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ABSTRACT

In forbidding the use of force except in self defence against armed attack or when authorised by the Security Council, the UN Charter appears as the culminating development of a system of international order based on the doctrine of state sovereignty. The cumulative result of international law-related acts, omissions and declarations of the Bush Administration since its inception can be construed as a fundamental challenge to the sovereign state system. The Administration's stated security strategy is one possible response to undoubtedly grave challenges to national and human security. In fact, only institutionalised partnership between the U.S. and the next tier of consequential states can hope to address those challenges successfully in part because only it would have the requisite legitimacy. That partnership or concert could be organised within the UN framework albeit intensifying its hierarchical elements.

Original in English.

KEYWORDS

Bush Administration – Use of Force – Self Defence – State Sovereignty – National and Human Security – Legitimacy



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TOWARD AN EFFECTIVE INTERNATIONAL LEGAL ORDER: FROM CO-EXISTENCE TO CONCERT?

Tom Farer

The current state of international legal order

From its birth in the minds of European elites roughly four centuries ago until the latter part of the Twentieth Century, international law was seen to facilitate, as it expressed the terms of, coexistence among politically organised communities recognising no superior authority.¹ It arose gradually out of the defeat of Hapsburg imperial ambitions and of the associated Papal claims to govern the spiritual and moral lives of all the peoples in Christendom. In a process analogous to the alluvial development of order among the indigenous inhabitants of remote villages without formal political institutions, the leaders of European communities—enjoying *de facto* independence from one another yet living in close connection and sharing similar cultures, histories and values, so they did not see each other as different species—inevitably developed shared understandings about the nature of their relationship and the proper way of dealing with cases where sovereign rights overlapped or where the locus or indicia of sovereignty were uncertain.

In general, rulers were to live like property owners, free to do pretty much what they willed with their respective estates. The United Nations Charter carried the logic of equal rights and duties further by prohibiting the exercise of force to deprive states of territory and the autonomous decision-making and law enforcement activities which are coterminous with the idea of a sovereign state.²

Throughout the Cold War, the Charter prohibition dominated discourse

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about the obligations of states. Yet during the approximately four and one-half decades that elapsed between the founding of the United Nations and the manifest end of that war, the United States, using either regular forces or proxies, invaded Guatemala, Cuba, the Dominican Republic, Grenada and Panama, while the Soviet Union did the same to Hungary, Czechoslovakia and Afghanistan. In addition, both ignored the ostensible sovereign rights of other states by employing a range of illicit means less flamboyant than invasion to manipulate their internal politics.³ When it came to disregarding Charter constraints on intervention generally and the use of force in particular, obviously the superpowers were not alone. France, for instance, made and unmade governments in West Africa at its discretion.

Some of these *prima facie* delinquencies were condemned by most academic international lawyers and also by huge majorities in the General Assembly of the United Nations, and a regional treaty organisation,⁴ seemingly determined to maintain, with marginal if any exceptions, the position that the only legitimate uses of force under the Charter are for self-defense against and actual or imminent armed attack or are authorised by the Security Council.⁵ Insofar as old-fashioned plundering aggression is concerned, the decisive response to Iraq's invasion of Kuwait in 1991 evidenced the continuing strength of collective support for the integrity of borders in the wake of the Cold War. But while in its authorisation of Desert Storm, the United Nations appeared to reaffirm the long-recognised prerogatives of sovereignty, it has to some degree attenuated them by authorising intervention in countries primarily to protect their populations from murder and misery whether resulting from the collapse of public authority (Somalia and Haiti 2) or its abuse combined with awful civil conflict (Sierra Leone and Liberia) or its abuse after putschists seize public authority (Haiti 1) or a murderous civil conflict aggravated by foreign intervention (Bosnia). Last year's unauthorised invasion of Iraq, coming not long after NATO's humanitarian intervention in Serbia over the issue of Kosovo and seen in light of the multiple delinquencies of the superpowers during the Cold War and of France's multiple interventions in the supposedly independent states of West Africa have led some commentators to conclude that international law has lost at least temporarily its capacity to serve as a central guidance mechanism for international relations.⁶ That remains to be seen. Arguably it is simply failing to a much greater than traditional extent to guide American foreign policy.

An authoritative legal system certainly is more than an archipelago of functional regimes. However effectively a blend of rules and principles, sometimes embedded in formal bureaucratic institutions, may as an observable matter stabilise behaviour and expectations concerning a wide array of subject areas as diverse as the uses of the seas and the protection of the chicken-breasted

sloth,⁷ they will not constitute a legal order unless they are seen as instances of a general system of authority that applies reasonably effectively to all states and addresses the existential concerns of human communities which include but is not limited to the question of who may use force under what circumstances. The system must also have broadly accepted rule for identifying which other rules are legal in character in the sense of commanding a respect superior to all other societal norms, what H.L.A. Hart⁸ called ‘the rule of recognition’.

Consent by state authorities, whether manifest in a formal text or in consistent practice, has been the international system’s rule of recognition. I see no evidence of dramatic change in this respect, but rather a gradual or gradually more open move toward what might be called law-making and interpreting by a ‘sufficient consensus’. Nowhere is this more evident than in the area of human rights. Twenty-five years ago, when their human rights behaviour was challenged, a significant number of countries—including such powerful ones as the People’s Republic of China—would still noisily invoke an alleged sovereign immunity to external appreciation of internal practices. Today such a defence is rarely if ever made.⁹ Governments stopped invoking the sovereignty defence when it ceased to resonate with their peers. In effect, they conceded that the norm of sovereignty had thinned out despite their objections.

I do not want to overstate this point. The ramparts of old-fashioned sovereignty are still strongly manned. Only within the past year, a cross-section of U.N. members balked at endorsing an idea, championed by Canada and other proponents of humanitarian intervention, that sovereignty was conditional on a state meeting its obligations to protect the security of its peoples.¹⁰ The tension between the previously dominant value of state security and the growing demand to emphasise human security (with state security as a contingent means to that end)¹¹ remains high and divides not only affluent democratic states from many at best semi-democratic, less-developed ones, but also elites within many states, including the democratic ones. In the failure of the United States to secure even a bare majority of Security Council votes for its proposed essay in regime change in Iraq, a country with a monstrous regime, one could read the continued cling of governing elites to the deflating prerogatives of state sovereignty.

