime is to be averted or aborted before its completion, or action by the SC is blocked by a Permanent Member’s exercise of its veto
- * The action is reported to the SC
- * The intervention is carried out in good faith and so as to minimize its consequences for the political independence of the target state
- * The intervention complies with the humanitarian Law of War and is reasonably calculated to cause less harm to “innocent persons” than would occur if the crime against humanity were allowed to proceed.

not extend to cases where the threat is in so early a stage of incubation that its actualization is uncertain and there is opportunity to test the efficacy of means other than force.

There has been little support in recent years for this view in Western academic circles, although it may well reflect the preferences of the Chinese and certain other governments in the Global South. While the Council may not have absolute discretion to define its authority, it has and in contemporary circumstances must have a very broad discretion to decide at what stage in the gestation of a threat it should intervene with coercive means of one form or another.

With respect to (b), the practice of the Council since the end of the Cold War seems to have resolved the once sharp dispute over its authority to authorize coercion to avert or mitigate catastrophes that occur mainly within one country. When in the 1970s it authorized coercive measures against the minority racist regime in what was then Rhodesia (contemporary Zimbabwe), the Council was sharply criticized by some legal commentators. Initially, the United Kingdom took the position that the matter was an internal concern. Sanctions against South Africa in the 1980s also encountered some opposition on legal grounds. Since the Cold War, however, the Council has authorized intervention to restore democracy (Haiti), to protect the delivery of humanitarian relief (Bosnia and Somalia), and to end civil conflicts marked by massive violations of human rights (e.g., Liberia and Sierra Leone). Practice has confirmed the breadth of the Council's power to act for the sake of human as well as national security.

3. Can regional and sub-regional organizations authorize uses of force that would otherwise be illegal?

Chapter VIII (Articles 52–54) of the Charter recognizes a possible role for such organizations, particularly in helping to mediate festering hostility that, if left unattended, could lead to armed conflict. It also recognizes them as possible instruments of the Security Council in dealing with Chapter VII situations. Article 54 states, however, that any “enforcement action” by such organizations requires the approval of the Security Council.

During the Cold War, the United States argued in relation to the Cuban Quarantine of 1962, the intervention into the Dominican Republic in 1965, and the invasion of Grenada in 1982 that approval could be implicit and gained after the fact—a position most scholars and governments rejected. In recent years, the United States

has altered its position insofar as the Organization of American States is concerned, insisting (most clearly in the case of Haiti) that enforcement measures require SC authorization. By contrast, the first Economic Community of West African States intervention in Liberia, although not authorized, was not criticized, much less condemned. In an analogous case, a distinguished panel of experts established by the Swedish government found NATO's intervention in the Kosovo conflict to be inconsistent with the Charter and thus technically illegal, but nevertheless “legitimate.” Whether NATO, originally a self-defense rather than a regional organization, can be said to have evolved into the latter is open to dispute.

4. Does military intervention at the request of a recognized government to assist it in repressing domestic opponents constitute a permitted use of force?

Some scholars and governments have argued that the prerogatives of sovereignty certainly include authorizing foreign intervention and that the recognized government is the agent of state sovereignty. Others have said that in cases of large-scale civil war, an intervention, even if invited by the recognized government, violates the country's political independence and the universal right of self-determination and should be deemed illegal.

5. Are interventions not authorized by the SC that are undertaken to prevent or terminate crimes against humanity ever legal under the Charter?

In the early decades after the Charter's adoption, scholars and especially governments were reluctant to concede that the claims of humanity might trump the principle of nonintervention, although at least in particular cases some seemed disposed to treat the circumstances as highly mitigating. The Kosovo Commission based its finding of “legitimacy” largely on what it perceived as the imperative of using force in order to abort massive ethnic cleansing. Few would dispute that mass ethnic cleansing is a “crime against humanity” with genocidal potential. With respect to the question of law, however, it is significant that a committee of experts with a strong collective commitment to the protection of human rights found the action, although legitimate, to be illegal under the Charter. This conclusion is in spite of the facts of the presence of such a crime, coupled with action by an arguably “regional organization” (but not, to be sure against a *member* of the organization), and SC resolutions

condemning the government of ex-Yugoslavia for its treatment of the Albanian population and calling upon it to cease and desist.

Nevertheless, some leading (primarily U.S.-based) international law scholars, including ardent defenders of the UN and the Charter-based legal order, have argued that humanitarian intervention is legal where the following criteria are satisfied:

- A massive crime against humanity is imminent or has begun to be executed
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Scholars insisting on the legality of interventions satisfying the above criteria emphasize the Charter’s recognition of human rights along with national sovereignty as paired constitutional principles. Even scholars from countries with a history of intense opposition to intervention of any kind now show some disposition to concede that in extraordinary circumstances, for example the onset of genocide, international action may be justified even if the SC does not authorize it. A number of Chinese scholars from influential think tanks have so conceded in a recent discussion, but they insisted that circumstances must be so exceptional that they cannot be codified. This position echoes that of the leading British authority on the use of force, Ian Brownlie, who analogized humanitarian interventions to “mercy killings” in domestic law, which are illegal but may be overlooked in extraordinary circumstances. Efforts by the Axworthy Commission, supported by the Canadian government, to promote agreement on the idea that the prerogatives of sovereignty are dependent in some measure on states meeting minimum obligations to their citizens initially met a cool reception from the generality of governments, implying that the Chinese approach was preferred.

The humanitarian arguments invoked by the United States and the United Kingdom in the case of Iraq, argu-

ments increasingly emphasized when evidence of WMD programs failed to appear, are unusual in that they refer to conditions that were chronic rather than acute. At the time of the invasion, violations of core human security rights appear to have been considerably less acute than during earlier periods when popular resistance to Saddam was more pronounced. The moral basis for distinguishing chronic violations of rights from acute ones, as most advocates of humanitarian intervention do, is problematical. But failure to require a sudden spike in human rights violations as a condition of humanitarian intervention would exponentially increase the number of potential targets; at least a strong plurality of UN members would be at risk.

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6. Are interventions strictly to rescue nationals arbitrarily threatened with death or grave injury, whether by the government of another country or by private groups whom that government cannot or will not control, legal under the Charter?

Some scholars have long insisted that intervention as a last resort for the protection of threatened nationals falls under the right to self-defense. They note that a state consists of a determinate territory and a population. Attacks on either, they argue, are “armed attacks” within the meaning of Article 51 of the Charter. It is also argued that such brief interventions, proportional to the necessity of extracting the threatened persons, should not be regarded as violations of either the territorial integrity or the political independence of the target state and hence not violations of Article 2(4) of the Charter. That argument rests implicitly on a view much like that of the Axworthy Commission, namely that by failing to meet their international legal obligations to protect the nationals of other states, states to that extent relinquish temporarily the full prerogatives of sovereignty.

