
The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies

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Abstract

Absent a clear case of an armed attack, the UN Charter severely restricts the ability of individual states to react to what they perceive as their national security risks, relegating such a task to the collective decision-making of the Security Council. Contemporary global security risks pose serious challenges to this regime. Stopping terrorist groups and rogue regimes from obtaining weapons of mass destruction or ending incidents of mass atrocities against civilian populations often require swift and resolute collective responses. Not all those who can respond to such threats are willing to do so, and the collective response of the Security Council frequently proves ineffective. As the stronger military power, the US has both the ability and the motivation to provide the public good of global security unilaterally, while other countries rely on international law to explain their inaction. The so-called 'Bush Doctrine', which asserts an authority to act unilaterally and pre-emptively, can thus be understood as an earnest effort to respond to these security challenges. But this doctrine upsets the existing UN regime, and in turn creates other risks to global stability. This essay seeks to lay out the prevailing global security risks as a collective action problem. It assesses the tensions that exist between existing legal constraints on the use of unilateral force and the proposals for their modification, and evaluates the ramifications of such proposals.

1 Introduction

The end of the Cold War destabilized global peace and security. Until that time, bipolar deterrence required each side to control its allies and clients. It inhibited regional rogue regimes from resorting to aggression, and kept many domestic ethnic tensions from turning into unmanageable violence. Iraq's invasion of Kuwait and the

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disintegration of Yugoslavia and the chaos that followed were less likely to happen before the dissolution of the Soviet Union.¹ The collapse of the USSR left the US as the sole global power. A ‘Hegemon’, as some have come to call it,² often with criticism,³ but certainly not a hegemon with unlimited powers.⁴ With the collapse of mutual deterrence, the US — alone, or perhaps with the help of a ‘coalition of the willing’ — assumes the role of managing actual and potential crisis situations around the globe. The management of such crises is becoming more and more complex, as the main tool to dissuade potential aggressors — deterrence — is not available *vis-à-vis* cross-national non-state terrorist networks which seek to use whatever means, including weapons of mass destruction (WMD), to destabilize the political status quo. At the same time, unipolarity reduces the risks for the US of getting involved in military action to protect foreign nationals against their government, the so-called humanitarian intervention. The unparalleled power together with the availability of reports on wide-scale human tragedies even breed a sense of moral responsibility to intervene militarily in foreign countries to prevent mass atrocities. For the US, then, hegemony has come to mean not only unrivalled power, but also taxing responsibilities. Hegemony has become a double-edged sword.

Unipolarity necessarily raises concerns about unilateral decision-making. Many across the globe view the US policies with growing doubts about the impartiality and infallibility of the US’s judgment. Concerns about impartiality are invoked by the tendency of the US to promote its self-interest in other areas of international law, including the environment (the Kyoto Protocol) and trade, and sometimes disdain for global standards of human rights. Concerns about infallibility focus on a fundamental disagreement about the promise of the use of the military muscle, as many outside the US emphasize the limits and long-term dangers of military action. Some even fear for their very sovereignty, as reflected in a question posed by a report of the Defence Committee of the Assembly of Western European Union: ‘Is it Europe’s destiny to be no more than an allied province?’⁵ To control against partiality, erroneous judgment, and loss of sovereignty, the opponents to unilateralism insist on maintaining the law which provides for collective decision-making through the UN Security Council.

In pursuing its self-appointed global management role, the US finds it difficult to remain within the confines of the traditional doctrine on the *jus ad bellum*. It therefore seeks to stretch the limits, insisting that the new limits reflect compelling US *and* global interests, and as such, they should be recognized as compatible with, or tolerated by, international law. The clearest example is the so-called ‘Bush Doctrine’ that breaks new grounds in attempting to justify pre-emptive military action.

¹ See R. N. Haass, *Intervention* (rev. ed., 1999), at 3–5.

² See e.g., M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003).

³ On an ‘imperial’ tendency of the US see Zemanek, ‘Is the Nature of the International Legal System Changing?’, *ARIEL* (forthcoming, 2004).

⁴ Nye, ‘Limits of American Power’, 117 *Political Science Q.* (2002–2003) 545.

⁵ ‘The United States National Security Strategy and its Consequences for European Defence’, Document A/1824, 4 June 2003, available at <http://assembly.weu.int>.

The aim of this essay is to provide background to the debate about the US role in the management of global crises. It seeks to learn the underlying logic behind the US policies in the post-Cold War era, and assess, on that basis, the different claims concerning US unilateralism in the use of force. After analyzing the role of the US in maintaining global security, this essay explores the tensions between existing legal constraints and the claims for change, and evaluates the ramifications of those proposals for change.

2 The Exploited Hegemon

A Global Threats and Concerns

With the Cold War over, one would have expected the US to decrease its defence budget, cut down considerably its military presence overseas and focus on guarding its borders against illegal immigration and drug trafficking. Instead, since 1990 the US has been directly involved in several military conflicts and interventions in foreign lands. It resorted to force against Iraq (1991, 2003, and several strikes in 1993, 1996, 1998), in Somalia (1993), in Bosnia (1994) and Haiti (also 1994), in Afghanistan (1998, 2001). It took the leading part in the NATO attack on Serbia (1999), and struck targets in Sudan (1998) and Yemen (2002). A superficial view would suggest that the Hegemon felt free to exercise its unparalleled military might. But a deeper look reveals that the post-Cold War imbalance of power threatened US interests and in fact required it to keep a vigilant eye on developing global crises and intervene directly more often than ever before.

The political instability in the post-Cold War era threatened basic Western interests in economic welfare.⁶ Growing reliance on international trade, in particular the importation of oil from the Middle East, required the developed economies to maintain stability in the global markets. The dependence of the US and its allies on foreign oil, particularly in the Middle East, obligated the US to maintain military capability to intervene in support of countries in the region against external or internal threats.⁷ Since the summer of 1990 and until today — notwithstanding the current occupation — Iraq poses a challenge to the stability of neighbouring oil-producing regimes. The terrorist network known as Al-Qaeda poses a different type of challenge. It aims at replacing the regimes in the Middle East with a restored Islamic Chalifate ruled by the Sharia law.⁸ The two threats are interconnected. Of particular offence to the Al-Qaeda ideologues was what they perceived as the occupation of Saudi Arabia and the desecration of Islamic holy places by US military forces situated to protect the regime against external or internal challenges. Hence, reducing Saudi Arabia's external

⁶ David, 'The Necessity for American Military Intervention in the Post-Cold War World', in The Aspen Strategy Group, *The United States and the Use of Force in the Post-Cold War Era* (1995) 39, at 43.

⁷ *Ibid.*, at 43–44.

⁸ On the ideology and goals of the Al-Qaeda group see Doran, 'The Pragmatic Fanaticism of al Qaeda: An Anatomy of Extremism in Middle Eastern Politics', 117 *Political Science Quarterly* (2002) 177; Posen, 'The Struggle Against Terrorism: Grand Strategy, Strategy, and Tactics', 26 *International Security* (2002) 39.

threats by removing Saddam and limiting the presence of US troops situated in Saudi Arabia may have been part of the effort to reduce the appeal of the Al-Qaeda ideas.