The Retreat of American internationalism

If, as the neo-conservative writer Robert Kagan¹² affirms, Europeans (the Germans above all) now personify belief in the law-guided resolution of interstate disputes by peaceful means, while Americans recognise force as the inevitable arbiter, then we are witnesses to something close to a reversal of historical roles. At the 1898 Hague Conference convened at the instance of the

Russian Czar to promote world peace, the chief U.S. representative spoke of war as “an anachronism, like duelling or slavery, something that international society has simply outgrown”, and proposed agreement on compulsory arbitration in the event that interstate disputes could not be resolved by diplomacy.¹³ Although the U.S. recognised an exception for those ‘differences’ that were “of a character compelling or justifying war”, the German delegation rejected its proposal, arguing that “treaties to limit arms and provide for ‘neutral’ arbitration of disputes negated [Germany’s] most important strategic advantage: the ability to mobilise and strike more quickly and effectively than any other nation”.¹⁴ In any event, the Germans argued, war, both in its ends and its means, is a prerogative of sovereignty not subject to judgment by third parties, a view not radically at odds with the raging hostility of American conservatives to the prospect of American war making being audited by the new International Criminal Court.¹⁵ Indeed, insofar as ends are concerned, it echoes in the views of certain quite respectable contemporary scholars.¹⁶

Of course, the difference between law-drenched American rhetoric and the German *raison d'état* softened when elites of the two states looked beyond relations between what the American lawyer-statesman Joseph Choate referred to as the “great nations of the world”¹⁷ to relations with what the American historian John Fiske¹⁸ called “the barbarous races”.¹⁹ In a similar vein, the influential turn-of-the-20th century German intellectual, Heinrich von Treitschke, called international law mere “phrases, if its standards are also applied to barbaric peoples”. “To punish a Negro tribe”, he wrote, “villages must be burned, and without setting examples of that kind, nothing can be achieved. If the German Reich in such cases applied international law, it would not be humanity or justice but shameful weakness”.²⁰

I do not want to overstate the parallel between German insistence on the prerogatives of sovereignty (and the consequent legitimacy of force as an instrument of statecraft) and the claims of the Rightists who now govern the United States. To begin with, von Treitschke rejected the idea of legal limits on the means as well as the ends of war. In stark contrast, as it has prosecuted the wars first against Afghanistan and then Iraq, the Bush administration has for the most part celebrated its strict adherence to the laws of war, going so far as to proclaim a new historical era in which technology makes it possible to target evil rulers rather than the societies they subjugate. Moreover, the administration has in part attempted to ground its recourse to force on interpretations of widely recognised legal and ethical rules rather than claims about the unreviewable prerogatives of sovereignty.²¹

Invoking the Charter-recognised right of self defence against an armed attack in the case of a *de facto* government (Afghanistan’s Taliban) that provides safe haven to a well organised terrorist organisation that had struck repeatedly

at American targets, killed more Americans than died at Pearl Harbor (when the Japanese attack precipitated U.S. entry into World War II), and threatens continuing assaults, is not a dubious stretch of the applicable norm. After all, the NATO states, including the smaller European countries that are normally among the strongest supporters of the Charter and the rule of law in international affairs, recognised the 9/11 terrorist attacks on New York and Washington as acts of war,²² as did the Security Council itself when it adopted a resolution recognising the applicability of the right of self defense under the circumstances created by the attack.²³

Iraq was a stretch, but, Bush administration defenders have argued, no greater than the one made by NATO when it bombed Serbia into submission over Kosovo, an action deemed technically illegal but nevertheless ‘legitimate’ by the Independent International Commission on Kosovo composed of the sort of cosmopolitan progressives committed to the minimisation of force in international affairs and the reinforcement of international institutions and law.²⁴ In the Kosovo case, recourse to force was considered and finally approved by a multilateral organisation of democracies (NATO) responding to the threatened commission of a crime against humanity (mass ethnic cleansing), about to be committed by a regime recently complicit in other such crimes and also of the crime of aggression (against Bosnia). In Iraq, the U.S.—backed by one Permanent Member of the Security Council and a mixed bag of thirty or so other states—acted to enforce Security Council resolutions under Chapter VII following repeated findings by the Security Council²⁵ of material breach of the 1991 cease fire agreement by the government of Saddam Hussein, a recidivist aggressor (Kuwait 1991, following Iran 1982). Moreover, in the preceding decade the Council had either acquiesced in or endorsed more limited military actions against Iraq by the U.S. and the United Kingdom for violations of the conditions of the 1991 cease fire and also for the defence of the Kurdish and Shiite populations from a renewal of gross human rights violations, bordering in the former case on genocide.²⁶

But Iraq looks like a merely modest stretch only when considered in isolation from the acts and claims that have marked American foreign policy since the advent of the Bush Administration in January 2001. When seen, however, against the backdrop of the National Security Strategy issued by the White House in 2002²⁷ and other statements from the Bush Administration,²⁸ Iraq looks a good deal more like a revolutionary challenge to the Charter system—and not just to its unprecedented restraint on recourse to force—for the Charter and the United Nations itself are only parts of a larger design implicit in the initial surge of international institution building following World War II.

What drove the architects of the United Nations, the international financial

institutions and the General Agreement on Tariffs and Trade (GATT) was a belief that the balance-of-power system marked by the commitment of national elites to the ceaseless competitive accumulation and exploitation of power is too dangerous to be endured and incompatible with the growing demand for welfare rather than warfare states.²⁹ An international free-trading system, facilitated by stable currencies (the IMF agreement) and the most-favoured-nation rule (the GATT), would make natural resources available to all countries, thereby removing one of the classical incentives to aggression and fostering interdependence. These political and economic institutions were the first elements of a management system for the global society and economy that would hopefully replace the global war system which from 1914-45 achieved slaughter on a planetary scale. Outside the Communist Bloc, the envisioned trading system and its associated financial order gathered pace and then was propelled forward by seismic changes in information, communications and transportation technologies, so that sixty years after World War II, we actually have the inter-connected world dimly imagined by the architects of 1945. We have what is called loosely 'globalisation', but it has occurred largely through private actors and without a proportional development of public management institutions, above all in the arena of political/military affairs, where the Cold War largely paralysed the Security Council and limited co-operation to avoiding catastrophic conflict between the superpowers.