7. Are reprisals legal under the Charter?

In pre-Charter international legal practice, reprisals were punitive acts responding to some illegal act committed by another state. They were deemed legitimate if they were

proportional to the delinquency that occasioned them. One of their recognized purposes was to deter a repetition of the delinquency. In relation to a reprisal carried out by the United Kingdom during the 1950s in what is

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today the Republic of Yemen, the Security Council declared reprisals to be illegal under the Charter on the grounds that they did not constitute acts of self-defense, which presumes an ongoing attack. A one-off border incursion by forces of State

A into State B could be resisted. But if State A's forces withdrew before State B could mount a response and appeared unlikely to make another incursion in the immediate future, then the opportunity for the exercise of self-defense rights had passed. State B would thus have to pursue other remedies for any damage done to it from the incursion including, of course, an appeal to the Security Council on the grounds that the situation constitutes an ongoing "threat to the peace."

Distinguishing reprisal and legitimate self-defense can be difficult in the context of ongoing hostile relations between states marked by numerous "incidents." For instance, the bombing of Tripoli by the United States in the wake of the 1986 bombing of a nightclub in Berlin frequented by U.S. military personnel and attributed to Libyan intelligence operatives was arguably a reprisal. The United States could have argued, however, that it was self-defense if it pursued the line that the bombing was only one in a series of Libyan-organized attacks on U.S. installations and personnel and that these various incidents amounted cumulatively to an ongoing attack. To take another case, certain Israeli incursions into neighboring Arab states might be characterized as incidents in a single ongoing low-intensity armed conflict. However, Israel has an explicit doctrine of reprisal; it has not tried to characterize every incursion as an incident of an ongoing war.

It appears that the SC has become inured to reprisals, at least in the context of Arab-Israeli conflict, and therefore takes note of them only when they risk igniting a general conflict, or when they are grossly disproportionate to the damage inflicted by the act held to justify reprisal, or when they violate rights protected by the humanitarian Law of War. With or without SC approval, some acts of violence may be of such scope and

intensity that states will probably regard them as acts of war even if it is unclear that they will be repeated—such, arguably, was the case with the attacks of September 11, 2001, even had there been no prior attacks on U.S. persons or property.

8. What limits does the Charter impose on the right of self-defense once it is triggered by an act of aggression?

Here there are two questions. The first concerns a case in which, following a wanton act of aggression, the aggressor withdraws from any territory it may have occupied, places its forces in a defensive posture, and calls for negotiation or mediation of whatever dispute occasioned the aggression. In this case, can the victim state initiate a defensive war without SC authorization, even though it might seek such authorization without further endangering itself? The second case concerns a state exercising its right of self-defense by preparing to invade an aggressor or destroy its military capability through an assault by missiles and aircraft. Must this state desist in cases where the SC, acting pursuant to Chapter VII, authorizes less intense measures such as economic sanctions or a blockade to force the surrender of the persons authorizing and conducting the aggression, or takes other action which the victim state deems insufficient? Neither the practice of states and of the SC under the Charter nor the opinions of international legal experts has provided entirely clear answers to either question.

PART II: THE NEOCONSERVATIVE PROJECT AND THE USE OF FORCE

Authoritative norms pull relevant actors toward compliance. If they fail, their authority is hollow. Why do legal rules and principles have that effect in a legal system lacking centralized enforcement institutions? Principally because they express the stable interests identified by the main subjects of the norms either through processes of unhurried deliberation (as in the various stages of proposing, negotiating and ratifying a treaty) or through the retrospective rationalization of a series of initially extemporized responses to concrete problems. Whether a single long deliberative process or the accumulation of initially improvised responses, in the end I would call it interest contemplated in serenity. (For the neorealist, of course, what I call a process of identification, implying the ultimately subjective character of interests, is really the appreciation of objective interests—the rational recognition of a country’s fate.)

It follows (from this statement of the probably obvious) that the adequacy of the Charter use-of-force norms is a function of whether these norms express the interests of today’s main actors.

Though the geopolitical divisions of the Cold War prevented consensus-building on the rules governing the international use of force, in the years immediately following its end, it became almost conventional among international law experts to celebrate a new or renewed coincidence between the Charter system and the interests of states both large and small. Only in one Western country during this brief era of good feeling did there exist among policy intellectuals sharp dissent from this happy view of things. Since that country, the United States, enjoyed hegemonic military power, the dissenters’ less sanguine views of what would serve the national and yes, even the human interest, had grave implications for the just renewed normative order.

1. The project

Hegemony, as neoconservatives argued in the 1990s, is not the mere possession of dominating power, but also the will to use it on behalf of a coherent project. In the

Clinton years, hegemony was only latent. The catastrophe of September 2001 created the circumstances in which it could be made real.

Although there is not a single comprehensive statement of the neoconservative project and its premises, out of the particular policies advocated by its high priests and house organs, as well as the thicket of argument surrounding them, project and premises materialize.¹ Having won the “Third” World War, conventionally called the “Cold War” although it had many hot incidents, we are now by dint of circumstance launched into a fourth. Like the second and third ones, it stems from a conflict of values and not of mere interests. It is a war between believers in free peoples and markets, on the one hand, and infidels, on the other; it is a war between democratic capitalism and its enemies. The former is expanding, not at the end of a bayonet, but in response to the desire of people everywhere to receive it or at least its blessings. It expands, in other words, by pull and not push. And that expansion is coterminous with the expansion of individual freedom.

As the financial and cultural base of the expansion (sometimes labeled “globalization”), the United States is the inevitable target for all those who, being threatened, resist. And since globalization is not a public policy but the summation of millions of private initiatives, the U.S. government cannot erase the bull’s eye from the nation’s flank by any policy other than attempting to remake the country in the image of its enemies, a closed society. For political reasons, the government could not do that; for moral ones, it should not try even if the political obstacles were to diminish.

Given these premises, war would seem to be our fate. A conventional war would be a minor affair for a country with such military power. But in the epoch of globalization, we must contend with asymmetrical war. Since the enemies of the open society cannot stand up to our armies, they turn to such soft targets as civilians and the infrastructure that supports them. Here our enemies find vast vulnerabilities springing from the very nature of our open society and the delicate systems of communication

and movement and energy generation that sustain quotidian life. The destruction of the World Trade Center illustrated the lethal potential of asymmetrical war even when waged without benefit of weapons of mass destruction. With unconventional weapons in the mix, images of unspeakable catastrophe are summoned.