Since the early 1990s, but most painfully noted on September 11, 2001, it became apparent that the economic interests have turned into security interests. The US has become the prime target of terrorist attacks by the Al Qaeda group, which views the fight against the US as the most effective way to win over adherents in the Islamic world and thereby shatter the current governments in the Middle East and restore the Islamic Chalifate.⁹ The proliferation of weapons of mass destruction to governments with a history of aggression and support of terrorist organizations — the so-called ‘rogue regimes’ — is another development of the post-Cold War era that threatens the US and the West in general.

In addition to the economic and security interests, yet a third motivation for military intervention that loomed large in the years following the collapse of the Soviet regimes was humanitarian. For many, hegemony has come also to mean responsibility,¹⁰ and as public attention in Europe and the US focused on man-made humanitarian disasters, the urge to do justice, even through using force where needed, to alleviate suffering and want, led to several interventions, including in Northern Iraq (1991) to protect the Kurds, in Somalia (1993), in Bosnia and Haiti (both during 1994) and later in Kosovo (1999).

Those interests in economic stability, security and justice were not unique to the US. There was a broad coalition of states that shared the US economic and security concerns. In the global economy, the economic interests of many states, including the US, Europe and East Asia, are increasingly intertwined. The US economy is heavily dependent on stable international trade and is vulnerable to external destabilization threats.¹¹ Yet difference of opinion exists as to the choice of responses to the threats, particularly to the threats of terrorism and rogue regimes, and to human rights violations abroad. More hesitant to recourse to military action, many in Asia, Europe and elsewhere hesitate to leap to the conclusion that the Al-Qaeda threat justifies all out war, and a break from the traditional constraints of international law, or that mass atrocities abroad justify military intervention. Instead, these voices prefer the strategy of intervention through adjudication, as can be seen, particularly in Europe, by the adoption of universal jurisdiction statutes to deter and punish foreign perpetrators of mass violence,¹² and their wide support for international criminal law and courts. This difference in attitudes leads to a difference in the readiness to commit resources to military action. This difference yields important ramifications, to which we turn now.

⁹ See Doran, *supra* note 8, at 182–185.

¹⁰ See Brilmayer, ‘Transforming International Politics: An American Role for the Post Cold War World’, 64 *U. Cin L. Rev.* (1995–1996) 119 (discussing the ethical responsibilities of the most powerful nation).

¹¹ David, *supra* note 6, at 48; Krugman, ‘Growing World Trade: Causes and Consequences’, *Brookings Papers on Economic Activity*, No. 1 (1995), at 327–362.

¹² On the evolution of universal jurisdiction in Europe see Green, ‘Criminal Responsibility of Individuals in Non-international Conflicts’, 45 *German Yearbook of International Law* (2002) 82; Meron, ‘International Criminalization of Internal Atrocities’, 89 *AJIL* (1995) 554.

B Security and Economic Stability as 'Public Goods'

The brief account of the three main rationales for intervention — economy, security and justice — provide the key to understanding the logic of the post-Cold War security situation. The US has a strong motivation, coupled with reasonably sufficient military strength, to maintain global stability. This serves both its own interests and the interests of many other communities, certainly in the developed world, but also of many developing societies. This global stability constitutes what economists call a 'pure public good', namely a good — like clean air or safe streets — that those who produce it cannot prevent others from enjoying ('non-exclusivity'), and whose consumption does not detract from the ability of others to consume ('non-rivalry'). Security and stability are obviously public goods, because all can enjoy them, without detracting from each other's enjoyment. The provision of such a good raises a collective action problem, because not all who benefit from the good wish to contribute to its production. This is certainly the case of global security.¹³ As first noted by Mancur Olson, when public goods can be provided by the relatively more powerful actors within a certain group 'there is a systematic tendency for "exploitation" of the great by the small!'¹⁴ Therefore, as long as the US has the military capacity to maintain global law and order, and as long as it has an interest in pursuing that goal, other states face the temptation to 'free ride', to reap the benefit of stability without incurring the costs of producing it.

Olson's observations were able to explain the disproportionate reliance on the American contribution in the context of NATO during the Cold War. As long as the two superpowers followed a deterrence strategy of 'mutual assured destruction', the outcome — stability — was a public good that smaller NATO members were able to enjoy with minimal contribution.¹⁵ Interestingly, as the two powers developed more discerning weapons that could distinguish between targets, deterrence lost much of its 'publicness', and the smaller NATO members became more willing to share the burden of providing defence.¹⁶

Global stability in the post-Cold War era constitutes an even more complex collective action problem than in the previous era. This is due to three main factors. The first factor is the limited availability of deterrence. The Cold War duopoly offered stability that was enhanced by the public good of mutual deterrence. The two powers could and did coordinate the mutual level of deterrence and thus economized on the costs of producing the public good. In contrast, the current era does not have the stabilizing factor produced by mutuality and by the efficacy of deterrence. There is no counterpart to the US hegemon, and deterrence does not work against those who try

¹³ For other cases of collective action problems in the international context see my 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law', 90 *AJIL* (1996) 384, 390–394.

¹⁴ M. Olson, *The Logic of Collective Action* (1965), at 29.

¹⁵ Olson and Zeckhauser, 'An Economic Theory of Alliances', 48 *The Review of Economics and Statistics* (1966) 266.

¹⁶ See Sandler and Hartley, 'Economics of Alliances: The Lessons for Collective Action', 39 *Journal of Economic Literature* (2001) 869; T. Sandler and K. Hartley, *The Economics of Defense* (1995) Ch. 2.

to destabilize the status quo and seek violence to achieve their goals. Thus there is almost no limit to the amount of collective effort that must be invested in protecting against these challenges. In these settings we encounter one other of Olson's observations regarding the provision of public goods, namely the tendency toward a sub-optimal provision of the collective good.¹⁷ The largest actor, the US in our case, will contribute as much as it can afford to. It may elicit relatively small contributions by some of its allies,¹⁸ but this much would be less than the total potential contributions of all other actors, large or small, once they truly commit themselves to the collective effort. Hence, actual global stability is under threat of being under-supplied.

The second factor that characterizes the post-Cold War effort to stabilize the status quo is the possible strategy of differentiation available to many states. States can add to the protection they obtain through the US efforts an added layer of protection by setting themselves apart from the US and its allies, thus shielding themselves from being targeted by terrorists. The US cannot 'threaten' them with removing them from its protective umbrella, although modest economic 'punishments' may become possible.¹⁹ These states can play the part of 'neutrals' in the raging war. President Bush's call, or plea, 'either you are with us, or you are with the terrorists',²⁰ on the one hand, and Al-Qaeda attacks on US allies, on the other hand, demonstrate the centrality of this factor.

An anecdotal, but telling demonstration of these realities is a report of a UN monitoring group of the Counter-Terrorism Committee issued on 2 December 2003. The report was not made public, but according to an interview with the chair of the committee, fewer than half of all member states cooperated with the committee, and the quality of the information provided by the cooperating states was being questioned.²¹

The third factor exacerbating the provision of global security in the post-Cold War era is the disagreement between the US and a number of other key actors, including members of the Permanent Five at the UN Security Council, about the ways to obtain the public good. Some even view US measures as unilateralist aggressive policies producing public bads and threatening global security. This disagreement is real, and it cannot be resolved by abstract analysis, because it is a matter of judgment call. The US may be correct in deciding to use force, or it may be making grave errors. The difficulty is that the position of those who dispute the US can be presented as motivated by free-riding interests, and at the same time the US position can be presented by its

¹⁷ Olson, *supra* note 14, at 28.