The collapse of Soviet power in 1991 coincided roughly with a resurgence of economic and psychological buoyancy in the United States to produce an international environment with some similarities to the one prevailing in 1945, but with differences the potential effects of which were not immediately clear. Similarity consisted in the widely sensed dawning at least in Western polities of a new epoch filled with vast potential for co-operation among leading states to ameliorate the human condition.³⁰

The first difference was the absolutely unrivalled nature of American military power. The Soviet equilibrator was gone with no state or coalition of states on the horizon to replace it. For the first time in human history, one country could deliver militarily decisive conventional force to any corner of the globe within weeks if not days of a decision to do so. Both celebrants and critics of American pre-eminence began referring to the now ubiquitous 'Unipolar World'.³¹ A second difference was the reality of an interdependence and integration probably beyond the imaginings of the architects of the post World War II institutions. This was not just a matter of transnational trade and investment flows, but of transnationally integrated production and service networks and of the vulnerable communication and energy systems that made such integration viable.

A third difference between the conditions prevailing in 1945 and 1991

was the cumulative effect of market integration and the revolution in transportation and communications on traditional culture and political awareness in the global periphery, together with an extraordinary acceleration in population growth. Demographic bloating has filled the countryside with redundant people; the communications and transportation revolution has given them the incentive and the means to try their luck in cities, far from traditional sources of moral authority and the anchoring rhythms of rural family life, where they have formed pools of socially combustible materials particularly in the misgoverned societies of Africa and West Asia—pools which, given the openness of borders and the ease of movement, are washing over the frontier between the West and the rest. From these pools, leaders driven not by poverty but rather by the challenge of consumerist, libertarian culture to their sense of identity and authority and impelled by a sense of humiliation for the political/military weakness of their societies in the face of Western cultural and military power, can draw recruits for guerrilla war against the United States, its allies and its collaborators.

Given these salient features of the post-Cold War world, in 1991 one might reasonably have looked to American leaders for a burst of institutional and normative creativity similar to the one they had exhibited after World War II. On the one hand, the United States enjoyed far greater relative military power and economic and cultural reach than it had sixty years earlier and, on the other hand, it faced a set of interrelated threats to its long-term national security and the welfare of its people that could be analogised to the threat that Soviet power and Marxist ideology had posed. But these threats lacked something at that point, namely a name, a face and an address that could fit them into the manichaeian template of American popular culture.

In the years following the Soviet Union's dissolution, Washington did emit a few rhetorical hints of new ambitions for the international order usually in terms of a commitment to the planetary spread of free markets and liberal democracy.³² And a handful of deeds, like the interventions, however reluctant, in Somalia, Haiti and the Balkans could be construed as a germinating American commitment to institutionalised multilateral oversight of conditions in national societies in order to assure some minimum level of security for their inhabitants.

But other signs pointed in a very different direction for American foreign policy. A paper produced by Pentagon planners during the senior Bush's presidency and leaked to the press³³ advocated the indefinite preservation of American strategic dominance, albeit, interesting enough, by avoiding exploitation of that dominance in ways other states would find threatening. The unilateralist tone of the Pentagon paper had a bi-partisan echo in an address made in the early years of the Clinton administration by its then United Nations Ambassador Madeleine Albright. In it she declared that the Clinton

administration would use international organisations only to the extent they served to facilitate achievement of U.S. interests, and would not hesitate to pursue U.S. goals unilaterally.³⁴ Since the future Secretary of State invoked as exemplary instances of unilateral action the Reagan era invasion of the tiny Caribbean island of Grenada and Bush senior's invasion of Panama—military adventures widely seen as illegal under international law—Albright appeared to be announcing U.S. independence of the global order's core norms, as well as from its core institution: the United Nations.

Yet the Clinton administration's actual policies included attempts to secure Congressional appropriation of funds needed to pay U.S. budgetary arrears at the United Nations, support for international environmental treaties, and—at the very end of its mandate—signing the Statute of the International Criminal Court, the symbol-rich target of right-wing spleen. So despite sounding occasionally like his right-wing critics, Clinton's policies were not out of line with the general movement—or at least the abstract preference—of American foreign policy during the 20th century in favour of the progressive expansion of international law to the end of regulating statecraft and even the internal behaviour of states to the extent it shocks the conscience of the U.S. electorate. Nevertheless, to anyone anticipating a leap forward rather than a slight increment in the reach of international institutions and law, Clinton's policies had to be disappointing.

Among other reasons for his caution was the disappearance in the foreign policy arena of a certain discipline imposed by the high stakes of Soviet-American competition in the Cold War. With those stakes off the table, the arena of foreign policy became completely accessible to antagonists in the cultural wars that had been burning brightly in America since the Vietnam era. In that arena, the sort of unashamed definers of national interest in brutally competitive terms who echoed the contempt of the turn-of-the-century German elite for the arbitrament of law in international relations could coalition with right-wing religious groups sympathetic to manichaeic imagery and, opportunistically, with libertarians hostile to public regulation and management whether national or international (but also dubious about overseas adventures) and ethnic diasporas anxious to employ American power to defeat adversaries of their overseas kin, rather than to manage international conflict in accordance with general behavioural norms.³⁵ As I have suggested, one of the bonds among these groups was hostility to the constraints on national discretion that international institutions, usually encapsulated as the United Nations, and international law were seen to impose. And for reasons too complex to summarise here³⁶ and, for that matter, not entirely clear,³⁷ during the two decades before the Clinton presidency, they had increasingly influenced the tone and imagery of political discourse.

The disputed presidential election of 2000 brought these disparate antagonists of the international-law-and-institution-building project to the centre of world power. Out went Clinton's mild incrementalism. In came a ferocious assault on the International Criminal Court, followed quickly by rejection of the proposed enforcement protocol to the Biological Weapons Convention, abortion of efforts to increase the transparency of the global financial system in order to reduce its complicity in official corruption, tax evasion and money laundering,³⁸ and repudiation (without tender of alternatives) of proposed restrictions on activities contributing to global warming (i.e. the Kyoto Protocol), to name the best known moves.