As the United States is the center of expanding *laissez-faire* capitalist democracy, the Islamic world, particularly its Arab sector, is the center of violent opposition precisely because the dynamism, pluralism, and instrumental rationalism of liberal capitalism challenge deeply rooted social arrangements. And this challenge occurs against a backdrop of nearly a millennium of armed conflict between the West and the various Islamic polities on the southern side of the Mediterranean and, in recent centuries, a succession of devastating military defeats and political humiliations for the latter. Added to this dangerous mix is a strain of sacrificial violence in contemporary, if not original, Islamic thought which lends justifications to the tactic of suicide bombing.

What, then, is to be done, according to the neoconservatives? A first step is to seek out and destroy immediate threats and demonstrate that U.S. power is now driven by an implacable will and a universal capacity to avenge

[The] premise of neoconservative grand strategy: given the opportunity, ordinary people will prove to be *homo economicus*, rational maximizers of their material well being.

every injury by inflicting greater ones. Being hated is not good; being hated without being at the same time feared is far worse. In destroying the Taliban regime and killing or incarcerating various al-Qaeda members, the first step was taken. Going after Saddam Hussein also was intended to have demonstrative value. For the Taliban were barely a regime, virtually unrecog-

nized and not fully in control of the country they misruled. Destroying the long-established regime in Baghdad, one not credibly connected to September 11, was a dramatic expansion of the anti-terrorist project, calculated to be a qualitatively more potent demonstration of Washington's will and power.

If one is to take neoconservatives at their word, however, the overthrow of Saddam Hussein also was intended to establish a capitalist democracy in what was once the most formidable and technologically advanced country in the Arab world.² This, too, would be done in part for

its hopefully contagious effects on the surrounding Arab states. This hope flows from a key, if not always clearly declared, premise of neoconservative grand strategy: given the opportunity, ordinary people will prove to be *homo economicus*, rational maximizers of their material well being. To serve its interests and theirs, the United States should provide the opportunity, as it provides the quintessential model: strict limits on state power; the rule of law including transparency of the public realm; an independent judiciary; extensive rights to private property associated with constitutional limits on the confiscatory power of the state; and free elections to sustain the rest.

The individual, being protected from depredations of the state, is thereby liberated to pursue material well being. The ethic of consumption will trump all other ends. An electorate of economic strivers will disown projects that reduce their wealth; they will find dignity and meaning in the struggle to produce and sufficient pleasure in the satisfaction of their appetites. That is why liberal democracies do not go to war with each other. To be sure, fanatics immune to the ethic of material consumption will not altogether disappear. But they will no longer be able to multiply themselves so easily. And *laissez-faire* democratic governments, driven by the coercive power of elections to mirror the interests of their electors, will cooperate with the United States to extirpate fanatics.

Neoconservatives did not rely exclusively on the argument that a contagion of democracy would spring from the demonstration factor of Iraq, thus reshaping the politics of the Middle East. The evidence of freedom, peace, and affluence in Iraq would weaken from within the stagnant autocracies of surrounding Arab states like Syria and Saudi Arabia. Meanwhile, the United States, with as many of the industrialized allies it might muster, would encourage them with positive and negative incentives to manage a transition to open societies for the benefit of the Arab people in general and for ours. Israel's people would benefit as well, because citizens of open societies would no longer have grounds to rage at their fate—rage that today's Arab governments deflect to Israel first and then to the United States.³

Is this project, to the extent it has survived sanguinary setbacks in Iraq and the multiplication of catastrophic violence in allied states, the expression of a small minority of ideologically driven politicians and policy intellectuals, or does it now reflect a widespread, irresistible conception of American interests? After September 11's demonstration of U.S. vulnerability to asymmetrical warfare, the neoconservative vision could draw support from

traditional conservatives concerned primarily with maximizing the country's security and wealth, as well as those who a priori equate U.S. and Israeli security interests. Should it not appeal as well to human rights activists and to the wider universe of centrists and liberals? Can one believe in the universality of human rights and not embrace a strategy that purports to merge realism and idealism in the cause of freedom? Apparently so. Most of the established organs and prominent advocates of liberalism and most of the leading figures and institutions in the American as well as the international human rights world have reacted along a spectrum ranging from intense skepticism through selective criticism to comprehensive hostility toward the Bush administration's grand strategy.⁴

2. Why the project cannot unite the American elite

Is the skepticism I refer to above a merely visceral response to the conservative messenger? Or might there be reasoned grounds, rooted in liberal values and the deep essence of human rights, behind American elites' rejection of this message?

A crusade for democracy, even full-blown liberal democracy, overlaps but is not synonymous with a crusade for human rights. Moral criteria for evaluating the exercise of power stretch into the remote past.⁵ So does the idea of possessing rights in relationship to power holders. But the idea of rights held in common, not just by all members of the same class, profession, guild, race, religion, or nation but by every human being simply by virtue of being human, is a modern one. And just as this idea is not synonymous with liberal democracy, nor is it synonymous with general human welfare.

A common conception of human rights is that they are categorical claims on human beings and institutions, primarily on governments, to act or refrain from acting in ways injurious to the exercise or experience of the right.⁶ At least the so-called first generation of civil and political rights that have evoked the widest consensus about their imperative quality are focused on the individual, not the wider community. More than that, they are claims that the community cannot trump or be subordinate to some presumed general good which, while causing injury to a few, enhances the welfare of the many.

Even if we could be certain that human welfare would in the long term be better served by violent statecraft, if one were committed to the view that human rights are trumps, then one might still oppose a crusade for democracy. The taking of innocent lives is among the probable

features of a violent crusade for whatever end. One particularly awful instance occurred during the invasion of Iraq, when a missile flying off course struck an apartment complex wiping out a child's immediate family, ripping off his arms, and crisping his body.⁷ Since civilians were not targeted—on the contrary it appears that the U.S. military made an extraordinary effort to minimize civilian casualties⁸—this child's horror was entirely within the boundaries of the humanitarian Laws of War.⁹ Moreover, given the Security Council resolutions violated by Saddam's regime, its chronic violations of human rights, and the loss of life arising from Iraq's aggressions against Iran and Kuwait, a not entirely implausible just war argument could be made in favor of the U.S.-led invasion.¹⁰ That being so, the just war tradition would absolve the U.S. and its allies from guilt with regard to civilian deaths and injuries, since serious efforts were made to avoid them. Nevertheless, pain and death inflicted predictably, albeit unintentionally, on the innocent rubs against the grain of human rights in any war of choice rather than self-defense. And that would be the case whether the choice is made for the purpose of preserving U.S. freedom of action or extending the incidence of democracy.

The one thing certain about armed intervention is the death and mutilation of the innocent.¹¹ Because the core human rights are imperative claims by individuals not open to trumping by some supposed long-term general good, a crusade to defend them has built-in restraints that a crusade for the general expansion of democracy does not. In the former case, we are constrained at least to balance the lives hopefully saved against those we will take in order to save them.

