

required by international law.⁶ Security Council Resolution 1373, adopted on September 28, 2001, spells out many of the specific controls required to defeat the enemy.⁷

Precisely because of who they are, societies that cherish human dignity anguish over every decision about using force, seek to ensure that the law of armed conflict is observed, and, above all, search for avenues of accommodation and settlement. But the United Nations and all people committed to a public order of human dignity must keep in mind that this time they are not engaged in an elective or optional conflict. They are under mortal attack, and in a war of self-defense, they must choose between only two possible exit strategies: either victory or defeat.

W. MICHAEL REISMAN

THE USE OF FORCE AGAINST TERRORISM AND INTERNATIONAL LAW

At the time of this writing, it is hard to know what international law questions will arise from the attacks of September 11, 2001, on the United States at the World Trade towers and the Pentagon. The situation is likely to change significantly between the time this Editorial is being written and its publication. Obviously, a strong response is required to suppress international terrorism, including the use of force. I support such a response but fear that the U.S. use of force without United Nations Security Council authorization under Chapter VII of the UN Charter may undermine long-term United States objectives and create an undesirable precedent damaging to the United Nations system, including world order interests shared by many.

Statements issued by the United States government to date dramatically call for a “war against terrorism” worldwide, while failing to acknowledge any formal role for the Security Council regarding the use of force in or against other states. While the U.S. administration assembled what appears to be a global alliance against international terrorism, it reserved to itself the right to decide how to use that force, including when and where it should be used. This policy was implemented by the commencement of attacks on Afghanistan on October 7, 2001. The United States claims the right to use force against other states that are associated with international terrorism.¹ Its broad claims to use force reflect an unfortunate failure by the United States to promote the objectives of the United Nations Charter, as well as the value of maintaining and strengthening the United Nations system.

I need not restate the argument in my previous Editorial that absent actions in self-defense under Article 51 of the Charter, uses of force against the territorial integrity or political independence of another state must be authorized by the Security Council under Chapter VII.² Article 2(4) otherwise forbids both the conduct of a just war and forceful reprisals. The Security Council has not adopted a decision under Chapter VII to authorize the use of force in this situation; and whether all the U.S. uses of force taken so far in response to the attacks of September 11 meet the requirements of self-defense is debatable. Military actions by the United States outside Afghanistan would be problematical if their objective is to suppress international terrorist groups generally and not to defend the United States from future attacks by those responsible for the events of September 11. They would conflict with the objectives of the self-defense exception and fall within the prohibited uses of force by reprisals or by engaging in a “just” war, in opposition to core Charter objectives to prevent

⁶ See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 41–54 (1999).

⁷ SC Res. 1373, *supra* note 4.

¹ *Text of President Bush's Address Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4.

² Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AJIL 834 (1999).

states from using force in international relations to promote their policy agendas no matter how just, except for the right of self-defense or a collective decision by the Security Council.

Even the use of force in self-defense is a grave act and, thus, a limited exception to the Charter prohibition on the use of force by states. Since the use of force is irreversible and irreparable, the right should not depend merely on the credibility of conclusory statements by government officials, especially when the government has had, as in this case, sufficient time and opportunity to disclose supporting evidence.

Any state that seeks to invoke the right of self-defense should be required to furnish the international community with credible evidence that it has suffered an attack, that the entity against which the right of self-defense is exercised was the source of the attack, that the attack or threat of attack is continuing, and that the use of force is necessary to protect the state from further injury. Ordinarily, such a showing could be made easily. Sometimes it may be more difficult, as in the case of terrorist attacks when their source is not immediately self-evident. While conclusory official statements might be acceptable when the victim state has no time or opportunity to present the requisite evidence, the facts justifying its actions should otherwise be revealed prior to taking necessary defensive steps. When such disclosure is not feasible, it should be made at the earliest time thereafter.