These and other acts and omissions, however inimical to the vision animating the founders of the UN Charter system, did not yet challenge the system itself. That challenge awaited the precipitating event of the 9/11 terrorist attack and the ensuing declaration of a right and a readiness to wage preventive (misleadingly labelled 'pre-emptive') war against any state whose actions or attitudes are deemed by the government of the United States to constitute a threat, whether or not imminent, to the nation's security. Even with respect to states—as distinguished from shadowy terrorist organisations with no fixed address or sunk capital—the Administration proposed to eliminate rather than deter—to wage wars of choice against states that *could* become threats.³⁹ Such an expansion of the right of self defence is simply incompatible with the Charter system.

As a kind of corollary of its preventive war doctrine, the Bush administration announced its intention of restarting nuclear weapons development⁴⁰ in order to create very low yield warheads that could notionally be used against buried command posts and laboratories.⁴¹ In this way it assaulted another pillar of the system of order that evolved under the umbrella of the Charter, namely the implicit doctrine that, except possibly to avert nation-threatening strategic defeat, nuclear weapons would be used only to deter a nuclear attack or as a way of mitigating the consequences of one and of retaliating. Simultaneously it violated at least the spirit of the nuclear non-proliferation treaty in which non-nuclear states relinquished the right to acquire such weapons in return for a promise of the nuclear powers to reduce their nuclear weapon stockpiles and work toward nuclear disarmament.⁴² Hence the subtext of its declaration was an intention to rely on the threatened application of American power rather than a multilateral regime to limit the proliferation of nuclear weapons.

Unilateral enforcement of a selective non-proliferation regime challenged not just the Charter but the entire four-century old system of state sovereignty with its corollary of equal legal rights. For what is more central to the idea of sovereignty than discretion to determine how best to defend the sovereign state's

political independence and territorial integrity? It is one thing for states to relinquish by treaty the right to choose weapon systems most likely to deter attack. What is left of sovereignty if a single state, acting unilaterally, can deny to others the one weapon which might deter it from imposing its will on any and every issue?

The prospect for international legal order in light of Iraq

The escalating costs of the Iraq occupation and the refusal of certain important states to contemplate helping bear them without the Security Council's assuming a prominent role in overseeing the political transition in that country has to be a learning experience, however unwelcome. One lesson is that most of the world, the developed as well as developing, clings to the essential elements of the system of order provided by the Charter's substantive and procedural rules. Above all, there remains powerful support for the presumptive invalidity of any armed intervention by one state in another without Security Council authorisation or, at least in Africa, without authorisation by a regional organisation.

The Bush Administration has given no indication that it is unsympathetic to this broad consensus in favour of restraints on unilateral recourse to force, so long as the rules do not apply to it. That is hardly surprising. From the parochial perspective of a Unipower, the happiest normative world is one in which it alone or it and whatever other country it anoints, are uniquely licensed to use force for purposes other than self defence against an actual or imminent attack. Most other countries, however, seem indisposed to license exceptions for the countries that deem themselves exceptional. So we are, for the moment, at an impasse.

Normative dissonance in the core security realm coexists, of course, with the diurnal invocation of allegedly authoritative rules and principles in the various parts of the archipelago of transnational regimes. Governments process asylum and extradition requests, enforce fishing regulations in zones defined by the Law of the Sea Treaty, try in some measure to protect endangered species, comply in varying degrees with the rules of the World Trade Organisation, and so on. The dynamics of transnational social life generate expectations, and the power of reciprocity enforces a fair measure of respect for norms just as convenience and efficiency and inertia foster a degree of support for the institutions in which many of them are embedded, elaborated and executed. But in the absence of any collective experience of being part of an integrated system of order reflecting and protecting the deepest values of its subjects, respect for expectations, I propose and fear, rests only on

immediate calculations of utility, and that is precarious ground on which to stand in hard times or when faced with issues that cut across the grain of important domestic interest groups.

A generalised reduction in the authority (and hence pull toward compliance) of international law and multilateral institutions is only one of the possible costs stemming from the present reluctance of the United States to accept normative restraints on its own choices concerning the ends and means of statecraft. More immediately important is its potential impact on the norms and processes for limiting the use of force and on the efforts to strengthen restraints on the further development and deployment of weapons of mass destruction. But the gravest probable side effects stemming from the Bush administration's hostility to the international-law-and-institution-building project are what the economists call 'opportunity costs'.

The states with the collective capacity to act are not addressing effectively either the misery scattered in wide swathes around the globe or the not wholly unrelated sources of both nihilistic and instrumental violence that are ravaging human and eroding the foundations of national security. The diffusion and stunning enhancement of technological knowledge and its products, along with the population explosion, urbanisation, increased environmental pressures, wrenching challenges to traditional belief systems and identities and unprecedented levels of political, economic, social and cultural inter-penetration will continue to generate or intensify pathologies, including searing inequalities in life chances that will not heal themselves. With varying degrees of co-operation and success, national elites confront certain symptoms—like transnational terror networks or genocidal conflicts or starvation that catches the eye in some wretched place by vastly exceeding the quotidian tragedy of death from malnutrition—but at most poke desultorily at their roots.

Going to the roots requires levels of resources, human and material, that no one state or even the NATO states together can deploy.⁴³ Only a concert that includes the most important non-Western states could gather the requisite aura of legitimacy and irresistible power. In a sense, the concert would be a multilateral hegemonic project, but the hegemon in this case would be constituted by elites governing, in most but not all cases democratically, a majority of the world's peoples though only a small number of its national states.

At the time of its adoption, the U.N. Charter purported but actually failed to embody great-power commitment to global governance at least in the key area of peace and security, because the two superpowers were already girding for a traditional great power grapple and lesser states were clinging to their empires. While the Cold War's end seemed to offer a new opportunity for replacing the traditional competitive state system with an historically

unprecedented co-operative one, neither the Unipower nor important regional actors like China, Russia and France were psychologically disposed to transform—as distinguished from very incrementally adjusting—a structure marked by limited co-operation often negotiated bi-laterally one issue at a time. NATO's inability to secure Security Council sanction for intervention in Kosovo underscored the limits. And shortly thereafter, when the current American administration replaced Clinton's, the United States began withdrawing even from the incipient order-building project that had lumbered glacially forward during the Cold War and accelerated very modestly in its immediate aftermath when the 'like-minded' medium and small states, led by Canada and Norway,⁴⁴ tried to improve human security through an International Criminal Court, the Conventions on Child Soldiering and Landmines, and other initiatives rejected by American conservatives.