The neoconservative view is that in light of the present conditions of international relations, broad freedom of action for the United States and the continuous deepening of global economic integration, both of which are deemed to serve humanitarian as well as national interests, require discretion to initiate preventive attacks on unfriendly states that develop weapons of mass destruction, particularly nuclear ones. This is true even if those states have credible grounds for feeling threatened by neighbors or by the United States and for believing that the only solid guarantee of independence and territorial integrity is to develop a WMD deterrent.

Neoconservatives advocate three further means. First, they require the exercise of police power within other states, but without their consent. In other words, the United States ought to be free to arrest or kill persons believed to be planning attacks, conspiring to attack, or

facilitating attacks on American persons or property abroad or within the United States. Second, they assume that the threat or the use of force is necessary to press authoritarian regimes into becoming elected ones. Finally, in light of the Bush administration's furious opposition to proposed legislation setting limits to the methods U.S. forces can use to interrogate prisoners it is plausible to say that neoconservatives deem it necessary to violate the prohibitions on torture and inhuman and degrading treatment that are contained in the Geneva Conventions of 1949 and the International Covenant on Civil and Political Rights.

All in all, it does seem accurate to describe these various felt needs as so inconsistent with widely held (though not universal) views about sovereignty, intervention and human rights as to merit the description "revolutionary."

3. The neoconservative project and UN Charter restraints on the use of force

The Charter's norms cannot be reconciled with the full range of measures the Bush administration and its neoconservative advisors declare necessary for the protection of American interests—which it equates with the interests of the West and, indeed, of all states other than a few evil ones. That being so, one might reasonably have expected

the administration to campaign for legal reform. However, it has not.

This apparent disinterest is subject to several interpretations. One is that the administration is generally happy with the inherited normative arrangements, but regards them as inapplicable to the United States, because it, not the Security Council, is the ultimate guarantor of international order. This claim has no precedent in the history of modern international law, dating back to the middle of the seventeenth century. That history coincided, however, with the bal-

ance of power system and an effective monopoly of force by the major states. Today, administration officials might argue, the system is dominated by a single power and all of the major states are threatened by nonstate actors. The attribution of exceptional privileges to the hegemonic power acting in the general interest is as congruent with the real character of international relations as the Westphalian idea of the legal equality of all civilized states was congruent with the character of international relations in the preceding era.

A second possible interpretation is that the dominant figures in the Bush administration regard international law neither as law nor as an element in international relations that needs to be taken seriously. To be sure, the president and the secretaries of state and defense occasionally defend one or another policy—for example, the invasion of Iraq and the treatment of detainees—as being consistent with international law. Moreover, when accused of actions that clearly violate treaty law, such as the kidnapping of persons in foreign countries or the rendition of suspected terrorists to torture regimes or the torture and cruel and inhuman treatment of detainees by agents of the United States itself, the administration sometimes pays a kind of deference to law by claiming that senior officials did not authorize the behavior, or have taken steps to insure that violations will not occur, or refuse to acknowledge that the behavior did occur.

In addition, the United States has now sent as its chief representative to the United Nations a lawyer who has written that international law is not law as we know it domestically, but rather a matter of political understandings adopted for the convenience of states and subject to unilateral change when such understandings prove inconvenient. Similarly, the President's Counsel, now the Attorney General, endorsed the view that international law cannot as a constitutional matter and should not be understood to limit the discretion of the President of the United States, for to do so would be to diminish the nation's sovereignty. This view of sovereignty reduces treaty law to the equivalent of mere political understandings.

A third possible interpretation of the administration's position is that it agrees with those writers who claim that violations of Charter norms have in their number and severity stripped those norms of binding character. That being our present normative condition, the administration is implicitly proposing a new, more flexible regime that allows responsible states such as the United States to exercise effectively their inherent right to self-defense in the altered conditions of international relations.

Yet a fourth interpretation is that the administration is simply clarifying, in light of changed conditions, the

Because the core human rights are imperative claims by individuals not open to trumping by some supposed long-term general good, a crusade to defend them has built-in restraints that a crusade for the general expansion of democracy does not.

ance of power system and an effective monopoly of force by the major states. Today, administration officials might argue, the system is dominated by a single power and all

actions that states are entitled to take pursuant to the “inherent right to self-defense” recognized by Article 51 of the Charter. The main problem with this interpretation, however, is that Article 51, while recognizing the “inherent right,” limits its exercise to cases of “armed attack” (hitherto construed to be ongoing or at least indisputably imminent). It also appears to require a state taking self-defense measures to report them to the Security Council with the understanding that the Council shall determine what further actions can be taken by the state in question or by any other state. Given the apparent reluctance of the administration to submit its actions to final review by the Security Council, this fourth interpretation should probably be seen as a merely cosmetic version of the first, second or third.

4. *The neoconservative project and the interests of the West*

Neoconservatives offer a more or less coherent diagnosis of nonstate transnational violence and then prescribe a course of action that happens not to fit within the Charter’s normative framework for the use of force and the protection of sovereignty. Moreover, this course of action is not congruent with long-established views on the means (i.e., *jus in bello*) states may employ to maintain either internal or external security. However, on the presumption that international law must reflect the interests of its subjects, opponents of the neoconservative approach to international law need to challenge its diagnosis of the threat to Western interests or the efficacy of its prescription for reducing it in order to argue effectively against its positions.

On the matter of diagnosis, the neoconservative explanation of anti-Western terrorism may obscure its real causes. Is it incontestable that Islamic terrorism is best understood as a pathological response to the paradigmatic freedom and affluence Western states enjoy within their own borders, contrasted with the intellectual and material poverty of much of the Islamic world? Or, to similar effect, that it can be construed as a demented aspiration to restore Muslim power in all the areas where it once was exercised (i.e., from Spain all the way round the Mediterranean basin to the gates of Vienna)? Or a fanatical effort to exclude from the Islamic World the diffuse cultural forces seen to issue from within the West, although they may be nothing more than the manifestations of a global postindustrial, consumerist economy? Isn’t there a more parsimonious, straightforward explanation, one that treats Muslim terrorist leaders as rational human beings defending tangible commonplace interests

by awful but relatively efficient means?

The more straightforward explanation is that Muslim terrorism is a response with many precedents of indigenous forces to what they not unreasonably perceive as an alien exercise of political-military power within territories they also not unreasonably perceive as theirs. This response is not

Muslim terrorism is a response with many precedents of indigenous forces to what they not unreasonably perceive as an alien exercise of political-military power within territories they also not unreasonably perceive as theirs.

fundamentally different from the rebellions or attempted rebellions in countries such as Algeria, Angola, South Africa, Southern Rhodesia, Kenya, Vietnam, and, earlier, in Ireland against colonial structures of domination. To be sure, alien power, exercised through or in collaboration with elements of the indigenous population, is often indirect and to a considerable extent hidden.