¹⁸ See Sandler and Hartley, 'Economics of Alliances', *supra* note 16, at 875.

¹⁹ For example, the US occupation authorities refused to allow French and German companies to take part in the rebuilding of Iraq.

²⁰ See *President Bush's Sept. 20, 2001, Address to Congress and the Nation*, available at <http://www.foxnews.com/story/0,2933,62167,00.html>.

²¹ 'UN Urges More Action on al-Qaeda', *BBC News World Edition*, 2 December 2003, rep. in <http://news.bbc.co.uk/2/hi/americas/3254828.stm>.

critics as partial. This breeds suspicion which leaves little space for coordination of collective action.

We can therefore conclude that the dynamics of maintaining global stability underwent transformation in the post-Cold War era. The previous system was characterized by mutual deterrence between the duopoly of superpowers, each providing collective security to its group of allies. The balance of powers between the two enabled them to coordinate their military arsenals and spending, and also, to a lesser extent, to convince their smaller allies to contribute to these costs. In contrast, the current unipolar system consists of a global collective action problem with only one relatively strong actor that provides security almost unilaterally to a much larger group of beneficiaries. There is no counterpart with whom to coordinate the level of military spending, and it is much more difficult to convince other beneficiaries (either because they are tempted to act as neutrals, or because they disagree with the US, or because of both) to contribute to the collective effort. For these reasons, we live in an era where stability is constantly challenged and the collective good is constantly under-supplied. The US views its potential allies as shirking their responsibilities, while some of these potential allies view the US more as a threat than a promise to global security.

C *The US Strategy in Providing the Public Good*

The US attitude towards international cooperation in this effort to provide these public goods is complex. It recognizes the obvious benefits of international cooperation, and seeks to achieve them. But at the same time it insists on maintaining its independent and unrivalled right of action. Militarily, the US resists having peer competitors.²² Legally, the US insists on its unfettered power to make assessments as to the risks and the means to address them. Acting in cooperation with allies is the preferred route, but when these fail to offer the support it seeks, the US 'will not hesitate to act alone, if necessary'.²³ The US expects others to join efforts — neutrality is betrayal! — because the fight can only be gained through collective action.

Viewed from this American angle, the US is the primary provider of global security. Some of its traditional allies share some of the collective efforts. Others share only a symbolic part. Those who ride free compromise the success of the campaign. Most annoying are other benefactors of the US efforts who not only free ride, but actually burden the US-led effort by invoking international law against it. Angry remarks about 'old Europe' betray frustration at what is viewed as European ungratefulness, if not hypocrisy. They also betray a lack of attention in the US administration to the crucial domestic dimension of global cooperation, to what Joseph Nye calls 'soft

²² Ikenberry, 'America's Imperial Ambition', *Foreign Affairs* (September/October 2002), 44, at 49–50.

²³ National Security Strategy of the United States (September, 2002), at 6, available at <http://www.whitehouse.gov/nsc/nss.html>; See also the Clinton Administration: 'We act in concert with the international community whenever possible, but do not hesitate to act unilaterally when necessary.' (A National Security Strategy for a New Century (December, 1999), at 19–20, available at <http://www.fas.org/man/docs/nssr-1299.pdf>.)

power,' the power of shared values.²⁴ As a result, international law loses its 'soft power' for many Americans, who come to see it as a tool to hinder the provision of the public goods of global welfare and security, a tool invoked against the US by unthankful opportunists. As such, and vindicated by their moral convictions and their perceived role as protecting Western civilization, since the end of the Cold War the US administration has failed to see both moral and strategic reasons for adhering to outsiders' views about international law.

3 Assessing the Doctrine on the Use of Force

The US strategy for addressing the new challenges can be reconciled with the traditional doctrine on self-defence only with great difficulties. The demand, in Article 51 of the UN Charter, that 'an armed attack occurs' before resorting to force stands in marked contrast to a right of humanitarian intervention²⁵ or to President Bush's assertion of a right of 'preemptive self-defense'.²⁶ Yet the US is not content with relegating discretion to intervene to the Security Council that has the authority, under Chapter VII of the Charter, to determine that a threat to international peace exists and to order that it be removed militarily. This attitude is the result of a combination of two requirements: the need to act unilaterally, and the need to act proactively. Unilateral action is required by the collective action problems identified above. The US finds it too risky to submit the protection of its interests — and as it sees it, global interests — to the free-riding discretion of the majority in the Security Council, including the other members of the Permanent Five club. Proactive action may be necessary due to several factors. First, having to economize its resources and reduce casualties, the US finds it necessary to act proactively and 'nip the threat in the bud', so to speak, rather than leave the initiative to the potential attacker — whether a rogue leader or terrorist groups — to gather military capabilities and strike at the opportune moment, when self-defence would be permitted under the Charter. Second, the threat of weapons of mass destruction (WMD) in the hand of such governments or terrorists renders a reactive strategy quite risky. Third, in the context of the new kind of stateless, suicidal terrorism, the logic of deterrence, which was the backbone of Article 51 constraints, does not work.²⁷

The task of international law is to respond to the challenges of the new conditions. The following section explores the tensions between the doctrine on the *jus ad bellum* and the US claims to modify it.

²⁴ Nye, *supra* note 4, at 552.

²⁵ Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1.

²⁶ See National Security Strategy (2002), *supra* note 23. On the legality of pre-emptive action see Reisman, 'Assessing Claims to Revise the Laws of War', 97 *AJIL* (2003) 82.

²⁷ Ikenberry, *supra* note 22, at 51.

A US Justifications since the 1990s Revisited

The early recourse to force by the US in the post-Cold War era was well within the traditional justification of the *jus ad bellum*. Kuwait's request for collective self-defence to repel the Iraqi invasion was recognized by the Security Council in several resolutions, in which it 'affirmed the inherent right of individual and collective self-defence in response to the armed attack by Iraq against Kuwait.'²⁸ In the aftermath of the September 11, 2001 attacks, despite some scholarly concerns about the availability of the traditional self-defence doctrine, the Security Council recognized 'the inherent right of individual or collective self-defence in accordance with the Charter.'²⁹ This could be viewed as an implicit endorsement of the subsequent US reaction in Afghanistan, and the ongoing war against Al-Qaeda.

Where the traditional *jus ad bellum* could not offer justification for action, the Security Council, released from its Cold War deadlock, has been amenable to granting authorization for action under Chapter VII, notwithstanding the consequent intervention in the domestic jurisdiction of states protected under Article 2(7) of the Charter. In 1991, the Council linked grave human suffering of citizens by their government with the threat to international peace and security, when it referred to the plight of the Iraqi Kurds.³⁰ The military interventions in Somalia, Bosnia and Haiti were all based on the theory that humanitarian tragedies caused by civil wars constituted threats to international peace and security and empowered the Council to authorize individual states to use 'all necessary means,' implicitly including military power to remedy the situation.³¹

But when the strict interpretation of Article 51 did not condone acts in self-defence, and the Permanent Five could not agree on approving attacks notwithstanding, such as in the subsequent case of Kosovo (1999), claims to extend the doctrine on self-defence as enshrined in Article 51 were made. The NATO attack on Serbian forces was explained as 'preventative action' necessary to avert threats to countries in the region, including NATO allies, and the prospects of a humanitarian catastrophe.³² The UK and US attacks on Iraq, in 1993, 1998 and 2003, were based, so were the

²⁸ SC Res. 661 (1990).