The terrorist attack of 9/11 left no ground for complacency about the conditions of the global status quo. But instead of animating a renewed search for a co-operative order, it initially empowered U.S. advocates of a violent, imperial project to reconstruct a recalcitrant world—the American Prometheus unbound.⁴⁵ Now, however, following the shambolic execution of their first step to that end, amidst a rising tide of popular hostility even among the polities of traditional allies (never mind those of hitherto moderate Islamic societies like Indonesia and Malaysia), the advocates of an imposed new order have lost the initiative.⁴⁶

That loss could be temporary, however, awaiting only a new act of catastrophic terrorism. For the warriors of the right, unlike many of their scattered opponents, recognise the volatile and dangerous conditions in which we live and offer a transformational vision. An anarchical system of sovereign states is compatible with American and, indeed, human security, they argue, only when all its constituents are capitalist democracies.⁴⁷ Hence the American superpower, with the aid of the willing, must shatter the Westphalian frame and impose an inegalitarian order, constraining the sovereignty of states deemed dangerous or feckless, while fostering over time—by whatever means prove efficient in given cases—the reshaping of authoritarian nations in the image of democratic capitalism.

Iconic invocations of the United Nations as an alternative means of order cannot compete with this proactive project. As presently constituted, the institution, despite its brilliant Secretary-General, does not measure up either to the immediate or to the deeper threats to order sketched above. Invoking it amounts to nothing more than an affirmation of sluggish incrementalism in the face of catastrophic risks. Calls for institutional reform, particularly of the Security Council, also have little political traction particularly within the unipower, at least in part because the envisioned reforms *by themselves* (adding members and possibly limiting the veto) appear to be and are largely formal responses to a

substantive challenge. Conservatives make a persuasive case for the proposition that, in the world as it has become, a system of order guided and inspired primarily by the negative virtue of mutual tolerance is a ship with many captains—a few even homicidal—pulling on the wheel as the iceberg nears.

The multilateral alternative to the unilateralist project must match the latter's visionary response to the present and prospective danger. In order to match, it too would have to move beyond Westphalian anarchy, but the departure would be far less abrupt and the break more narrow. From the beginning, after all, there were hierarchical elements in the Charter system coinciding with its purification of the Westphalian paradigm. How else can one describe the Charter's allocation of enforcement powers to a Security Council of only fifteen members, five of them permanent and endowed with veto power and, as originally conceived, power to direct UN military operations through the medium of officers drawn from their respective armed forces?⁴⁸ Moreover, since the Charter did not provide for World Court review of Security Council decisions, arguably it accorded to the Security Council unlimited authority to determine not only the nature and duration of enforcement measures, but also the existence of the jurisdictional conditions—'a threat to the peace'—requisite for applying them.

Over the past decade or so, the Council has authorised the use of coercion, economic sanctions and force in pursuance of ends going well beyond the prevention, limitation or termination of inter-state conflicts and the full-scale civil wars spilling dangerously across borders that were the focus of concern at the time of the Charter's adoption. In doing so, it built on a precedent from the 1970s when it had found the white racist *de facto* government of Southern Rhodesia (now Zimbabwe) to be a threat to the peace even though at the time it was facing little internal resistance and so did not need to pursue its dissidents across neighbouring frontiers.⁴⁹ The nub of the matter, then, is that a system of global governance characterised by close co-operation among today's leading states within the framework of the Security Council—for instance to force the termination of a suspected WMD development program or to resolve an incipient ethnic conflict or remove a government committing gross violations of human rights or to assume stewardship over a state foundering in the hands of kleptocrats—would not be entirely alien to the Charter paradigm, although it would be a great leap beyond the status quo. Only such a leap, however, is likely to reach the accumulating challenges of our era. With the exception of Rhodesia (a residual case of decolonisation), and the first intervention in Haiti (where in effect the U.N was endorsing a regional organisation's judgment about who constituted a country's legitimate government,⁵⁰ the Council has concerned itself with the internal conditions of states only in instances of humanitarian crisis—famine, genocide, mass slaughter—and even then, only erratically. But

it has never authorised intervention to deal with the *chronic* violators of human rights; regimes that survive through such regular applications of torture, arbitrary detention and exemplary assassination that they come to seem normal, much less regimes like the Angolan that torture and maim their citizens indirectly by stealing the national patrimony rather than producing public goods or, like the Libyan one, appropriate much of the patrimony to support a dictator's fantasies.

As far as one can tell, no proposal for threatening the delinquents in any such case with ejection and the transitional placement of their battered polities under United Nations trusteeships, possibly coupled with positive incentives to the miscreants for pre-emptive reform, has ever been contemplated, much less put on the agenda. And for that there have been at least three reasons. One was the previous lack of American interest in the reconstruction of awful but not utterly failed states. Another was the certain opposition within the Council both from one or more of the Permanent Members and of representatives from the developing world, filled as parts of it are with regimes of the sort just described. A third was the absence of a mandate or a mechanism for developing comprehensive plans for the correction of those state structures that guarantee the perpetuation of mass poverty, joblessness, functional illiteracy, chronic illness and accumulating alienation from the new global order. At least with respect to the Middle East, the first of those reasons no longer prevails, possibly pending the outcome and ultimate cost to the United States of intervention in Iraq. The second and third, the latter being largely determined by the former, remain bars to action.