It does not appear to be a controversial proposition that the United States, like the British and French before it, exercises what could reasonably be perceived as imperial power in the Middle East by means of various instruments of statecraft: open military intervention (e.g., Iraq, Lebanon); intervention by proxy (e.g., support for Saddam Hussein’s invasion of Khomeini’s Iran); subversion (e.g., overthrow of the Mossadegh government in Iran); payments to accommodating chiefs (e.g., the annual subvention for the Mubarak regime); and the arming and equipping of military, police, and intelligence personnel (e.g., Tunisia, Morocco, Saudi Arabia, Egypt). I offer these facts not to make a normative point. People will doubtless differ on whether, at the end of the day, imperial domination contributes more to the well being of local peoples than it extracts in tolls for its efforts. I invoke these facts simply to suggest that Muslim rage may be attributable to tangible policies of domination and perceived exploitation as was Irish, Kikuyu, and Algerian radicalism (and their use of terrorist tactics), to name only three well-known cases.

What follows from this hypothesis is that, at least in theory, it might be possible to reduce the incidence of Islamic terrorism by a sharp withdrawal of the Western political, clandestine, and military presence in Islamic countries. This would leave indigenous forces perhaps to negotiate accommodations in some places and to submit

their differences to the arbitration of force in others. Even assuming that terrorism directed at the West might thereby be reduced, it does not, of course, follow that a manifest contraction of the Western political/military presence undertaken for the stated purpose of altering a relationship conceded to have been imperial would best serve the interests either of the West or the majority of local peoples. The requisite cost-benefit analysis would be immensely complex and, in the end, highly uncertain—which generally means that inertia prevails.

I have put the policy issue dichotomously. In fact, there are many points between the status quo, on the one hand, and, on the other, a policy of strict nonintervention in local affairs and the concomitant dismantling of the entire Western military-intelligence structure in the Middle East. A finite number of acts such as the following might alter significantly the apparently rampant perception among Muslims generally that the U.S. is at war with the community of Islam or is determined to exercise imperial power over its Middle Eastern homeland:

- The withdrawal of Western troops from bases in Arab countries and Western naval forces from the Persian Gulf
- Western insistence on the establishment of a sovereign Palestinian State in all of the West Bank and Gaza with a capital in East Jerusalem following a period of UN or U.S.-EU trusteeship
- a Europe-U.S. led initiative to effect the generously funded resettlement of Palestinian refugees in the new state and other parts of the Arab World
- and Western insistence that Israel ratify the nonproliferation treaty and forswear first use of weapons of mass destruction.

In fact, there are plausible grounds for believing that support for jihad can be very significantly shrunk by changes in U.S. policy. An incorrigible core of fanatics will undoubtedly remain in all circumstances, but we might be able to reduce dramatically the dimensions of the sea in which they swim. On this hypothesis, then, the current intensity of the terrorist threat to U.S. national security is not our fate, it is our choice.

The choice thus far has been to intrude more violently into the Middle East. The invasion and occupation of Iraq is to this point the principal illustration of that flight from the Charter norms that the successful containment of terrorism is alleged to require. The catastrophic terrorist attacks on Madrid and London appear to have been motivated by this instance of flight. Various

observers of trends in the Islamic World, including the part expatriated to Europe, believe that the invasion of Iraq has facilitated the translation of Muslim anger and alienation into recruits for terrorist organizations. Moreover, the now well-documented and widely publicized recourse to torture and inhuman and degrading treatment of detainees in Afghanistan, Guantánamo, and Abu Ghraib are certain to have weakened the West's necessary effort to build a worldwide consensus against the use of brutal means for political ends which is the essence of terrorism.

To be sure, things may look different years from now. We might take the leisurely historical view recommended by Premier Zhou Enlai to Henry Kissinger when, responding to the latter's query about his assessment of the French Revolution's impact, he said it was too early to tell. Still, if proponents of radical normative change are felt to carry the burden of persuasion, it seems fair to conclude at this point: "Case not proven." There is, however, a case for codifying certain minor deviations from a literal reading of Charter norms that still leave in place powerful restraints on unilateral recourse to force. I now turn to them.

PART III: KEEPING THE NORMATIVE ORDER INTACT

In the wake of the flaring doubt about the future of the United Nations, sparked by the invasion of Iraq without Security Council sanction, Secretary-General Kofi Annan invited sixteen notables broadly representative of the UN membership “to assess current threats to international peace and security, to evaluate how well our existing policies and institutions have done in addressing those threats, and to recommend ways of strengthening the United Nations to provide collective security for the twenty-first century.” The High-Level Panel on Threats, Challenges, and Change, as it was called, released its report in late 2004.

1. Restating the Charter’s norms: on the report of the High-Level Panel

Not surprisingly, one focal point of this unusually candid report is the legal regulation of the use of force. On the one hand, and this was surprising, the Panel appears to reinforce the Charter skeptics by stating bluntly: “That all States should seek Security Council authorization to use force *is not a time-honored principle*.” (Emphasis added) On the other hand, it immediately breaks with the skeptics, who either disparage legal regulation of force in a unipolar world or call for new norms that would provide much more space for the violent defense of interests deemed vital. For the Panel goes on to say, referring to the claimed obligation to seek Security Council authorization for the use of force, that, “what is at stake is a relatively new emerging norm, one that is precious but not yet deeply rooted.” It continues,

For the first 44 years of the United Nations, Member States often violated these rules and used military force literally hundreds of times . . . and Article 51 only rarely providing credible cover. Since the end of the cold war, however, the yearning for an international system governed by the rule of law has grown.¹²

Complementing that yearning, the Panel’s report

continues, is something approaching a negative consensus (with the United States as the main possible holdout) in opposition to the merely de facto restraints of a balance of power system or to a security system legislated and policed “by any single—even benignly motivated—superpower.” Moreover, the report states that “expectations about . . . legal compliance” with the Charter constraints (essentially as initially construed) “are very much higher [today].” While recognizing that the potential for catastrophic attacks by terrorists has sharply intensified threats to national and human security, the Panel nevertheless adheres to the original view that resort to force without Security Council authorization is unacceptable where a threat is not imminent. For, if it is not imminent, then there is time to have recourse to the Council. That the Charter empowers the Council to authorize preventive (as distinguished from merely preemptive) action is clear to the Panel, which even suggests that the Council’s power in this respect may be read more broadly today than in the past. It illustrates preventive action with the hypothesized case of State A, which has previously expressed hostility to the idea of State B suddenly acquiring nuclear weapon-making capability. Even without evidence of State A’s intention to use or to seek concessions by threatening to use force, the Council could, in the Panel members’ collective view, find a threat to the peace and therefore authorize action pursuant to Chapter VII of the Charter.

