

EDITORIAL COMMENTS

IN DEFENSE OF WORLD PUBLIC ORDER

With the end of the Cold War, many in America and throughout the industrialized world came to take national security for granted and to view military action as essentially optional. The lawfulness and wisdom of prospective interventions—in Kuwait, Somalia, Bosnia-Herzegovina, Kosovo, East Timor, or Macedonia—could be debated in terms of humanitarianism, “just war” theories, or the degree of national interest at stake, and stringent preconditions for engagement, such as alliance support, projected casualty rates, and carefully defined “exit strategies,” could be exacted. Many countries drastically reduced their military budgets. The attacks on September 11, 2001, not only killed thousands of Americans and foreign nationals and tore holes in New York and Washington; they shattered the world view and, quite possibly, the emotional foundation on which that sense of security rested.

All terrorism is unlawful, but the attacks on New York and Washington, whether they prove to have been initiated by groups of individuals or by governments, are different from those that have plagued London, Belfast, Madrid, and Moscow. Those unlawful acts were designed to change a particular policy, but not to destroy a social organization. The ambition, scope, and intended fallout of the acts of September 11 make them an aggression, initially targeting the United States but aimed, through these and subsequent acts, at destroying the social and economic structures and values of a system of world public order, along with the international law that sustains it. Not just the United States, but all peoples who value freedom and human rights have been forced into a war of self-defense.

These implications were quickly and widely recognized. Within a day, NATO’s North Atlantic Council agreed that

if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by *Article 5* of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.¹

The council explained that “[t]he commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism.”² On October 2, Lord Robertson, the secretary general of NATO, reported that “it has now been determined that the attack against the United States on 11 September was directed from abroad” and that it would “therefore be regarded as an action covered by Article 5 of the Washington Treaty.”³

Meanwhile, on September 12, the United Nations Security Council had issued Resolution 1368, by which the Council,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

¹ NATO Press Release (2001)124, Statement by the North Atlantic Council (Sept. 12, 2001). NATO press releases and speeches, *see* note 3 *infra*, are available online at <<http://www.nato.int>>.

² NATO Press Release (2001)124, *supra* note 1.

³ Statement by NATO Secretary General Lord Robertson, Brussels, Belgium (Oct. 2, 2001).

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

...

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

...

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.⁴

Many other governments have expressed willingness to assist the United States in this common defense.

This rapidly and almost spontaneously formed coalition evidences the shared perception of a common danger, not simply to individual states, but to a system of world public order. How much cooperation will materialize in the implementation of military and economic strategies in the coming months and years remains to be seen. All the parties have their own concerns and interests, which could diffuse the immediate objectives or simply prove to be incompatible with them. In strategic matters, the efficiency of forceful unilateral action can sometimes outweigh the political advantages and moral strengths of multilateralism. This is why executive committees operate at every level of social organization as unilateral instruments for the implementation of multilateral policy. What is now clear, however, is that the executive committee, whatever its membership, will operate with wide international authority and broad support.

The United States, perforce the leader in this war of self-defense, commands the most powerful military force in the world. The fact that the enemy has no comparable arsenal should not lull observers into the comfortable illusion that victory is assured. For one thing, the enemy has chosen a form of warfare that makes it inaccessible to many current weapons and practices.⁵ Moreover, the real sources of strength of the free world—open societies, constitutional safeguards, and a science-based and technological civilization—present the enemy with innumerable vulnerable targets and, often, with the very weapons to attack them, wreaking horrible damage. Using terror, small but radical and ruthless forces, such as Sendero Luminoso and Tamil Eelam, have demonstrated that they can sow violence and destruction and bring large communities to a standstill.

Democracy's arsenal will have to develop new offensive and defensive weapons and new modes of warfare that can destroy the enemy's capacity without destroying democracy itself. The international law about using those weapons will also have to be developed. The different circumstances of each new conflict will require different adaptations, which, while faithful to the policies and principles of humanitarian law, will ensure their continuing relevance in new contexts. For example, the enemy has chosen to infiltrate or conceal itself in apparently neutral countries from which it can conduct a dirty war, targeting and reveling in massive civilian destruction. New methods of response may have to be devised to reach the enemy, even in the territory of states that are unwilling or unable to exercise the control

⁴ SC Res. 1368 (Sept. 12, 2001); see also SC Res. 1373 (Sept. 28, 2001), cited in text at note 7 *infra*. UN resolutions are available at <<http://www.un.org>>.

⁵ See generally CHARLES J. DUNLAP, JR., TECHNOLOGY AND THE 21ST CENTURY BATTLEFIELD: RECOMPLICATING MORAL LIFE FOR THE STATESMAN AND THE SOLDIER 1–19 (Strategic Studies Institute, 1999).

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.

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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).