A multilateral project liable to compete politically with the unilateral one that dominates the present Presidential Administration in the United States must include a strategy for inducing their removal. The only conceivable means to that end would be an historic compromise between the American Unipower and the next stratum of consequential states. The former would rejoin the great architectural project—begun with American support after World War II—to construct a normative and institutional system sufficient for the tasks of global governance. Rejoining requires that the United States surrender its claim of entitlement to exceptional status and its disinclination to reconcile its preferred means and goals with those of other states. The latter would have to embrace the idea that the primary purpose of governance must be positive action by all means necessary to protect the common good, whether in the face of immediate or of merely developing threats to peace and security, and the relevant security would be declared that of human beings, not merely of 'states' which has been a euphemism for any elite in control of a determinate national territory. Such a compact between the hegemon and the next tier of consequential states would carry the seed of a real legal order encompassing and vitalising the current archipelago of regimes. The historical conditions in which the elites of potential

concert members find themselves give them a breadth of common interests without historical parallel and yet they continue to rely primarily on the antiquated instrument of bilateral diplomacy to co-ordinate co-operation, where they are inclined to co-operate, and to avoid or mitigate conflict.

The move to collaboration can be accomplished within the framework of the United Nations and without reform of the Security Council. If there can be a Group of Eight self-tasked primarily with co-ordinating action in the economic realm, there can be a Group of Ten, Twelve or Fifteen, for that matter, accepting wider responsibilities, meeting regularly at the Ministerial and even more frequently at the higher bureaucratic levels to co-ordinate policy. It could be supported either by an independent secretariat or one custom-built within the U.N., in either event drawing on national and international institutions for intelligence to assist it in identifying and prioritising issues and developing operational plans for co-ordinated action using all the instruments of statecraft. Once approved by the relevant governments, where the execution of plans required armed intervention, they would be brought formally to the Security Council for authorisation. Since in the first instance, the concert would certainly include all of the Permanent Members plus India, Japan, Germany, Brazil and possibly such emerging market states as South Africa, Turkey, Indonesia and Mexico, one could reasonably anticipate approval even from an unreformed Council.

The concert would be open to additional members sharing its commitments (and able to contribute substantially) to extending the benefits of a globally integrated economy, mitigating the painful incidents of growth and planetary integration, limiting the spread of weapons of mass destruction, battling transnational terrorist groups and commercial mafias, and deterring illicit force and crimes against humanity. Based on those constitutive principles, a group of such diversity, size and power should be able to endow decisions of the Security Council reflecting the group's previously negotiated consensus with greater legitimacy than those decisions enjoy today, in part because the concert's backing would induce the expectation of effective enforcement.

Legitimacy, of course, is a matter of degree. The world confronts a clash not of civilisations but of cultures: the humanist on the one hand, and the chauvinist/chiliast, on the other—a clash that is internal to each historic civilisation. The concert and its purposes are expressions and instruments of the humanist project. They are concerned with spreading to all peoples the good things of this world and they call for co-operation and tolerance across national, religious and ethnic lines. Thus they are implicitly hostile to the world views of nationalist fanatics and religious extremists all over the world, not least in the United States.

Conclusion

Movement toward such a concert of leading states may have to await disasters more awful than 9/11, or it may be driven by the steady accumulation of costs to order and welfare evidencing ever more vividly the insufficiency of the present patchwork of contested norms and uncoordinated, generally weak institutions. Or it may not occur at all. Whatever its insufficiencies, the present order of things, like any established allocation of power and authority and wealth, has about it an aura of inevitability and is encrusted with accumulations of interest furiously resistant to change. The easiest response to traumas large and small is supposing that doing more of the same but with greater energy and larger resources will pre-empt new ones.

Like the man with a hammer seeing all problems as nails, the U.S. with its hypertrophied military power⁵¹ is inclined to see problems as amenable to military solutions, a tendency aggravated by the remarkably effective ideological assault within the country on the idea of public authority as an instrument for addressing inequalities of wealth and power and also by the appeal to significant electoral groups of manichaeian and apocalyptic templates for identifying threats and prescribing responses.⁵²

Washington nevertheless remains the more plausible source of any initiative to fashion an effective concert. Such an initiative could begin with a deceptively modest call for regular consultation among the states in question assisted by a planning secretariat consisting of seconded experts and a directorate of senior officials, one from each state with direct access to their respective heads of government. In theory, of course, a group of Washington's potential partners could shape such a proposal, thereby strengthening the hand of American multilateralists. But given their heterogeneity, their habit of dealing with the United States bi-laterally, and their individual political and social preoccupations (as well as the sensitivity of most non-European national elites to measures and precedents tending to shrink their own sovereign prerogatives), as a group they are unlikely instigators of new architectural proposals. And proposals emanating only from the Europeans may lack the heft needed to engage American interest.

"Old ideas", John Dewey wrote almost a century ago, "give way slowly; for they are more than abstract logical forms and categories. They are habits, predispositions, deeply ingrained attitudes of aversion and preference".⁵³ The realist assumption that co-operation among powerful states can never be more than a matter of temporary expedience, a mere tactic in the immutable struggle for power, is an old idea lodged in the consciousness of most governing elites. Yet in the face of the present grave threats to the security and affluence of the powerful, some once confirmed realists are beginning to move toward the constructivist view that identities and interests are plastic. Once the

personification of the realist optic in public affairs, former Secretary of State Henry Kissinger⁵⁴ advocates U.S. engagement with China, rejecting the call for restraint on economic intercourse in order to slow China's growth.⁵⁵ A legal order based on a concert of leading states is possible, if the constructivist intuition gains similar converts.

NOTES

1. Despite its overall utility, the word 'coexistence' may be a bit misleading in that particularly the larger participants in the construction of international law did not concede to the smaller ones a right to persist and the large ones did not for several centuries eschew forceful appropriation of a part of each other's territory and people. Coexistence did not, for instance, prevent Poland from being thrice partitioned by its more powerful neighbors—Russia, Prussia and Austria—between 1764 and 1795. Still, while one state might occasionally seize the territory and peoples of another, until it did, it had no recognised right to be concerned with the ways in which its neighbour organised its society and economy, legitimised its rule, or coerced its population. Those were matters to be determined at the discretion of the various kings and oligarchs. One could therefore say, as others have, that initially the system's only common—or shall we say constitutional—value was tolerance of diversity.
2. T. Farer, "Law and War", in C.E. Black and R.A. Falk (Eds.), *The Future of the International Legal Order*, Princeton: Princeton University Press, 1969.
3. S.C. Schlesinger & S. Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala*, Cambridge, MA: Harvard University Press, 1999; M. Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, Hoboken, NJ: John Wiley & Sons, 2003.
4. T. Farer, "Panama: Beyond the Charter frame", *American Journal of International Law*, vol. 84, 1990, pp. 503-515; and "A paradigm of legitimate intervention", in L.F. Damrosch (Ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, New York: Council on Foreign Relations, 1993.
5. For a more detailed analysis of the practice of states in construing Charter restraints on the use of force, see T. Farer "Panama: Beyond the Charter frame", *American Journal of International Law*, vol. 84, 1990, pp. 503-515; T. Farer, "A paradigm of legitimate intervention", in L.F. Damrosch (Ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, New York: Council on Foreign Relations, 1993; T. Farer, "Humanitarian Intervention Before and After 9/11: Legality and Legitimacy", in J.L. Holzgrefe and R.O. Keohane (Eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge, Cambridge University Press, 2002; T. Farer, "Beyond the Charter frame: Unilateralism or condominium?" *American Journal of International Law*, vol. 96, 2002, pp. 359-364; T. Farer, "The prospect for international law and order in the wake of Iraq", *American Journal of International Law*, vol. 97, 2003, pp. 621-628. See also C. Joyner, "Reflections on the

