

Self-Defense and the World After September 11: Implications for UN Reform

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This paper offers several observations on the Secretary-General's vision for the role of military force in international relations, particularly with reference to the views of the United States government on the use of force in the post-September 11 era.

Secretary-General Annan devotes a significant section of *In Larger Freedom* to the UN's place in the maintenance of international peace and security. His analysis and recommendations are in some sense mere elaborations of ideas expressed in earlier speeches and documents, in particular those concerning the UN's responsibility to aid populations whom their governments will not protect. Yet *In Larger Freedom* of course goes much further, with its chapter on "Freedom from Fear" clearly influenced by the important work of the High-Level Panel on Threats, Challenges and Change. Annan provides a broad range of recommendations for the UN's members regarding terrorism and organized crime, weapons of mass destruction, and conflict prevention, including peacekeeping and peacebuilding. But the report's five paragraphs on the use of force, though brief, represent the Secretary-General's most forthright discussion of his vision for the role of military force in international relations. In this paper I will offer several observations on this discussion, particularly with reference to the views of the United States government on the use of force in the post-September 11 era.

1. The Choice of Issues:

In Larger Freedom emphasizes three areas of disagreement among states – over preemptive force, preventive force, and protective force. This division of the *problematique* differs from that of the High-Level Panel, which addressed individual and collective (i.e., non-Security Council-authorized) self-defense, Security Council-authorized force for interstate disputes, and Security Council-authorized force for internal conflicts. Although the Secretary-General's recitation of the issues has a nice alliterative ring, useful for public consumption, students of *jus ad bellum* would note that the High-Level Panel's description better differentiates between the issues regarding Article 51 self-defense and Article 42 measures.

More important, the Secretary-General omits discussion of disagreements over the employment of force *after* armed aggression has occurred. To note two obvious areas:

- With respect to Article 51 action, interpreters of international law continue to disagree about the sort of attack that triggers self-defense. More specifically: (a) The International Court of Justice endorsed a minimal threshold on the amount of force that constitutes an "armed attack" in the 1986 *Nicaragua v. United States* judgment. (b) In the 2004 *Israeli Wall* advisory opinion, the ICJ, over strong dissent of several Western judges, said that cross-border attacks by non-state actors that could not be attributed to a state did not trigger Article 51 at all. Thus, Israel could not assert that self-defense allowed it to build a wall against suicide bombers from the occupied territories. The briefs filed in both of these ICJ cases suggest that key member states disagree on these issues at least in principle, though it is frankly difficult to know the extent to which most states believe the ICJ's rulings deserve respect on these use of force questions. (c) There is disagreement about the conditions under which a state can be the target of self-defense by virtue of actions by non-state actors. When the U.S. government asserted the right to use self-defense against Afghanistan in 2001, it did

so based on a theory of “harboring” terrorists, originally announced on the night of September 11, 2001, when President Bush stated that it would “make no distinction between the terrorists who committed these acts and those who harbor them.” This position was at odds with existing customary international law regarding the responsibility of a state for the actions of private actors on its territory. The endorsement of the U.S. action by NATO and the OAS, and the non-protest by other governments, suggests that the United States may have instantly achieved a change in the rules, so perhaps the disagreement is merely among academic and nongovernmental commentators. But if the United States, Russia, or other states that might become the victim of transnational terrorist groups chooses to respond by force against another state without Council approval, now-hidden disputes about the legitimacy of such measures may well emerge.

- With respect to Article 42 action, I believe there is still a significant discord among states about when the Council should authorize force following aggression. The 1991 debates after the invasion of Iraq were characterized by calls for more patience in letting sanctions work, couched in the legal language of the discretion to be afforded the Council under Article 42 in determining if non-military means have proved “adequate.” And states clearly consider many transborder uses of force not serious enough (at least in terms of their own national interests) for authorizing force under Article 42, e.g., Ethiopia/Eritrea and the Great Lakes area. To his credit, the Secretary-General does consider this question in paragraph 126, where he endorses five criteria for Council action based on the High-Level Panel’s report. (See also point 4 below.)