To limit the use of force in international relations, which is the primary goal of the United Nations Charter, there must be checks on its use in self-defense. Disclosure to the international community of the basis for such action would help to serve this purpose. The alleged credibility of conclusory statements by a state's leadership should not be a sufficient basis for actions in self-defense since it would encourage abuse. When attacks on a state are so grave as to justify actions in self-defense, the supporting evidence would normally be readily available. Disclosure of that evidence should be required even if the state would wish to claim that classified information would be disclosed. The use of force in self-defense is limited to situations where the state is truly required to defend itself from serious attack. In such situations, the state must carry the burden of presenting evidence to support its actions, normally before these irreversible and irreparable measures are taken.

The United States should have disclosed the factual bases for its claim of self-defense against the terrorist attacks before engaging in military action. It had time to do so, as it waited nearly a month before initiating the use of force. In addition, it reported that it had the necessary evidence to link Afghanistan and terrorists located there to the September 11 attacks and thus should have been able to present probative support for its self-defense right. Attention had been directed to the relationship between the government of Afghanistan and terrorists operating there for some time. The United States claimed that the September 11 attacks were linked to previous attacks by the same source, some of which had led to public indictments, trials, or convictions, such as the prior bombing of the World Trade towers, the destruction of U.S. military housing in Saudi Arabia, the bombing of U.S. embassies in Africa, and the attack on the USS *Cole* in Yemen. I expect that the evidence it had collected would have enabled the United States to demonstrate a sufficient factual basis for the use of force in self-defense in response to the September 11 attacks. Its failure to do so in this situation makes it easier for others to take unjustifiable military actions based on unsupported assertions of self-defense.

Moreover, in the weeks that followed the September 11 attacks, the United States had more than sufficient time to seek the Security Council's approval for an appropriate military response, as it has done with regard to actions other than the use of force. Thus, in one subsequent resolution the Security Council declared its condemnation of the September 11 terrorist attacks and its continuing availability "to take all necessary steps in response."³ In

³ SC Res. 1368 (Sept. 12, 2001). United Nations resolutions are available at <<http://www.un.org>>.

a second resolution submitted by the United States and unanimously adopted on the same day, the Council acted under Chapter VII to require all member states to prevent and suppress acts of international terrorism, especially by denying terrorists the use of the states' territories and access to sources of funding.⁴ Passage of these resolutions illustrates the degree of international support at the United Nations for the U.S. opposition to terrorism. But the resolutions also clearly demonstrate that the United States decided not to seek Security Council sanction of its use of force, preferring to take its own military actions without disclosing the factual basis for them. When the United States did deliver a letter to the Security Council in support of its military actions in self-defense, as required by Article 51, it continued its unfortunate policy of providing conclusory reasons only, although the Council did discuss the issues raised by the letter.⁵

Moreover, the U.S. policy of basing the military actions merely on a claim of self-defense in the absence of a broader Security Council authorization is counterproductive because, more than in many past situations, the United States could have benefited greatly from the direct involvement of the Security Council and the support of the United Nations system as a whole. First, international terrorism is widely condemned.⁶ The likelihood of receiving the Council's approval of broad authority for effective action against international terrorism is as great as in any prior situation in which Chapter VII authorization has been sought. Second, to the extent that the United States wishes to build a stable, long-term coalition in support of its stated objective of suppressing international terrorism worldwide, the United Nations would appear to be the preferred vehicle. It constitutes an excellent forum for the disclosure of proof of the identity of the perpetrators and the sources of future terrorist threats, and states that might be unwilling to take actions under U.S. auspices can avoid political embarrassment by casting their lot with the United Nations as the lead agency. By taking military actions without the Security Council's authorization and without legally binding other states to support such actions through Council decisions, the United States has given states freer rein to oppose long-term efforts to suppress international terrorism and military actions outside Afghanistan, especially since all the commitments of support were solely political and made only to the United States, sometimes secretly. Furthermore, by failing to use the resources of the Security Council, the United States undermines the view that the Council, and the United Nations as a whole, should be the primary vehicle to respond to threats to and breaches of the peace, which strengthens the belief that states may freely act outside the United Nations system.