²⁹ SC Res. 1368 (2001).

³⁰ SC Res. 688 (1991): 'Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region'.

³¹ SC Res. 794 (1992) (Somalia), SC Res. 816 (1993) (Bosnia), SC Res. 940 (1994) (Haiti).

³² Statement of U.S. State Department spokesman James P. Rubin, 16 March 1999, rep. in Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 628, at 631. Rubin also mentioned a third ground, the failure to comply with international law and international agreements.

claims, on Iraqi non-compliance with Resolution 687 and the authority of those two states to implement that resolution.³³

The so-called Bush Doctrine was asserted in the context of the war against global terrorism. It has its root in previous anti-terrorist strikes. In the aftermath of the bombing of US embassies in Nairobi and Dar es Salaam, the US attacked targets in Afghanistan and Sudan. The missile strikes were justified by President Clinton as acts of self-defence, a ‘necessary and proportionate response to the imminent threat of further terrorist attacks’.³⁴ But the Bush Doctrine goes further than endorsing acts to prevent ‘imminent threats’. It stipulates that action is justified ‘even if uncertainty remains as to the time and place of the enemy’s attack’:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.³⁵

The claims to extend the scope of the traditional doctrine on self-defence can be grouped into three separate legal bases: the war against terrorism requires intervention in states that harbour them, tolerate them, or fail to prevent them from acting; the threat of weapons of mass destruction in the hands of ‘rogue regimes’ requires early intervention to prevent them from developing WMD capabilities; finally, humanitarian catastrophes justify forcible intervention. These three bases require three different extensions of the self-defence doctrine: imputing the terrorist acts to the harbouring governments; extending the traditional ‘anticipatory’ self-defence earlier in time to recognize a right to ‘pre-emptive’ self-defence; and recognizing foreign populations as targets of aggression that ought to be defended by the international community.

The international legal community has responded to these challenging developments with much intensive argument and discord. Scholars have been up in arms, conducting a passionate yet sophisticated debate about whether or not Article 51

³³ The 1998 strike: Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 93 *AJIL* (1999) 471, at 477–478; the 2003 strike: Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 97 *AJIL* (2003) 419, at 424–425. On the legality of the strike as based on SC Res. 687 see Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego Int’l L.J.* (2003) 7, at 34–37. For criticism of this authorization thesis see Gray, ‘From Unity to Polarization: International Law and the Use of Force against Iraq’, 13 *EJIL* (2002) 1.

³⁴ Report to Congressional Leaders (21 August 1998), rep. in. Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 93 *AJIL* (1999) 161, at 162. In a letter to the UN Security Council, the US used the framework of using force ‘to prevent these attacks from continuing.’ (Letter to the President of the Security Council, 20 August 1998 rep. in Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 93 *AJIL* (1999) 161, at 163.)

³⁵ National Security Strategy (2002), *supra* note 23.

could be, and should be, construed as to allow military action other than in response to an actual armed attack. Two camps have emerged, on both sides of the academic divide, entrenched in their positions, and unable to convince each other. Much of the debate developed casuistically, following or distinguishing previous precedents, observing and interpreting state practice, or giving different interpretations to certain Security Council resolutions. There were others who agreed to the need to adapt the framework of Article 51, but disputed the claim that such adaptation could evolve through unilateral action.

Instead of drawing the contours around the competing arguments, I intend to shift the focus from the battlefield of legal argumentation to the more fundamental debate, which animates the different arguments, but which is not the province of lawyers only. This is the debate about the identity of the decision-makers who should be entrusted with the task of assessing serious global security risks.

B *The Logic of the Old Law and the New Challenges*

What characterizes the three claims for extending the doctrine on self-defence — intervention in states that harbour terrorists, in rogue states, and in states where humanitarian catastrophes occur — is their toleration of the exercise of unilateral discretion by individual states instead of the Security Council. The concept behind the UN Charter regime was to eliminate individual state discretion in assessing its security risks.³⁶ The Charter law assigned discretionary powers only to the Security Council, permitting states to protect themselves only in the clearest instances where armed attack actually ‘occurs’, and is beyond dispute.

This system survived not because the law convinced actors to rely on the Security Council. Rather, the system survived because on the whole it made sense. Many potential conflicts were suppressed by the two superpowers that were able to control their respective clients without the need to involve the UN. Moreover, in most conflicts the weapons could not offer a devastating first strike, a fact that helped reduce the risks of forgoing pre-emptive action and resorting to action only in self defence: deterrence was based on the expectation that the attacked would survive to retort. In fact, the stability, provided through deterrence, led the two superpowers to mutually agree to reduce their first-strike nuclear capabilities, including their defences against such strikes (the anti-ballistic missiles), thereby ensuring second-strike capabilities to both. As explained by Thomas Schelling, mutual deterrence depends on a stable balance, which exists only when neither side is motivated to strike first and destroy the other’s ability to strike back.³⁷

The new challenges demand ongoing risk assessment. Every state must determine whether foreign governments effectively prevent terrorist action in their territory, whether such governments are rogue regimes contemplating recourse to WMD, and

³⁶ See Ranzhofer, ‘Article 51’, in B. Simma (ed.), *The Charter of the United Nations — A Commentary* (1994) 662, at 676: (emphasizing the risk of an abuse of a state discretion to assess the imminence of an attack).

³⁷ T. C. Schelling, *The Strategy of Conflict* (1963) 232.

whether humanitarian concerns are sufficiently high to justify (or even to require) military intervention. Above all, every state must assess whether it can trust the decision-making process of the Security Council — to what extent it should rely on the promise of collective security. The slightest doubt may convince states under threat to act alone in what would be deemed, under the doctrine, as an act of aggression.

But relegating risk assessment to the Security Council — the solution preferred by many scholars³⁸ as well as states — has become a rather precarious policy ever since these conditions ceased to obtain. The presence of WMD in the hands of rogue regimes or even terrorists destroys the opportunity of mutual deterrence and increases the risks of deferral to collective security protection. Potentially threatened states cannot rely on a resolute preventive action by the Security Council due to inherent difficulties, including potential free-riding, in the collective bargaining among the Council's members, in particular the Permanent Five. Potential disagreements among Council members may also preclude an effective and timely response to humanitarian catastrophes, as in the case of Kosovo (1999).

For the US, reliance on collective security is a particularly challenging proposition. Not only is the US the prime target of global terrorism and rogue regimes, but as explained above, it is also the primary provider of security, in many cases through unilateral action. For the US, the demand is that it allow the Security Council to review its assessment of risks before it is allowed to provide the public good that *all* benefit from. In other words, to let others approve US action that is designed to protect also those others. This proposition sounds to American ears not only incompatible with its own democratic processes, but also outrageously hypocritical. For other states, which might find themselves under US attack, the same proposition is the ultimate manifestation of their sovereignty.

