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# *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*

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## **Abstract**

*The UN embodies a precarious 'institutional bargain' between the United States and the rest of the world, based in part on a distinctly American vision of world order. The US was largely responsible for creating the normative and institutional order embodied in the UN, and for reshaping it in the post-Cold war era. This article argues that the US military action against Iraq has done serious but not irrevocable damage to that order. The UN has been a surprisingly conducive venue for cultivating a climate among Member States that renders them receptive to — or hard-pressed to resist — the US' projection of soft power. That climate affects and has been affected by innovative approaches to peace and security over the last 14 years, which the US supported and often led. The immediate response to 9/11 reinforced the tradition of the US using the UN to shape global norms. Most states were prepared to acquiesce, evidenced by the widespread support for self-defensive action in Afghanistan and Security Council Resolution 1373 on terrorism. Most were not prepared to acquiesce to the invasion of Iraq, however, because the context in which the action took place and the discourse surrounding it were seen as a major departure from the prevailing normative and institutional framework. They were seen not as an attempt to adapt existing norms and institutions to new threats, but rather to tear them down and start again from scratch. The result is a damaged UN Charter-based legal order, but one that is likely to recover, not least because American interests and identity are embedded in it.*

## **1 Introduction**

The United States was largely responsible for creating the United Nations, gave it life in the early Cold War years and reinvigorated it in the post-Cold War era. But US

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engagement with the Organization has always been ambivalent, and the normative consensus that seemed to emerge in the 1990s was very fragile. This article considers the impact of recent US actions on the normative and institutional framework embodied by the UN. My central argument is that, while many of the post-Cold War interventions and innovations could be reconciled with evolving conceptions of sovereignty and security, Iraq was a bridge too far. The result is a seriously damaged US-UN relationship, but one which may yet recover because the broader normative and institutional framework remains intact.

The article proceeds as follows. In the first section, I look at the UN as both an ‘institutional bargain’ and the embodiment of a particular vision of world order. The ambivalent attitude of the US to the UN reflects the precarious nature of the institutional bargain. But the relationship is more enduring than it may seem, because the Organization reflects principles and values that US presidents have been espousing for 100 years. It has proven to be a good place for the US to exercise and extend its already substantial reservoir of ‘soft power’.<sup>1</sup> The UN’s value to the US *and* the constraints it imposes are a by-product of the Organization’s role in cultivating and implementing norms through a discursive process that the US has had a major role in shaping.

In the second section, I argue that the post-Cold War activities of the UN reflect a normative agenda that has been especially conducive to the promotion of US values and understandings about world order. Specifically, I look at Security Council-authorized interventions based on an expanding definition of what constitutes a threat to international peace and security; extensive ‘state-building’ efforts undertaken in the context of consent-based peace operations; and the broader human rights/democratization/good governance activities of UN agencies. These activities shaped and were shaped by a normative climate that permits ever deeper intrusion in the domestic affairs of states, an agenda that is compatible with expanding US definitions of its own interests, and yet needs the imprint of multilateral legitimacy to escape charges of neo-imperialism.

In the third section, I look at the impact of the immediate response to September 11. Three normative developments stand out: the widespread international acceptance of the application of self-defence against Al-Qaeda; the general support for ‘nation-building’ in Afghanistan following the overthrow of the Taliban regime; and the unprecedented legislative act of the Security Council in adopting Resolution 1373. These all suggest that the US tradition of using the UN to shape the normative climate in which it pursues its interests continued right up to 2002, and that much of the rest of the world was prepared to be carried along.

The Iraq episode is the focus of the fourth section, which I describe as a bridge too far not because the US-led invasion itself was such a stretch of the normative and institutional framework, but because of the context in which it took place and the discourse surrounding it. The promulgation of the 2002 National Security Strategy

<sup>1</sup> J. Nye, *Soft Power: The Means to Success in World Politics* (2004); J. Nye, *The Paradox of American Power* (2002).

and US diplomacy in late 2002 and early 2003 wavered between a genuine attempt to build support for its Iraq policy and a barely hidden desire to discredit the existing legal order's constraining rules on the use of force. My reading of events is that much of the unilateralist rhetoric was 'cheap talk': while President Bush and administration officials often *spoke* as if recourse to the UN was optional, US diplomatic *actions* were conspicuously multilateral.