Given the broadly representative character of the Panel and the generally distinguished qualifications of its members, it

seems reasonable to take its report as persuasive evidence of a normative consensus that includes virtually all powerful countries (and, a fortiori, weak ones) other than the United States under the present administration and, in light of its past behavior, presumably Israel. While the

International law is supposed to help its subjects predict whether their actions will elicit applause, indifference, or indictment.

report does not address directly and unambiguously all of the problem areas I identified at the beginning of this paper, it is an unequivocal reaffirmation of the core elements of what I have identified as the original understanding. Hence the declared policies of the Bush

administration are as irreconcilable with what I take to be the present consensus about appropriate legal restraints as they are with the initial interpretations of the Charter by most scholars and governments. To persist in those interpretations

The invasion and occupation of Iraq is to this point the principal illustration of that flight from the Charter norms that the successful containment of terrorism is alleged to require.

risks casting the United States as a rogue state, a role not well calculated to enhance that broad measure of international cooperation required to contain the terrorist threat.

While consensus seems broad and clear with respect to preventive war and less comprehensive assaults on political independence and territorial integrity, it attenuates beyond that core to a point that allows some play in the joints of the tripartite division of force that a literal reading of the Charter appeared to achieve. In the following areas of potential importance there remains dissensus or ambiguity.

a. The authority of regional and sub-regional organizations

International law is supposed to help its subjects predict whether their actions will elicit applause, indifference or indictment. Where a regional or sub-regional organization authorizes the preventive use of force or intervention on other grounds seemingly reserved by the Charter for Security Council decision, reaction is not predictable because historically it has been governed by differences in context that are very hard to generalize. A broad coalition of states in the General Assembly condemned the U.S. invasion of Grenada even though it appeared to have been requested by the hitherto obscure but nevertheless real Organization of Eastern Caribbean States. (Despite the intimate relationship between President Ronald Reagan and Prime Minister Margaret Thatcher, the U.K. signaled its objections by abstaining rather than voting, as it would normally have done, with the U.S.) Yet not long afterwards, a Nigerian-led invasion of Liberia, authorized

pursuant to ad hoc procedures of the Economic Organization of West African States, evoked a mixture of indifference and congratulations for mitigating the chaos and butchery in Liberia. In neither case did the regional body comply with the apparent intent of the UN founders that regional organizations secure a favorable Security Council vote before initiating enforcement actions.

As long as the veto of one Permanent Member can paralyze the Security Council, international security may arguably be enhanced by offering a state some alternative to impotence, on the one hand, and, on the other, recourse to force it unilaterally determines to be essential to its interests and consistent with the purposes and principles of the United Nations. But not all present or potential regional and sub-regional organizations are equally good forums for appraising state claims. One can imagine an organization so dominated by its most powerful member that its preferences will always rule. NATO, by contrast, with its rule of unanimity, its numbers, and the democratic accountability of its member governments really can persuasively evaluate proposed interventions in terms of their justness, their prudence, their threat to international peace and security, and the risk to national or human security of not acting. It would no more have approved the invasion of Iraq than would the Security Council. Its approval and monitoring of the Kosovo intervention strengthened the claim that it was “legitimate” even if not strictly consistent with the Charter.

What follows is that if the community of states is going to concede to regional bodies the authority to legitimate military action, the community must begin to distinguish among claimants to regional organization status by establishing criteria of recognition. It should also concede a conditional delegation of authority to such organizations only in the event that Security Council action is blocked by a veto rather than the inability to secure nine votes. Finally, a doctrine attributing authorizing power to regional organizations could be more easily reconciled with respect for the principle of sovereignty, if such power could be exercised only with respect to actions against member states. In their case, one can argue prior consent to the procedures whereby the organization acts. If the target is a non-member state, reconciliation is far more problematical.

b. Armed intervention to prevent crimes against humanity

Strangers to our planet wandering through the pre-9/11

academic and think tank conference circuit or the associated literature might easily have concluded that every Western government with the means to project force beyond its own frontiers was straining against the leash woven out of normative uncertainties, awaiting only their resolution before hurling itself into the humanitarian fray. But even before September 11's universal refocusing of concern, once these observant strangers moved from the conference room to the world of action, or in this case more frequently inaction, what would they have seen? Surely nothing less than the disingenuous marriage of noble rhetoric and heroic constraint that has characterized the behavior of the United States and other countries that declare themselves driven in some degree by moral passion when faced with slaughter in places outside their perceived circle of national interests or slaughter conducted by regimes with which they find it convenient to fraternize.

That said, it remains true that from time to time in certain states, public opinion, aroused by the international human rights community, moves governments, particularly when by chance they are led by persons who in some measure shares the public's passions, to contemplate humanitarian intervention. On the whole, the Security Council has not been a bar to action. Kosovo was, in this respect, exceptional. The Chinese have grumbled, being still uneasy about any precedent for intervention, sometimes the Russians too; but in the end they acquiesced even in the Haitian case where the main emphasis of the proposed intervention was on restoring a democratically-elected regime rather than ending crimes against humanity.

There are two ways of managing the prospective collisions between the impulse to intervene to prevent mass killing and Charter norms. One is to do nothing, an approach dictated by the belief that the collisions will be so exceptional that they can be absorbed without much damage to the normative order. The other is to agree on a set of conditions for intervention without Security Council authorization. Agreement may at first be informal, a declaration by various governments to which some other governments may voice objection. Or it might assume the form of a declaratory resolution of the Security Council, which arguably is not subject to veto. The conditions ought to be the following:

- As a threshold or triggering requirement, there must be imminent or ongoing and massive crimes against humanity or a failure to protect against grave threats to life stemming from natural or man-made disasters

- All remedies short of force must have been exhausted except (a) where timely and effective intervention requires immediate recourse to force or (b) remedies short of force (like comprehensive economic sanctions) that might ultimately be effective are very likely to inflict more collateral damage to human welfare than armed intervention would
- The intervention must be conducted in compliance with international humanitarian law and collateral damage is minor or, because of self-imposed constraints, is projected to be minor in comparison to the damage to the subject population that would predictably have occurred if the intervention had not proceeded
- There must be a high probability that the use of force will achieve a positive humanitarian outcome
- The intervening states (a) must report the intervention to the Security Council, (b) must lay before the Council a program for eliminating the threat to human rights that precipitated the intervention and for restoring indigenous authority once the triggering conditions are terminated, and (c) must request the Council to monitor their compliance with the program and assess their satisfaction of the above conditions.

I think that these conditions will usefully structure debate within states contemplating intervention, within the wider international community, and within the Security Council.