lawfulness of invasion", *American Journal of International Law*, vol. 87, 1984, pp. 131-144.

6. Glennon - in M. J. Glennon, "The new interventionism", *Foreign Affairs*, vol. 78, May/June, 1999, pp. 2-7; *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York, Palgrave, 2001- sees the exhaustion of the Charter system of collective security. Though disagreeing with Glennon's analysis and conclusions at almost every point, Thomas Franck (T. M. Franck, "Break it, don't fake it", *Foreign Affairs*, vol. 78, July/August, 1999, pp. 116-118) seems to end with the conclusion that international law is temporarily overborne by the violent reassertion of *raison d'état* and sees no early prospect for its revival.

7. In Steven Krasner's crisp formulation (S. Krasner, "Structural causes and regime consequences: regimes as intervening variables", in S. Krasner (Ed.), *International Regimes*, Ithaca: Cornell University Press, 1983, pp. 1-21.), regimes are "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations".

8. H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961.

9. I was able to witness this type of state behavior first-hand by virtue of my membership on (and for two terms, presidency of) the Inter-American Commission on Human Rights of the OAS (1976-83).

10. A report—"The responsibility to protect" (available online at <<http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf>>, access on September 11, 2006.)—was commissioned by the International Commission on Intervention and State Sovereignty established by Canadian Foreign Minister Lloyd Axworthy after Kofi Annan gave a controversial speech to the U.N. General Assembly on sovereignty and intervention in 1999. Despite the claim by the Secretary General that the U.N. Security Council had "favorably received" the Report, "the concrete results of the meeting appear mixed. There is very little appetite in the Council to commit to principles that would force its hand": S. N. MacFarlane, J. Welsh & C. Thielking, "The responsibility to protect: Assessing the report of the international commission on intervention and state sovereignty", *International Journal*, vol. 57, 2003, pp. 489-502.

11. As the Human Security Program of the Canadian Department of Foreign Affairs and International Trade defines it, "*Human Security is a people-centered approach to foreign policy which recognizes that lasting stability cannot be achieved until people are protected from violent threats to their rights, safety or lives*". See <http://www.humansecurity.gc.ca/psh_brief-en.as>, access on September 11, 2006.

12. R. Kagan, *Of Paradise and Power: America and Europe in the New World Order*, New York: Knopf, 2003.

13. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 48.

14. *Ibid.*, p. 48.

15. The Clinton administration opposed inclusion of crimes against peace (i.e. the illegal recourse to force) among the offences subject to the Court's jurisdiction (see Human Rights Watch, "Human Rights Watch condemns United States' threat to sabotage International Criminal Court", Press Release, 1998, July 9, available at <<http://www.hrw.org/press98/july/icc-us09.htm>>, access on September 11, 2006.) Conservatives (e.g. J. Bolton, "The global prosecutors", *Foreign Affairs*, vol.

78, January/February, 1999, pp. 157-164.), opposed the Court as such insofar as it would sit in judgment on any Americans even if charged with genocide or other crimes against humanity.

16. J. Yoo, "International law and the war in Iraq", *American Journal of International Law*, vol. 97, 2003, pp. 11-23; cf. R. Wedgwood, "The fall of Saddam Hussein: Security Council mandates and preemptive self-defense", *American Journal of International Law*, vol. 74, 2003, pp. 24-34; P. Zelikow, "The transformation of national security: Five redefinitions", *National Interest*, vol. 71, 2003, pp. 17-28.

17. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 69.

18. Coiner of the term 'manifest destiny'.

19. P. H. Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2000, p. 50.

20. *Ibid.*, p. 50.

21. W.H. Taft IV & T.F. Buchwald, "Preemption, Iraq, and international law", *American Journal of International Law*, vol. 97, 2003, pp. 5-10.

22. Statement of the North Atlantic Council, 12 September 2001, Press Release (2001) 124; available at <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>, access on September 11, 2006.

23. In Resolution 1368 (12 September 2001), and especially Resolution 1373 (28 September 2001).

24. The Commission was also endorsed by UN Secretary General Kofi Annan. Full text of the report can be found at <<http://www.reliefweb.int/library/documents/thekosovoreport.htm>>, access on September 11, 2006.

25. An overview of the relevant Security Council Resolutions—and of the overall "case" the US was making—can be found in the text of the draft resolution offered up by the US, Spain and the UK on March 7, 2003, available at <<http://www.casi.org.uk/info/undocs/scres/2003/20030307draft.pdf>>, access on September 11, 2006.

26. W.H. Taft IV & T.F. Buchwald, "Preemption, Iraq, and international law", *American Journal of International Law*, vol. 97, 2003, pp. 5-10.

27. Available online at <<http://www.whitehouse.gov/nsc/nss.html>>, access on September 11, 2006.

28. For example, Bush's commencement speech delivered at West Point Academy in June 2002, available at <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>>, access on September 11, 2006.