But discourse matters and, as I argue in the conclusion, the normative and institutional framework embodied in the UN Charter and post-Cold War practice is facing an existential challenge. There are elements of US foreign policy — and discourse about that policy — that are tantamount to a frontal assault on the framework, a desire not to work from within the system but to tear it down and replace it. However, the framework is more robust than meets the eye and is likely to withstand this latest challenge, not least because both American interests and identity are embedded in it.

## 2 The US as International Institution-builder

In the year 2000, former Chairman of the US Senate Foreign Relations Committee Jesse Helms said in a speech to the UN Security Council, 'No institution — not the Security Council, not the Yugoslav tribunal, not a future ICC — is competent to judge the foreign policy and national security decisions of the United States.'<sup>2</sup> This reluctance to accept legal and institutional constraints on US security interests is not surprising given the country's status as sole remaining superpower. But for two reasons the attitude is difficult to sustain as a matter of policy. First, the US has struck what John Ikenberry calls an institutional bargain with the rest of the world, which cannot be abrogated without considerable cost. Second, most international institutions — including the UN — are the product of a distinctly American vision of world order, which cannot be abandoned without impinging on the US' sense of self as a nation.

Ikenberry questions the simple hypothesis that the US organizes and operates within institutions it can dominate, and resists or opts out of those it discovers it cannot.<sup>3</sup> He argues that a more complex set of calculations is involved. In entering into institutional arrangements, leading states seek to 'lock in' other states to the rules and policy orientations of the institutions, while at the same time trying to minimize limitations on their own autonomy and discretion.<sup>4</sup> Conversely, weaker states agree to be locked in because they expect the arrangement to impose some limits on the leading state, or at least make that state's behaviour more predictable and less

<sup>2</sup> Address to the Security Council, 20 January 2000, available at [http://www.senate.gov/~helms/FedGov/UNSpeech/body\\_unspeech.html](http://www.senate.gov/~helms/FedGov/UNSpeech/body_unspeech.html) (August 7, 2001).

<sup>3</sup> Ikenberry, 'State Power and the Institutional Bargain: American's Ambivalent Economic and Security Multilateralism' in R. Foot, S. N. MacFarlane and M. Mastanduno (eds), *US Hegemony and International Organizations* (2003), 49 at 50. See generally, J. Ikenberry, *After Victory: Institutions, Strategic Restraint and the Rebuilding of Order after Major War* (2001).

<sup>4</sup> *Ibid.*, at 53.

arbitrary. The bargain, therefore, entails *some* reduction in the policy autonomy of the leading state in exchange for a relatively stable order that suits its interests and works to the long-term benefit of all. It is driven largely by instrumental calculations of short- and long-term interests, and its efficacy depends on the extent to which both sides perceive an interest in ‘institutionalizing’ the behaviour of the other. If the dominant state feels it can achieve all of its goals unilaterally, both now and in the future, then there is little incentive to strike or adhere to the bargain. Conversely, if the weaker states believe that the power imbalance may shift in their favour, perhaps by their banding together in opposition to the dominant state, they may calculate that their interests are better served by holding off on the bargain or defecting from it.

Ikenberry’s model is helpful in explaining the pattern of ‘ambivalent engagement’ that has characterized US policy towards most post-Second World War international organizations.<sup>5</sup> Shifting power relations and calculations of interest, influenced by reluctance on the part of *any* participants in the institution to be tied down more than necessary, would explain the precarious nature of the institutional bargain. And it is bound to seem especially precarious in the post-Cold War era, when the bargain is largely between the US and every other state. Because the US dominates the world by almost every conceivable material measure,<sup>6</sup> it is more likely to calculate that it can do better on its own, while other states are more likely to calculate that the institution is not going to provide much protection against US high-handedness.<sup>7</sup> But Ikenberry himself hints that the instrumental calculation that underlies the bargain does not provide a full explanation of the role of institutions. The hint is in his concept of ‘stickiness’: institutions have some independent ordering capacity because procedures for altering or discontinuing the arrangement can be demanding, the institution itself can help to promote its own continuity, and because groups with vested interests in the success of the institution resist attempts to abandon it.<sup>8</sup> To these rationalist explanations, I would add a more constructivist, normative account. The institutional bargain produces and reproduces a normative framework that permeates international and domestic decision-making processes. That normative framework is not a direct cause of behaviour, but rather shapes the climate in which decisions are made.