Naysayers may argue that the Security Council would not have authorized effective actions to suppress international terrorism but only ineffective palliatives, or that it might not even have authorized the use of force against terrorist organizations that threaten international peace. These risks cannot be ignored, although I consider them to be inconsequential. First, the role of the Security Council is not to rubber-stamp requests to engage in the use of force by states, even the United States. Negotiation and adjustment will always be necessary. This process could well have produced a more effective approach than that initially developed

⁴ SC Res. 1373 (Sept. 28, 2001).

⁵ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946, at <<http://www.un.int/usa/s-2001-946.htm>>. The Security Council meeting is reported in Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5. In fact, the United Kingdom Foreign Office tried to make the factual case since the United States had not done so. *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001* (Nov. 14, 2001), at <<http://www.fco.gov.uk/news/newstext.asp?55556>>. This updated a previous report of the same title (Oct. 4, 2001), at <<http://www.number-10.gov.uk/news.asp?NewsId=2686>>. It contained no direct information linking Afghanistan or terrorist groups in that country to the September 11 attacks. See Warren Hoge, *Blair Says New Evidence Ties bin Laden to Attacks*, N.Y. TIMES, Nov. 15, 2001, at B5.

⁶ GA Res. 56/1 (Sept. 12, 2001).

by the United States, especially if it attracted more widespread and serious support than the United States could garner by itself.⁷ Just as the elimination of safe haven countries and sources of funds requires worldwide support, as recognized in the recent Security Council resolutions, so further actions against terrorists, even military actions, require the support of the international community and the infrastructure of the United Nations. For example, military actions are likely to create domestic instability in neighboring states and refugee problems. If the Taliban are destroyed, a new government will have to be formed and will require international support. Pockets of hostility will emerge elsewhere and could spread. Only if a wide range of states are bound as strongly as possible to support actions against international terrorism and institutions are put in place to address the consequences of such actions will the use of force and other efforts to suppress terrorism remain viable over time. Second, if a bona fide initiative by the United States before the Security Council had failed, much would have been gained and little risked. A showing by the United States that its evidence, objectives, and proposed plans were well-founded would have effectively set the stage for action outside the UN structure because exhaustion of resort to the Security Council would prove the Council's limitations and strengthen the legitimacy of the proposed action. For these reasons it would have been extremely difficult for the Council to refuse to take effective actions against international terrorism.

The Security Council, if not the entire United Nations system, should take on the responsibility of combating contemporary international terrorism, especially when conducted by nonstate actors that have the ability to locate in one or more convenient states, and to plan and initiate actions that can cause considerable damage to almost any target anywhere without leaving an easily identifiable trail. This kind of conflict is different from the interstate uses of force that constitute the implicit bases for the laws of war⁸ and the circumstances that animated the limitations on the use of force included in the United Nations Charter. While today's terrorist organizations could be taken as the ultimate threat by nonstate entities against the fundamental organizing system of territorial states, there are no grounds for concluding that the state-based system cannot meet the challenge. Consequently, one should not presume that the system established by the UN Charter is incapable of dealing with this problem.

Involvement of the Security Council in the use of force in response to the September 11 attacks would have avoided further undermining the benefits the United Nations system can provide to all. The Security Council's participation in the use of force and other actions against international terrorism could help to build durable and broadly supported defenses against this threat. Regardless of the perception by the United States of its military and economic strengths relative to those of any other state, it cannot win this "war" alone or with the uncertain support it has constructed outside the United Nations system. The world order that has benefited the United States and the international community subsequent to World War II is built on the Charter, especially its provisions on the use of force.

Over the long term the interests of the United States and the international community will be best served by the Charter-based system of world order. If international terrorists have a coherent goal, it is to undermine this system—an objective the United States is perhaps unwittingly promoting by its actions. Despite the flaws of the United Nations, no one has proposed a better system for serving the interests of peace and security in the face of the agenda of international terrorist groups. The United States should initiate a policy of strong adherence to the Charter and help make the Security Council central to the inter-

⁷ Remember that the failure to conclude the actions against Iraq effectively was ultimately the result of a decision by the president of the United States and not of a clear restriction imposed by the Security Council.

⁸ With the sole exception of civil wars.

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.

JONATHAN I. CHARNEY

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,¹ 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,"

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