29. According to George and Sabelli (S. George & F. Sabelli, *Faith and Credit: The World Bank's Secular Empire*, Boulder, CO: Westview Press, 1994.), "again and again, the *Proceedings* of Bretton Woods stress the ruling obsession of these leaders of a war-torn world: Never to revert to the 'competitive currency depreciations, imposition of exchange restrictions, import quotas and other devices that had all but stifled trade' and plunged the planet headlong into its most devastating conflict ever". On John Maynard Keynes' influence on the creation of especially the IBRD, see R. Skidelsky, *John Maynard Keynes: Fighting for Freedom, 1937-1946*, New York: Penguin, 2002.

30. See, for instance, then President George H. W. Bush's 1991 reference to a new world order in his

State of the Union Address to the U.S. Congress, available at <http://www.presidency.ucsb.edu/site/docs/doc_sou.php?admin=41&doc=3>, access on September 11, 2006.

31. e.g. C. Krauthammer, "The unipolar moment", *Foreign Affairs*, vol. 70, January/February, 1990, pp. 23-33.

32. A. Lake, "Confronting backlash states", *Foreign Affairs*, vol. 73, March/April, 1994, pp. 45-55.

33. P.E. Tyler, "U.S. strategy plan calls for insuring no rivals develop", *New York Times*, March 8, 1992, p. A1.

34. T.W. Lippman, "Clinton struggles to define world vision", *Chicago Sun Times*, September 30, 1993, p. 30.

35. T. Farer "The interplay of domestic policy, human rights & U.S. foreign policy", in T.G. Weiss, M.E. Crahan, and J. Boering (Eds.), *Terrorism and the UN: Before and After September 11*, London: Routledge, 2004 (forthcoming).

36. Ibid.

37. In a recent review of books on the Bush administration, the liberal economist, Paul Krugman (P. Krugman, "Strictly Business", *New York Review of Books*, November 20, 2003 pp. 4-5.) writes of the right-wing's success in setting the tone and parameters of public discourse and, after trying to explain its success, ends by admitting to a certain puzzlement.

38. P. O'Neill, "Confronting OECD's notions on taxation", US Department of State Website <<http://usinfo.state.gov/topical/econ/group8/summit01/www01051001.html>>, access on September 11, 2006, originally published in *The Washington Times*, May 10, 2001.

39. See Section V of the White House National Security Strategy, available at <<http://www.whitehouse.gov/nsc/nss5.html>>, access on September 11, 2006.

40. The US House of Representatives refused to fund the initiative. See C. Hulse, "House trims Bush plan for research on weapons", *New York Times*, July 19, 2003, p. A9.

41. Idem, "House retreats from Bush's nuclear plan", *New York Times*, July 15, 2003, p. A18.

42. S. Weinberg, "What price glory", *New York Review of Books*, November 6, 2003, available at <<http://www.nybooks.com/articles/16733>>, access on September 11, 2006.

43. To convey a sense of the gap between needs and proposed responses to them, I note that the United States proposes to spend up to \$150 million for schools in Indonesia that would offer the children of poor Muslims an alternative to those run by Islamic radicals that prepare students more for jihad than successful participation in the global economy. One hundred and fifty million dollars is slightly less than the annual budget of the public schools of my home town (Littleton, Colorado), population 40,000. Indonesia's population is 207 million. Pakistan, where the malign effect of radical *madrasas* is better known, has a population of 153 million.

44. These have formed "The Human Security Network", which grew out of a bilateral agreement—the Lysøen Declaration and Partnership Agenda—between Norway and Canada. Other states include Austria, Greece, Ireland, Jordan, Mali, the Netherlands, Slovenia, Switzerland, Thailand and (as an observer) South Africa.

45. A leading exponent of this view is Charles Krauthammer (C. Krauthammer, "The real new world order: the American empire and the Islamic challenge", *The Weekly Standard*, November 12, 2001, p. 25; "A new policy", *Townhall.com*, June 8, 2003, online at <<http://www.townhall.com/columnists/charleskrauthammer/ck20010608.shtml>>). For a more nuanced view, see S. Mallaby, "The reluctant imperialist: Terrorism, failed states, and the case for American empire", *Foreign Affairs*, vol. 81, March/April 2002, pp. 2-7. For a skeptical view, see J. Kurth, "Confronting the unipolar moment: The American empire and Islamic terrorism", *Current History*, December, 2002, pp. 403-408.
46. Pew Research Center for the People and the Press, *What the World Thinks in 2002*, Washington DC, 2002, available online at <<http://people-press.org/reports/pdf/165.pdf>>, access on September 11, 2006.
47. Even some thinkers hitherto associated with the political center or even the center-left in their overall ideological disposition— M. Ignatieff, "The burden", *New York Times Magazine*, January 5, 2003, pp. 22-27, 50-53 is one example, *New York Times* columnist Thomas Friedman another—are attracted by the perceived opportunity to realize the so-called "democratic peace" (see M. Doyle, "Kant, liberal legacies, and foreign affairs", *Philosophy and Public Affairs*, vol. 12, Summer, 1983, pp. 205-235) through the medium of an American Imperium. In his post-9/11 columns (a collection of which was recently published; see T. Friedman, *Longitudes and Attitudes*, New York: Anchor, 2003), Friedman, although critical of many details of implementation, argues that the goals of the Bush administration are boldly idealistic and just and in the American and human interest.
48. Charter of the United Nations (59 Stat. 1031, T.S. 993, 3 Bevans 1153), Chapter VII, Article 47.
49. M.S. McDougal & W.M. Reisman, "Rhodesia and the United Nations: The lawfulness of international concern", *American Journal of International Law*, vol. 62, 1968, pp. 1-19.
50. D. Malone, *Decision-making in the UN Security Council: The Case of Haiti, 1990-1997*, New York: Oxford University Press, 1998.
51. P. Kennedy, "The perils of empire; this looks like America's moment. History should give us pause", *Washington Post*, April 20, 2003, p. B1.
52. J. Didion, "Mr. Bush & the divine", *New York Review of Books*, November 6, 2003, online at <<http://www.nybooks.com/articles/16749>>, access on September 11, 2006.
53. R. Thomas Tripp, *International Thesaurus of Quotations*, New York: Penguin, 1970.
54. H. Kissinger, "Single-issue diplomacy won't work", *Washington Post*, April 27, 1999, p. A-17.
55. J. Mearsheimer, *The Tragedy of Great Power Politics*, New York: W.W. Norton, 2001.