2. Pre-Emptive Self-Defense -- The Phoenix Rises:

In considering the first of the three disagreements, both the Secretary-General and the High-Level Panel squarely endorse the legality of pre-emptive self-defense, i.e., the use of force against an imminent attack from abroad. This is welcome news to me, but it may come as a surprise to international lawyers when, for instance, Annan asserts that “[l]awyers have long recognized that [Article 51] covers an imminent attack.” (para. 124). In fact, while many leading U.S. and British scholars have argued for the legality of the practice, pointing to the tacit endorsement of the Israeli first strike of 1967 in support of their claim, most European and other scholars would probably still say that such force is illegal. They would cite as evidence of its illegality the language of Article 51, various statements of governments, and the dangers of an unfettered right to strike first in the case of imminent peril. Indeed, the Bush Administration’s September 2002 National Security Strategy made essentially the identical legal claim, much to the chagrin of European international lawyers. The Secretary-General has, I believe, perceptively gauged state attitudes – though perhaps not their public ones -- on this question. He has also thrown an important bone to the United States by acknowledging what it – and a few other states – has long publicly claimed: that no state can be expected to willingly absorb the first blow of a sure attack.

3. Preventive Self-Defense -- Keeping the Genie in the Bottle.

Both the High-Level Report and *In Larger Freedom* restate the obvious in emphasizing that the Council has clear authority under the Charter to respond preventively through military means to threats to, and not merely breaches of, the peace. And the list of five factors to guide the Council in its decisionmaking is eminently sensible. Implicitly, of course, the brief paragraph (125) on this issue is a ringing rejection of the broader claim from the U.S. National Security Strategy. In asserting that the world, or at least the United States, “must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries,” the Bush Administration was suggesting that even non-imminent threats, if of sufficient gravity, would trigger Article 51. Bush Administration officials repeatedly echoed this rhetoric in making the political case – especially to the U.S. public – for the Iraq invasion based on the consequences of allowing Iraq to develop weapons of mass destruction. Significantly, they did not base their legal claim to use force on preventive self-defense (but instead on extant Security Council authority) and thus formally insisted that they were neither bypassing the Council nor relying on Article 51.

Clearly the Secretary-General has recognized that legal arguments aside, the United States might one day bypass the Council entirely in situations of less-than-imminent threats. (How many other situations are there, after all, where the U.S. government can claim that a prior authorization for force against a state akin to Resolution 678 remains in effect?) His attempt is perfectly understandable from the perspective of the principles and purposes of the United Nations;¹ but I believe the basic thrust of the Bush doctrine now has broad and deep domestic support such that no U.S. President after September 11 will ever be content with the imminence standard of preemptive self-defense laid down in the *Caroline* case (i.e., “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”). Unless one is content to gloss over the differences by simply not discussing what “imminent” means, the Secretary-General’s position will not end disagreements among states over the scope of Article 51.

4. The Proposal for a Security Council Resolution:

Conor Cruise O’Brien wrote famously in *United Nations, Sacred Drama* that “the ‘satisfaction’ derived from the public offering of the ‘glowing phrases’ [is] the feeling that the thing feared may be averted, and the thing hoped for be won, by the solemn and collective use of appropriate words.” Though O’Brien was writing about General Assembly and Security Council meetings responding to particular crises, his words hold true for the Secretary-General’s proposal (endorsing the High-Level Group’s idea) for a Council resolution identifying the issues for deliberations on when force will be used.

The notion of criteria for Council authorization for force has great appeal, in that it could serve as a standard for the Council’s members when they are contemplating approving force in the future. Even if the criteria are phrased at a fairly high level of generality – which seems inevitable – they will channel discussion in a useful direction. Of course, the establishment of criteria is no guarantee that they will be followed; indeed, as is common in legal discourse, they may just change the terms of the debate to match the criteria without really altering the views of the parties. But encouraging states to justify their positions differently from the way they did before can lead to substantive changes in positions over time.