This analysis leads to two key questions. The first is substantive: To what extent should international law tolerate unilateral assessments of both the presence of global security risks and the means of addressing these risks, including the unilateral use of force? This question is addressed in Section 4 below. The second question is institutional: Granting the necessity for allowing at least some unilateral discretion in extreme situations, what are the appropriate modalities to prevent abuse of such discretion? Section 5 below explores means to limit the abuse of such a doctrine by procedural guarantees.

4 Unilateral Responses to Collective Threats?

It is difficult not to be sensitive to the American claims. Yet, there are weighty considerations to the contrary. Accepting the American view raises several concerns

³⁸ Delbrück, 'The Fight against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the "War Against Terrorism"', 44 *German Yearbook of International Law* (2001) 9, at 22; Condorelli, 'Les attentats du 11 Septembre et leurs suites: où va le droit international?', 105 *Revue générale de droit international public* (2001) 829.

of both policy and principle. This section contemplates the concerns and ramifications of the American position. Section A addresses the policy questions; sections B and C discuss questions of principle.

A *Managing the Risk of Error*

The UN Charter envisions the Security Council as the proper institution to react to ‘threats to international peace and security’ decisively and swiftly. But in practice the Security Council often finds it difficult to live up to this promise. To start, it does not have the standing army it was designed to have. But even more profoundly, even after the end of Cold War paralysis, disagreements among the Permanent Five often preclude an authorization for military invasions, as witnessed in the examples of Kosovo (1999) and Iraq (2003). Both theory and practice suggest that differences in the assessment of threats to vital self and collective interests may exist between the Permanent Five. The outcome of such differences is equilibrium of inaction.³⁹

The Bush Doctrine on pre-emptive self-defence challenges this equilibrium. Given the fact that the US views itself as the prime if not the only provider of global stability and security, the US asserts the right to act even without Security Council authorization. Put bluntly, absent Security Council condemnation, forceful action will not be deemed illegal.⁴⁰ Changing the equilibrium for Security Council engagement from equilibrium of inaction, determined by the necessity of unanimity of the Permanent Five to equilibrium of action, in which states can unilaterally determine whether threats to ‘international peace and security’ exist and may act upon such determination *unless prohibited* by the Council, raises serious questions about expediency and efficacy.

First, an equilibrium of action may induce rogue regimes and terrorists to act sooner, or more fiercely, than under the current regime. This concern is the easiest to discard. Our operating assumption is that terrorists and rogue states do not play by the rules and are not prone to deterrence. Regardless of what other states do, they anxiously try to obtain means for action without delay. Hesitation and inaction are the policies that will only strengthen their resolve and increase their capabilities.

The second concern involves problems of *bona fides* mistakes. The unilateral assessment of the risks may be wrong simply because of insufficient data or poor judgment by decision-makers acting impartially. A concerned party may act responsibly, but make mistakes in its choice among courses of action. States may agree on the threat emanating from a certain regime, but offer different proposals

³⁹ Wedgwood, ‘Unilateral Action in the UN System’, 11 *EJIL* (2000) 349, at 353 (‘A passive system of security — favouring inaction over action — can avoid the danger of provocation of one superpower by another, but prove unable to meet other challenges truly threatening to international peace’).

⁴⁰ Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’, 93 *AJIL* (1999) 824, at 827: ‘the likely lesson of Kosovo is that states, or collectivities, confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto: instead of seeking authorization in advance by resolution subject to veto, states or collectives will act, and challenge the Council to terminate the action. And a permanent member favoring the intervention could frustrate the adoption of such a resolution’.

ranging from its forceful removal, its restraint through threats, or its appeasement through positive inducements. The difficulty, however, is that risks of error are endemic in every system. A system that requires the approval of all powers (i.e., depends on the judgment of each and every power) is equally prone to mistakes as in a system that requires the approval of only one power. Recall that it was sufficient that only Russia or China cast a negative vote to defeat a Security Council approval of a humanitarian intervention in Kosovo in 1999.

But there is yet another concern coupled with the previous one: if the decision to recourse to force requires unanimity of, say, the Permanent Five, there would be fewer instances of such a recourse compared with a system that entitles each of the five to act on its own judgment. This is simply because it is statistically less possible that all five would err in favour of action. Modifying the equilibrium in favour of unilateral action therefore means tolerating more instances of military intervention than under the previous arrangement. This gives rise to various types of questions. One is whether the increased tendency to use force might be more effective than not in reducing violence. Another looks at the deeper social processes: the international community was able to redeem itself of the view that war was not illegal only by the sheer social powers of revulsion from the scourge and senselessness of war in the early 20th century. Relaxing the constraints on unilateral action may slip us back to those dark days.⁴¹ These are in themselves questions of risk management, to which there is no *a priori* satisfactory answer. Instead, one suggestion is to concentrate efforts on improving the unilateral and collective decision-making processes to reduce such risks of error as much as possible. But it is important to note in this context that the logic of collective action in the provision of global security, analysed in Section 1 above, suggests that some of the participants in the decision-making process may be tempted to signal their differences with, say, the US so as to deflect terrorist threats. Such a temptation may include voting against US initiatives. In such a scenario, the requirement of unanimity is not always one that is impartial. It can be counter-productive.

The final concern is with the potential abuse of the new equilibrium by states that promote their self-interests while jeopardizing collective interests. The unilateral assessment of the risks may be wrong due to partial motives, as the recourse to force may be motivated by self-interests that have nothing to do with the collective goals. Most humanitarian interventions between the 1960s and 1980s were frowned at because of this concern. This is why the Bush Doctrine on pre-emptory self-defence raises so many concerns. Before addressing these concerns in Section 5, sections B and C below address doctrinal difficulties with the notion of individual risk assessment of global threats.

⁴¹ Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 *EJIL* (2003) 227, at 238.

B Relaxing the Doctrine of Self-defence Means Relaxing the Concept of Sovereignty

To fully realize the significant doctrinal ramifications of the suggestion to relax the doctrine on self-defence and to allow states to individually assess risks that necessitate pre-emptive responses, it is necessary to explore the link between the law on war and the concept of sovereignty. This is due to the fact that the upshot of the unilateral exercise of discretion to assess and react to the external threats is a significant compromise of the discretion of a government as to its choice of responses to prevent people in its territory from threatening the interests of others situated both inside and outside that state's territory. The US claim is essentially an assertion of the right to review the policies adopted by the other government and to override them whenever the US finds it necessary. If, for example, a certain government wishes to negotiate a compromise with a group of terrorists situated within its territory, a compromise which the US deems unsatisfactory, the US asserts, under the Bush Doctrine, a right to interfere and jeopardize the domestic compromise and perhaps much more than that. The Bush Doctrine is thus a major limitation on the concept of state sovereignty. Needless to say, a claim to intervene for humanitarian reasons carries the same implications for state sovereignty.

Sovereignty is a two-faceted concept. It carries an internal as well as an external claim. When Jean Bodin developed this concept, he emphasized its internal meaning. Sovereignty for him was monopoly over the domestic exercise of power. The sovereign was the one who enjoyed no competition with the Church or other domestic claimants concerning the control of the domestic population.⁴² When transposed into the realm of international law by Vattel, the concept of sovereignty came to mean independence of any external force, subject only to the law of nations that applies equally to all states.⁴³ The two concepts — the internal and the external — could coexist due to the principle of international law prohibiting the intervention of one sovereign in the domestic affairs of the other without the other's consent.