2. Furthering the normative intent of the Charter

There is nothing new about powerful states using all of the instruments of statecraft, including brute force, not only to disable potential rivals and to protect against immediate threats to vital interests, but also in an effort to create an international environment that mirrors their values. This is particularly true of states with a strong sense of ideological mission, which view the reproduction of their domestic institutions and values as a good in itself. Moreover, despite the disconfirming record of Sino-Soviet or Sino-Vietnamese relations, such states presume that mirror image regimes will be far more cooperative than those reflecting very different ideas about government and society. In recent history we have seen Marxist, Fascist, social democratic, and liberal capitalist regimes all trying to clone themselves.

As I noted earlier, the main premise of neoconservative ideologues is that the employment of American hege-

mony to spread democracy, if necessary at the point of a bayonet, serves American interests no less than its values. Though I, too, believe that human security would be better served in a world of liberal democratic states, I am not convinced that the use of force in violation of substantive and procedural norms supported by the generality of states, or at least the leading states, much less in flagrant violation of human rights and humanitarian law, will advance the democratic cause. On the contrary, there are signs that, at least in the United States, it is beginning to erode those constraints on executive power that have long distinguished North Atlantic democracy from illiberal formal democracies in Latin America and parts of Asia.

If, as sometimes appears to be the case, the call for looser restraints on the use of force is in service of a violent crusade for laissez-faire democracy, it will surely go unanswered, for such a crusade will threaten the interests of many states, the United States included, I believe. Perhaps for that reason the call is usually made in more traditional and hence disarming terms. Loosened restraint is said to be necessary not for the indefinite reproduction of congenial regimes, but rather to protect conventional interests that all states share, above all the protection of their populations from catastrophic attack. The main argument is now familiar: unlike states, terrorists (i.e., NGOs with bombs) cannot be deterred because they have few if any sunk assets and operate clandestinely. Hence, they must be preempted, that is killed or captured wherever and whenever they surface. This preemptive action is an exercise of the inherent right of self-defense. Exercise cannot be limited by any notion of imminence, since the clandestine, hit-and-run character of terrorists

What the Charter does not allow is unauthorized military action against alleged terrorist organizations or individuals residing in a country able and willing to prevent use of its territory for attacks on other states.

at war makes it likely that preparatory behavior will go undetected. For the same reasons, compounded by the ability of contemporary terrorists to inflict huge losses on target societies, exercise cannot be limited by mandatory recourse to the Security Council in advance of any action. Consultation involves some delay, while the opportunity to strike the shadowy, fast-moving enemies of civilization will often be fleeting. Moreover, in

order to persuade other countries of the need for action, it would often be necessary to reveal fragile intelligence sources that could easily be compromised.

To be sure, these concerns are not trivial. Can they be taken sufficiently into account by means of an interpretation of the received normative order that leaves it essentially intact? The answer, I think, is “yes.”

a. The Case of al-Qaeda

Take the case of al-Qaeda. For a number of years before September 11, 2001, it had attacked U.S. targets, including its embassies in Kenya and Tanzania and a vessel of its armed forces in Yemen. These attacks were part of a declared campaign against the lawful U.S. presence in the Middle East. Although not carried out by a state, the attacks and their broad aims were equivalent to the waging of war and the U.S. could therefore exercise its right of self-defense under Article 51 of the Charter, but was obligated to bring the situation to the Security Council so that it could review the situation and determine what collective measures would best serve international peace and security. However, since the analogue of an aggressive attack had occurred and was likely to recur at times and places of al-Qaeda’s choosing, arguably the United States was not required to remain inert while the Security Council deliberated. If, for instance, its armed forces encountered al-Qaeda operatives aboard a ship on the high seas flying no national flag, it certainly was permitted to attack and destroy the ship or to seize the operatives. Moreover, if, as was the indeed case, Osama bin Laden was ostentatiously using a country as his operations base, the United States could demand of its government that Bin Laden be detained and the base shut down, so no further attacks could be made. Moreover, if that government was indisputably colluding with Bin Laden, or if there was substantial reason to believe that the host government either could not or would not prevent Bin Laden from quickly shifting to a new venue, the United States could attack Bin Laden without any prior request. And in the event the Bin Laden host government attempted to repel this exercise of self-defense rights under the Charter, it too would be a legitimate target of U.S. forces. In short, the U.S. government could reasonably have construed the Charter to allow an attack on al-Qaeda installations in Afghanistan, for instance after the embassy bombings. The Security Council’s implied authorization of the U.S. invasion of Afghanistan following September 11 is consistent with this analysis of what the Charter allows.

What the Charter does not allow is unauthorized military action against alleged terrorist organizations or individuals residing in a country able and willing to prevent use of its territory for attacks on other states. Thus, if Osama Bin Laden were suddenly discovered summering in Provence, the United States would not be entitled to lob onto his villa even the most intelligent of missiles or to drop in a few members of Delta Force without permission from the French government which, in my hypothetical case, is perfectly unaware of his presence. Rather it either would have to secure permission from Paris or authorization from the Security Council. Is this an intolerable constraint on the protection of nations against transnational terrorism? Would it not be fair to say that disregard of the extant law in a case such as this would end that cooperation between the intelligence services of France and the United States that the Bush Administration has lauded? Surely legal constraint in this case reinforces or at the very least reflects the conditions of interstate cooperation essential for the counter-terrorist struggle.

What can be done under Charter norms when a group allegedly disposed to transnational terrorism is merely nascent? Let us hypothesize a case in which U.S. intelligence identifies an anti-American group and determines that it is beginning to plan attacks on American targets. Since most governments are today hostile to transnational terrorism and inclined to cooperate in its suppression, a word from Washington wrapped, perhaps, in a few incentives, should be sufficient to secure local steps to suppress the budding terrorists. Suppose, however, that the government is reluctant or unable to act

because the alleged terrorists are members of an important ethnic constituency or are located in a remote part of the country where there is virtually no governmental presence. In this case, there are two possibilities. One is that the United States would obtain the other state's authorization to act in effect as its proxy. Here, the rights of sovereignty would allow one state to outsource a delimited exercise of its police

The Charter's normative and institutional arrangements are consistent with the key interests of great states in the era of transnational terrorism. They are inconsistent only with the dangerous hegemonic designs not of the United States as a society, but of the small clique that is temporarily in control of the national government.

power to another. The other possibility is that the United States would seek authorization from the Security Council. Since all Permanent Members regard transnational terrorism, particularly Islamic terrorism, as a threat to their respective national interests, if the United States can offer persuasive intelligence of the group's aims, the Council is likely to exercise its now well-precedented authority to authorize preventive action. This may involve some risk to intelligence sources.