As for the list devised by the Secretary-General, it seems to be lacking two elements – (a) the availability of military resources, and (b) the role for the Council after the authorization for force. With regard to the former, whether the Council delegates authority to a coalition or creates a UN force, its members need to evaluate not only the prospects for success generally (the fifth factor in the current list), but the actual feasibility of any military action in terms of member state commitments. This is now a standard consideration for peacekeeping missions, but needs to be for all Chapter VII authorizations as well. As to the latter, the members of the Council need to reach agreement on its future role once force is authorized. Will it be consulted or will its approval be required at various steps? This sort of consensus up front can help prevent some of the disagreements that arise when the Council delegates authority only to find that the delegee is no longer interested in conferring with the Council.

More important, the Secretary-General’s factors seemed aimed principally at preventing the Council from authorizing too many operations. Each asks the Council’s members to essentially think very hard before approving force. Perhaps this strategy is simply a

¹ The same hold true of the Secretary-General’s approach to humanitarian intervention, which will be addressed in other contributions. Both the Secretary-General and the High-Level Panel emphasize how gross violations of human rights can and should trigger Council military action. But they avoid – surely deliberately – discussing what states should do if the Council does not authorize force. Instead, as has been the Secretary-General’s refrain since his 1999 address to the General Assembly, he implores states to act through the Council, which assumes away the problem of unilateral action. Yet to do otherwise would have taken him into the highly difficult waters navigated by the International Commission on Intervention and State Sovereignty and others and simply proved too controversial – and thus distracting -- for most member states. As it is, many of the criteria in paragraph 127 for Council action mirror those that the ICISS and others have devised for out-of-Council measures.

counterbalance to the earlier paragraphs in which the Secretary-General notes that the Council already has the authority to respond to all sorts of threats to the peace and is meant to respond to concerns about the overall legitimacy of the Council. Yet if this latter concern is addressed through expansion of the Council's membership, as strongly recommended by the Secretary-General, the problem may well be too much reluctance to use force rather than too much readiness. The criteria thus do not, for instance, ask member states to seriously contemplate the consequences of inaction – a task that the High-Level Committee emphasized in its report (para. 207(e)) but is effectively dropped in the Secretary-General's report.

This sort of question is important both in the context of humanitarian intervention, where lives are immediately in the balance, and in the case of the preventive force for non-imminent threats to the peace that the Secretary-General wants only the Council to approve, rather than letting member states act on their own under a broader reading of Article 51. If the U.S. government perceives that the Council is reluctant to act preventively – something that the Secretary-General's criteria, along with the expanded membership, makes more of a prospect -- then the possibility for broader claims under Article 51 increases. One can only hope that any resolution adopted by the Council restores some balance to the decisionmaking by giving the Council more than just reasons *not* to act.

5. The Feasibility of a Council Resolution:

Whether the Council's members are interested in agreeing upon criteria is another question. On the one hand, the UN's members took twenty-five years to agree on a definition of aggression that was supposed to guide the Council in acting under Chapter VII. Yet that exercise took place in the General Assembly and moreover was frozen for many years by Cold War-related issues. The process proposed by the Secretary-General would be confined to the Council, which now has a practice, stretching back to the Gulf War (and of course to Korea in the first instance) of authorizing the use of force. Surely the various uses of force can be examined to find common areas for discussion.

On the other hand, some members of the Council will still prefer the ad hoc approach, where each case is taken on its own and none is a precedent for future action. This seems to be the case for China and some developing world states, particularly with regard to force to respond to domestic crises. Yet the Secretary-General's proposal cleverly does not ask states in the Council to reach consensus on exactly what sort of domestic crises should trigger an authorization for force – although it is clear that his own view is that genocide and crimes against humanity at a minimum must do so. Rather, his proposed Council resolution would simply note that Council members must agree on the proper purpose of the force – or, as the High-Level Panel put it, that “the primary purpose of the proposed military action is to halt or avert the threat in question.” This recourse to a high level of generality may permit consensus on a resolution while papering over fundamental differences among Council members as to what exactly constitutes a legitimate purpose. Moreover, as noted, the U.S. government would want to make sure that nothing in the resolution affects a state's rights under Article 51. Although the Secretary-General wisely did not suggest incorporating his views on Article 51 – limiting it to actions after or immediately preceding an armed attack -- into the proposed resolution, the two issues may prove hard to separate.

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