The current challenges to the doctrine on the use of force pierces through the prohibition of interference of one state in the domestic affairs of another, thereby infringing Bodin's basic notion of sovereignty. According to the Bush Doctrine, if the US finds the efforts of a certain foreign government to fight terrorists on its territory as insufficient or ineffective, it has the full authority to interpose and even act in its stead. If the same doctrine applies not only to the US but also to other states, then, when judged necessary, any one state would claim the right to replace another government, when that government is unilaterally judged as 'rogue' or engaging in violence against its own citizens. This spells the end to the sovereign claim for monopoly over the exercise of power domestically: the policy decisions of any state are subjected not

⁴² See J. Bodin, *On Sovereignty* Book I (1583, J. Franklin, trans. 1992) Ch. 8.

⁴³ E. de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, Vol I (1758), at 18–19. On the internal and external meanings of 'sovereignty' see recently Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law', 4 *Melbourne J. Int'l L.* (2003) 1.

only to a collective decision of the international community through the Security Council, but also to the discretion of the US, and perhaps of any other state. Moreover, if those states do not approve of the policies adopted, they have the right to act instead of the national government, using force if they deem necessary.

Indeed, views amenable to such external reviews of domestic policies have emphasized the notion that sovereignty was not only a right but also a responsibility.⁴⁴ Scholars invoked the words of the arbitrator Max Huber in the *Island of Palmas* arbitration.⁴⁵ '[T]erritorial sovereignty', Huber wrote, 'involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the right of other states, in particular their right to integrity and inviolability in peace and in war.'⁴⁶ This principle of territorial sovereignty, reasoned Huber, 'serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian'.⁴⁷

Huber's concept of sovereignty is reflected in the contemporary law of state responsibility.⁴⁸ But the circumstances have changed, and there is no unanimity as to the utility of the principle of territorial sovereignty as a useful tool for allocating global risks and responsibilities. Some sovereigns will not be able, or simply refuse, to live up to Huber's vision of the collective effort to guarantee minimum protection for all. If international law is to provide for such guarantees, goes the Bush Doctrine, it should recognize the diminishing sovereign rights of those governments that fail a test imposed by other governments.

Put differently, the concept of sovereignty has been transformed from a neat allocation of responsibilities to one that constitutes a zero-sum game. A state that feels itself under potential threat faces the tough choice between paying respect to the sovereignty of another state from which attacks may be forthcoming, thereby exposing its own interests to greater risks, or paying more respect to its own sovereign interests, proactively infringing the other state's sovereignty so as to prevent a threat from materializing.

Note however that sovereign risk assessment is not confined to the realm of proactive military action. In principle, the same challenge is posed by the exercise of universal jurisdiction for crimes committed by non-nationals abroad. To indict a

⁴⁴ On the evolution of this concept of limited sovereignty in the 1990s see Wheeler, 'The Bush Doctrine: American Exceptionalism in a Revolutionary Age', 27 *Asian Perspective*, (2003) 183.

⁴⁵ Reisman, 'International Legal Responses to Terrorism', 22 *Hous. J. Int'l L* (1999) 3, at 51: 'Legal inquiries into this area frequently commence with an analysis of the rights of the state from which the terrorists operate and thus assume that the question is essentially one of the violation by the target state of the sovereignty of the state that is hosting the terrorists. But that is only one-half of the normative picture. It is important to recall that the host state also has important obligations to other states which are the very basis of its claim to territorial sovereignty. From this latter perspective, the sovereignty deferences that are accorded to actions within the territory of a state by other states are conditional and synallagmatic.'

⁴⁶ *Island of Palmas (or Miangas)*, Arbitral Award of 4 April 1928, rep. in 22 *AJIL* (1928) 867, at 876.

⁴⁷ *Ibid.*

⁴⁸ This is why omission can constitute an international wrongful act of a state. See Draft Article 2 of the ILC Draft on Responsibility of States for Internationally Wrongful Acts.

foreigner for crimes committed under the authority of another sovereign — having been pardoned or even chastised by that sovereign — is to infringe that sovereign claim to have monopoly over the exercise of authority over acts of its nationals within its territory. The exercise of universal jurisdiction signifies a lack of confidence in the commitment of the foreign state's institutions to maintaining the rule of law and to protecting citizens against governmental or other abuse of their most basic rights. The difference between intervention through military power or judicial power is thus not a qualitative difference when viewed from the perspective of Bodin's concept of sovereignty. Both are efforts to intervene and potentially overrule the monopoly over the national exercise of authority. Both also are based on the hope that such intervention would deter rogue regimes and prevent mass atrocities. The difference between the two is in the assessment of the risks involved. Military intervention carries the risks of increased human suffering, costly and perhaps ineffective rebuilding efforts and ultimately more harm than good. Judicial intervention carries the risks of ineffectiveness, increases the costs of negotiations over the removal of the rogue leaders and the transition to a more acceptable government, and ultimately raises the stakes for those who consider a recourse to force. In both cases this is a cost-benefit analysis that assumes a right of one sovereign to intervene in the exercise of sovereignty by another sovereign. There is thus agreement on the principle, although a remaining dispute about the means. This leads us back to the key dilemma identified and discussed above: Whom should the international community entrust with the assessment of risks?

In light of the observation that the notion of domestic sovereignty creates a zero-sum game under contemporary conditions, the resistance to the demand for subjecting the sovereignty of one state to the discretion of other states loses much of its bite. This is because there is no *a priori* principle that always favours inaction over proaction. The risk of error can cut both ways. Even in environmental law, where the risk of error is significantly less dramatic, the well-known 'precautionary principle' is certainly not equivalent to a 'wait and see' policy.⁴⁹ Taking precautions often entails preventive action.

Having said this, it is impossible to underestimate the significance of unilateral pre-emption as a major step in the incremental erosion of the concept of sovereignty in international law. It is a step that merits most careful attention, but at the same time it is a step that the international community should consider, provided there can be procedural guarantees to prevent its abuse.

C *The Bush Doctrine and Sovereign Equality*

The Bush Doctrine raises two challenges to the principle of sovereign equality. First, it asserts its own rights, remaining equivocal on the question whether the same doctrine could be invoked by other states. Second, it implies that not all states are alike, and some states — rogue states, ones that harbour terrorists, those bent on genocidal

⁴⁹ See E. Benvenisti, *Sharing Transboundary Resources* (2002), at 109–113.

policies — are not entitled to equal respect as the others. Both prongs of the argument call into question the cherished concept of sovereign *equality*.

The claim for exclusive US authority to act pre-emptively — if so should the Bush Doctrine be interpreted⁵⁰ — raises a deep concern about inequality: Can the international legal system accept unequal allocation of powers in the context of assessment of aggressive threats? More specifically, should the US, when acting to provide a public good, be granted privileges no other state enjoys?