What is the alternative? That the United States glob-

THE IDEAL PRINCIPLES FOR HUMANITARIAN INTERVENTION :

- * As a threshold there must be imminent or ongoing and massive crimes against humanity or a failure to protect against grave threats to life stemming from natural or man-made disasters.
- * All remedies short of force must have been exhausted.
- * The intervention must be conducted in compliance with international humanitarian law.
- * There must be a high probability that the use of force will achieve a positive humanitarian outcome.
- * The intervening states (a) must report the intervention to the Security Council, (b) must lay before the Council a program for eliminating the threat, and (c) must request the Council to monitor their compliance with the program and assess their satisfaction of the above conditions.

ally and lesser powers regionally should be free to lob missiles or troops into a country, and kill or kidnap its residents, often with collateral injury to persons conceded to be innocent, on the basis of such intelligence as each deems sufficiently reliable? The likely result of repeated violation of the territorial integrity of states is the progressive collapse of cooperation on a whole range of issues including nonproliferation. If states are thrown back on their own resources to guarantee their security, the incentive to find means for deterring intervention by more powerful actors will be multiplied. It is hard to think of means to that end other than the reputed possession of weapons of mass destruction.

b. The case of acquisition of WMD by a hostile state

The one other scenario often adduced by enthusiasts for preventive intervention is the imminent acquisition of nuclear weapons by a state not presently a member of the nuclear club. The High-Level Panel report addresses this case directly, hypothesizing an instance where a state that has expressed hostility to another state suddenly acquires nuclear weapon-making capability. The Panel members' response is that, even without evidence of any intention on the part of the acquiring state to use the weapons or to seek concessions by threatening use, the Council could find a threat to peace and authorize enforcement measures. In doing so, however, the Council might well take into account legitimate fears of intervention on the part of the acquiring state and condition its enforcement measures on the provision of pledges of nonintervention from states that have previously threatened it.

PART IV: CONCLUSION

The nub of the matter, then, is that, properly construed, the Charter's normative and institutional arrangements are consistent with the key interests of great states in the era of transnational terrorism. They are inconsistent only with the dangerous hegemonic designs not of the United States as a society, but of the small clique that is temporarily in control of the national government.

Neither conclusion is intended to celebrate the existing system of global governance, which is plainly inadequate to deal very effectively with the full range of threats to human security. There are, for instance, two dozen or more states governed by tyrants and kleptocrats unable or unwilling to provide their peoples with a minimum of public goods and thereby killing them through the slower mechanisms of malnutrition and preventable disease. A more perfect system of governance would remove these mafias and place the states under trusteeships for the benefit of their peoples. It would also foster much greater interstate cooperation, including intrusive surveillance, to reduce the risk of pandemic flu, a risk more grave than bioterrorism at this time. These examples could easily be multiplied. More effective governance will not occur unless and until the United States is prepared to institutionalize cooperation among the leading states, accepting restraints on unilateral action, compromising on ends and means, and receiving in turn heightened cooperation and burden-sharing in the maintenance of international order. This may never occur. Loosened restraints on the use of force will help to guarantee that it will not occur. This, perhaps, is the main reason why neoconservatives urge their adoption.

NOTES

1 See, for example, Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs* 70 (Winter 1990/1991), pp. 23–33; Mark Helprin, "What Israel Must Do to Survive," *Commentary* 112 (November 2001), pp. 25–28; Daniel Pipes, "Who is the Enemy?" *Commentary* 113 (January 2002), pp. 21–27; Norman Podhoretz, "How to Win World War IV," *Commentary* 113 (February 2002), pp. 19–29. For a critical view, see Nicholas Lemann, "The Next World Order," *The New Yorker*, April 1, 2002, pp. 42–48.

2 Alan Murray, "Bush Officials Scramble to Push Democracy in Iraq," *Wall Street Journal* (April 8, 2003), p. A4; Lawrence Kaplan, "Regime Change," *The New Republic* 228 (March 3, 2003), pp. 21–23.

3 See Thomas Carothers, "Promoting Democracy and Fighting Terror," *Foreign Affairs* 82 (January/February 2003), 84–97.

4 The Lawyers Committee for Human Rights in particular published "A Year of Loss: Examining Civil Liberties Since September 11" (September 2002), and its update, "Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Civil Liberties" (April 2003); available at www.lchr.org/us_law/loss/loss_main.htm.

5 See Micheline Ishay, ed., *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (London: Routledge, 1997).

6 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2002), p. 35.

7 Samia Nakhoul, "Boy Bomb Victim Struggles Against Despair" *Daily Mirror*, April 8, 2003, p. TK.

8 See George F. Will, "Measured Audacity," *Newsweek* 141 (April 14, 2003), p. 66.

9 The primary treaties of humanitarian law governing international armed conflict are the 1907 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocol 1 to the Geneva Conventions. Taken in concert, the provisions of these

treaties require that military attacks must be directed at military targets and that the rules of necessity and proportionality be followed, but it does not mean that there cannot be civilian casualties. See Michael Bothe, et. al., *New Rules for Armed Conflicts* (Dordrecht: Kluwer Law International, 1982), pp. 304–305.

10 The White House claimed that Saddam Hussein repeatedly violated sixteen United Nations Security Council resolutions designed to ensure that Iraq does not pose a threat to international peace and security. A list of those resolutions can be found in the White House briefing paper, “Iraq, A Decade of Deception and Defiance,” available at www.whitehouse.gov/news/releases/2002/09/20020912.html. See, for example, “Iraq: Witnesses Link Mass Graves to 1991 Repression”; “The Mass Graves of al-Mahawil”; “Mass Graves Hide Horror of Iraqi Past and Human Rights Testimony on Prosecuting Iraqi War Crimes,” all available on the Human Rights Watch Web Site at www.humanrightswatch.org. More than one million people were killed during the Iran-Iraq war. See Dilip Hiro, *The Longest War* (New York: Routledge, 1991), p. 1. The U.S. State Department reports that 1,000 Kuwaitis were killed during the Iraqi invasion and subsequent occupation in 1990–91. See usinfo.state.gov/regional/nea/iraq/crimes. The reader may wish to compare with the “Special Report” published by the United States Institute of Peace after a December 2002 symposium to address the question, “Would an Invasion of Iraq be a ‘Just War’”; available at www.usip.org/pubs/specialreports/sr98.pdf.

11 Stuart Taylor, Jr., “In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light,” *New York Times*, November 6, 1983, p. A20. The invasion of Panama resulted in the deaths of 300 Panamanians. See Adam Isaac Hasson, “Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic—Trends in Political Accountability and Transnational Criminal Law,” 25 *Boston College International and Comparative Law Review* 125 (Winter 2002), pp. 125–158.

12 UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565 (December 2003), paras. 82 and 186.

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This report should be cited as:
Tom Farer,
“Legal and Legitimate Use of Force: The UN Charter and the Neoconservative Challenge”
(New York: Carnegie Council, 2006).