In the context of the debate about the *jus ad bellum* the principle of equality gained particular attention because of the concern that what would be permitted to one state would be permitted to all. Equality meant a slippery slope: if the US uses force outside the confines of the doctrine, then a precedent is set for others to emulate. In an era of US dominance, the concern is that such action sets the standard for all to follow. Implicitly referring to the US position, the UN Secretary-General has expressed his ‘concern’ that ‘if it were to be adopted, it could set precedents that resulted in the proliferation of the unilateral and lawless use of force, with or without justification’.⁵¹ In this light, a claim for US exceptional powers may be less threatening. Accepting the US claims would thus not imply that other states could emulate it. Thus, for example, Israel would not be able to simply adopt the US pattern of reaction to terrorist attacks by following the Afghanistan (2001) example and striking targets in Syria following a terrorist attack within Israel. Likewise, India will not be able to emulate the US by striking Pakistan.⁵²

Formal inequality is part and parcel of international law. The law bows to relative military or economic power to bridge over differences, to accommodate needs, or simply to maintain at least a semblance of coherence. The Charter system recognized the leadership role played by the Permanent Five, granting them veto power in the Security Council. The IMF and World Bank institutions reflect the different economic powers of participating states. The NPT regime allowed only the Permanent Five to maintain their arsenals of nuclear weapons. During the Cold War, international recognition of the spheres of influence of the US (‘the Monroe Doctrine’) and the USSR (‘the Brezhnev Doctrine’) were reflected in the relative toleration in the respective military interventions in Central and South America and in Central and Eastern Europe. The European Communities found ways to reflect their differences in the voting patterns. The trade regime reflects the differences between developed and developing economies. Environmental agreements recognize ‘differential obligations’. Indeed, developing states seek more inequality of duties to set off the relative weakness of their economies and accommodate dire needs of their citizens. Indeed, the move from formal equality, in the sense of similar rights and obligations to each sovereign,

⁵⁰ Such an interpretation is offered by Wheeler, *supra* note 44.

⁵¹ See The Secretary-General Address to the General Assembly, New York, 23 September 2003, available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

⁵² But in fact, after the Israeli attack on Syria, President Bush ‘did nothing to dispel the impression that the White House, after discouraging Israel from assuming that it could embrace the Bush doctrine in its battle against Palestinian extremists was now doing nothing to stop Israel from doing so.’ ‘Bush Tells Israel It Has the Right to Defend Itself’, *New York Times*, 7 October 2003.

to a more elaborate sense of equality — to each according to needs, to each according to capabilities etc. — is not foreign to international law.⁵³ It is acceptable, if it reflects a valid interest.

The other concern about sovereign equality relates to the distinction between ‘rogue’ and other states. For the claims for pre-emptive actions or humanitarian intervention suggest that some states are more entitled than others to have their sovereignty respected. This claim does not depend on any subjective sense of moral superiority. Instead, it is based on an objectively verifiable factor that may be called ‘deterability’. For it is only because a regime is undeterred that the need to act pre-emptively arises. As explained by President Bush:

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first. . . . [D]eterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.⁵⁴

Ours is certainly a different world than the one observed by Hugo Grotius when he wrote his celebrated treatise *De jure belli ac pacis* (1646). Grotius’s conception of the law of nations was built upon the logic of the balance of power and deterrence, for, as he explained, ‘there is no state so powerful that it may not some time need the help of others . . . even the most powerful peoples and sovereigns seek alliances, which are quite devoid of significance according to the point of view of those who confine law within the boundaries of states’.⁵⁵ For the first time since the Peace of Westphalia, global peace cannot be founded on alliances and counter alliances between competing powers nurtured by mutual deterrence. Global security can be threatened by a single rogue state armed with biological, chemical or nuclear capabilities, or by non-state actors.

Simply put, actors that are undeterrable — rogue governments, terrorist groups — merit less respect for their sovereign rights. These actors undermine the promise of reciprocity, which has long been the foundation of the international legal order. Cynically, at the same time they try to take shelter behind the very same normative framework they seek to undermine. The Bush Doctrine can be understood as an attempt to recreate the Grotian conditions of mutual respect based on mutual deterrence, by eliminating actors who are not complying with the key precondition of good citizenship — the willingness to assume a defensive posture and not act with deadly force until attacked. Like a democracy that must preclude access to its political processes of forces that seek to destroy it, so international law must resort to extraordinary measures to protect itself against those ‘undeterrables’ who do not

⁵³ Cf. Brilmayer, *supra* note 10, at 124 (‘The traditional international law vision of a world of completely equal states is essentially a myth’).

⁵⁴ National Security Strategy (2002), *supra* note 23.

⁵⁵ H. Grotius, *De jure belli ac pacis* (1646, trans. by Francis W. Kelsey, 1925) at 17.

commit to the fundamental obligation of responsible sovereigns in the sense underlined by Huber. Similar to democracies fighting for their survival against anti-democratic forces that set up procedures for disqualifying parties that do not accept the basic rules of the democratic game,⁵⁶ so can the international community develop tools for imposing certain limits on those who undermine the basic rules of citizenship in the international community. Such tools should provide new responses that would be able to assess and manage the risks of the ‘undeterrables’ effectively and responsibly, while ensuring accountability for decisions taken.

5 Towards a New Equilibrium in Global Emergencies

The above analysis leads us to the following observations. The Article 51 paradigm is ill suited to provide for sufficient protection against the three main contemporary challenges to international peace and security. In addition, the US has both the interest and ability to provide unilaterally reasonable military responses to protect global stability and security. Based on these two observations, the central US demand is to retain its sovereign authority to assess security risks and its discretion to respond to them in either a reactive or proactive way.

One possible response to these challenges is denial. We can choose to ignore the fundamental challenges that contemporary terrorist threats, as well as the US responses to them, pose to the rule of law. We can continue to debate the legality of this or that policy — humanitarian intervention, the Bush Doctrine — under Article 51 or Chapter VII. But this approach risks becoming out of sync with reality. And when the law is outdated, it can yield little respect. The reason of the law has changed. The law should recognize this, and adapt itself in order to retain, or regain, its authority.

Another response is the creation of an ‘acoustic separation’ between the norm and the exception.⁵⁷ Following the method that criminal law deals with of extreme situations in which individuals resort to violence in self-defence, scholars have suggested leaving the rule on the use of force intact but to recognize a grey area for post-hoc assessment of legitimate breaches of the rule in truly exceptional cases.⁵⁸ This approach echoes correctly the essentially unprincipled, subsequent judgments pronounced by a ‘global jury’, consisting mainly of reactions of states and international institutions to specific military actions.⁵⁹ Such post-hoc reactions reflect the political realities created by the attack, including the new insights gained as to the

⁵⁶ The most comprehensive account remains Fox and Nolte, ‘Intolerant Democracies’, 36 *Harvard Journal of International Law* (1995) 1.

⁵⁷ Meir Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’, 97 *Harv. L. Rev.* (1984) 625.

⁵⁸ Simma, *supra* note 25.

⁵⁹ T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 186; See also Byers, ‘Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change’, 11 *The Journal of Political Philosophy* (2003) 171, at 186.

desirability of such attacks. The main difficulty with this rule-exception approach, however, is that the exception may soon become the rule. The frequent invocation of the exception removes the necessary acoustic separation between the two. The rule becomes a myth, and the real law becomes the fluid and vague operational code.⁶⁰

Before declaring the demise of the law,⁶¹ and the beginning of anarchy, it is worth exploring yet another possibility. The other possible response, which I would like to outline below, acknowledges the need for recognizing the lawfulness of unilateral action to address global emergencies. This recognition calls for a law that would offer objective criteria for discerning when military intervention is legitimate, or at least tolerable, and when it is not. Such a response should also focus on the procedure for the evaluation of claims for their compliance with the criteria for intervention.

The Bush Doctrine can be seen in this light as one effort to identify a key area where unilateral proactive measures are necessary. The doctrine identifies global terrorism as providing such a general situation that calls for specific extraordinary measures. After explaining the reasoning for taking a proactive stance, President Bush gives some indication about the decision-making procedure:

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

In other words, the doctrine outlines an action that is always focused on a specific threat; that threat can be to US or global interests; the response would be measured, involving the use of force only when and to the extent necessary;⁶² both the threat and the reasons to respond to it in the way chosen will be communicated.

This complex combination of substantive and procedural conditions vaguely resembles the regime derogations in time of national emergencies recognized under human rights regimes. According to such regimes,⁶³ states may derogate from some of their obligations after they declare 'public emergency which threatens the life of the nation', if such derogations are 'to the extent strictly required by the exigencies of the

⁶⁰ W. M. Reisman, *Folded Lies* (1979).

⁶¹ Glennon, 'The UN Security Council in a Unipolar World', 44 *Va. J. Int'l L.* (2003) 91, at 98: 'Since 1945, so many states have used armed force on so many occasions, in flagrant violation of the Charter, that it can only be said that the use-of-force regime has lapsed. In framing the Charter, the international community failed to anticipate accurately when use of force would be unacceptable and to apply sufficient disincentives to those uses.'

⁶² 'The United States will not use force in all cases to preempt emerging threats' (National Security Strategy (2002), *supra* note 23).

⁶³ Article 4(1) Covenant on Civil and Political Rights: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

situation'. Certain reporting obligations must be complied with.⁶⁴ The same approach can be taken, *mutatis mutandis*, for addressing what may be called 'Global Emergencies'. Derogating from Article 51 constraints may thus be tolerated, subjecting the national assessment of the risk to certain conditions, procedural obligations, and ultimately to international review.

Such a recasting of the Bush Doctrine as a manifestation of a derogation regime can help refine the conditions and limits for such action. Whereas the human rights regimes identify such emergencies as ones 'which threaten the life of the nation', a derogation regime for 'global emergencies' would not be restricted to one nation only. It would require a demonstration that the public emergency threatens 'the life of another nation' (in case of humanitarian intervention), or 'the lives of nations' (in the case of global terrorism or WMD in the hands of rogue regimes). Put differently, a state that cannot present itself as providing a public good will have to do with the traditional framework of the *jus ad bellum*. Thus, regional powers seeking to engage in conflict with their neighbours will not be able to avail themselves of the derogation. Israel, for example, will not be able to avail itself of this derogation regime in attacking Syrian or Iraqi targets pre-emptively. As in the bombing of the Iraqi nuclear reactor in Osirak (1981), Israel will have to weigh the consequences of possible infringement of Article 51. This is why, in my view, an essential part of the Bush Doctrine is the initial statement invoking the threat not only to the US but also to its allies.

Following this determination of 'global emergency', the derogating state would be required to demonstrate that its measures derogating from their *jus ad bellum* obligations are strictly required by the exigencies of the situation. The Security Council, acting under Chapter VII, could then review the declaration, appraise whether the measures taken are indeed strictly required, and decide whether or not to overrule it.

The Bush Doctrine, and the more general approach of derogations outlined here changes the equilibrium among the members of the Security Council. It 'shift[s] the burden of the veto'.⁶⁵ It favours unilateral action, essentially by any one of the Five who could veto a contrary position of the Security Council. But at the same time it provides limits to unfettered unilateral discretion. Although the rhetoric of derogation may seem to further dilute the self-defence paradigm, it does just the opposite, because it keeps the boundaries of the self-defence exception appropriately narrow, and it puts limits to the derogation from the self-defence exception, by restraining such derogation through procedural guarantees that enable the Security Council and the world to review and react to the exercise of unilateral discretion. In contrast to a rather permissive and vague concept of pre-emptive self-defence that is available to all states and requires little in terms of procedural guarantees, the derogation limits the

⁶⁴ Article 4(3) Covenant on Civil and Political Rights: 'Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

⁶⁵ Henkin, *supra* note 40.

grounds for resorting to proactive use of force, reduces the potential abuse of the doctrine by regional bullies that seek to overcome their neighbours, and provides clear guidelines and procedural opportunities for review in and outside the Security Council.

The derogations regime would not necessarily increase legitimized violence. To take the invasion of Iraq (2003) as an example, the derogation regime would have required the US to demonstrate that Iraq posed a global threat which necessitated preventive military action. The same debate about the possible existence of WMD in Iraqi hands would have ensued. Failure to convince the international community would have meant that the US claim would not have been accepted as lawful, and the US would have had — as it actually did — to base its intervention on other grounds.⁶⁶ But in the case of Kosovo (1999), or Afghanistan (2001), the derogations regime would have made a difference for those who viewed them as otherwise illegal.

In practical terms, the derogations regime offers the US, and the other Permanent Five, a new basis for the lawful use of force. The Security Council will not be able to adopt measures against the Five. Still, in all likelihood, their preference will remain to act on the basis of clear Council authorization, rather than invoke the power of derogation.

The adoption of the derogation regime does not necessarily depend on an amendment of the Charter. State practice, initiated by an explicit assertion of the principle by the US or any other of the Privileged Five, can start a process through which the regime will take shape. This will not be the first time in which the text of the Charter would be reshaped by practice.⁶⁷ Legal scholars should facilitate the process by focusing on the new realities and potential responses.

6 Conclusion

Kofi Annan did not exaggerate when he referred to the Bush Doctrine as 'a fork in the road', 'a moment no less decisive than 1945'.⁶⁸ The Bush Doctrine should be regarded as a genuine attempt to adapt the legal doctrine to contemporary demands. It is an outcome of serious contemplation of the new threats. As President Bush asserted '[I]t has taken almost a decade for us to comprehend the true nature of this new threat.'⁶⁹ The proper reaction to it must therefore not be a vehement protest against the motivation of an imperialistic hegemon, but the careful assessment of a new approach that would be able to address and accommodate as many concerns as possible. Such an approach should be sensitive both to substantive aspects and institutional ones. This essay offered an attempt to realize the constraints that shape the US behaviour, and explore the tensions between these constraints and the legal doctrine.

⁶⁶ See *supra* text to note 33.

⁶⁷ See Franck, *supra* note 59.

⁶⁸ The Secretary-General Address to the General Assembly, New York, 23 September 2003, available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>.

⁶⁹ National Security Strategy (2002), *supra* note 23.

The war against terrorism and rogue regimes necessitates fresh thinking about entrenched legal concepts as fundamental as the principle of sovereign equality and the doctrine of self-defence. In 1928 Max Huber explained sovereignty as derived from the global interest in minimum security for all.⁷⁰ Nowadays, minimum security necessitates certain significant limits on sovereignty. The goals of the law have not changed. But global realities have changed, and these changes require important modifications of the doctrine. The controversial Bush Doctrine is an attempt to modify the doctrine. It constitutes a significant departure from the traditional doctrine. Recasting it as one example of a derogation regime is one way to point out possible paths for progressive development of the law.

⁷⁰ *Supra* note 46.