<sup>5</sup> Four recent collections of essays discuss this pattern of ambivalent engagement. S. Patrick and S. Forman, *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (2002); D. Malone and Yuen Foong Khong (eds), *Multilateralism and US Foreign Policy: International Perspectives* (2003); Foot, MacFarlane and Mastanduno, *supra* note 3; M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003). Earlier collections include C. W. Maynes and R. Williamson (eds), *US Foreign Policy and the United Nations System* (1996); and M. Karns and K. Mingst (eds), *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Influence* (1990). The best recent single author study on the US policy towards international organizations is E. Luck, *Mixed Messages: American Politics and International Organization, 1919–1999* (1999).

<sup>6</sup> Brooks and Wohlforth, ‘American Primacy in Perspective’, 81(4) *Foreign Affairs* (July/August 2002) 20. See also, ‘Present at the Creation: A Survey of America’s World Role’, *The Economist*, 29 June 2002, Special Survey, at 4, and 8–9.

<sup>7</sup> For a similar instrumental, interest-based account of US policy towards multilateral institutions, see Foot, MacFarlane and Mastanduno, ‘Conclusion: Instrumental Multilateralism in US Foreign Policy’, in Foot, MacFarlane and Mastanduno, *supra* note 3, at 265–266.

<sup>8</sup> Ikenberry, ‘State Power and the Institutional Bargain’, *supra* note 3, at 52, n. 5.

It is not easily abandoned, especially when the rhetoric surrounding the bargain is value-laden (for example, 'expanding democracy' or 'promoting freedom'), because abandoning the bargain could be seen as rejecting those values. Put otherwise, participants become hoist on the petard of their professed commitment to the values and norms embodied in the bargain. They may be prepared to abandon or redefine those values and norms, but doing so requires a sustained political effort that entails more than a recalculation of fixed interests.

More than most countries, US identity is wrapped up in the constellation of institutions built after the Second World War. The post-war order, as John Ruggie and others have argued persuasively, is based on a distinctly American vision of world order.<sup>9</sup> At key moments in the 20th century (specifically, 1919, 1945 and post-1947), the US sought to reconstruct the international order 'in terms of organizing principles that resonate with America's sense of self as a nation'.<sup>10</sup> Pure appeals to national interest and great power politics have never been enough to sustain US international engagement, given its relative ability to isolate itself from the rest of the world and long aversion to 'entangling alliances'. From Theodore Roosevelt on, US leaders drew on 'American principles' to build a world order that would serve US interests. Woodrow Wilson, of course, was the most explicit in enunciating a value-based approach to institution-building and foreign policy. Franklin Delano Roosevelt, Harry Truman and Dwight Eisenhower were much more comfortable with balance of power politics, but they all embraced 'reformist aspirations for the international arena, linking US engagement to a broader vision of world order which they felt would resonate with the American public'.<sup>11</sup> That vision included security cooperation through institutionalized arrangements, an open world economy, self-determination and the promotion of democracy. The same principles were at play at the founding of the US: individual rights, anti-statism, democracy, the rule of law and human betterment through human action.<sup>12</sup> US 'nationalism' is rooted not in land or people, but in a set of values that, in principle, everyone can embrace. This is a defining feature of American 'exceptionalism', and it has defined the country's relationship to the rest of the world, situating the US as the 'city on the hill' for others to imitate.<sup>13</sup>

When rooted in an unexamined belief in the superiority of the country's founding principles and used to justify exemption from laws and institutions that bind others

<sup>9</sup> See esp., J. Ruggie, *Constructing the World Polity* (1998) and J. Ruggie, *Winning the Peace* (1996). See also Luck, *supra* note 5; Hirsh, 'Bush and the World', 81(5) *Foreign Affairs* (2002), 18, at 31.

<sup>10</sup> Ruggie, *Constructing the World Polity*, *supra* note 9, at 201.

<sup>11</sup> *Ibid.*, at 211–216. For a similar account of continuity in the multilateral thrust of the foreign policies of Wilson, FDR, Truman and Eisenhower, see I. Daalder and J. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (2003), at 9–12.

<sup>12</sup> Ruggie, *Constructing the World Polity*, *supra* note 9, at 218.

<sup>13</sup> Kahn, 'American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chi. J.Int'l L.* (2000) 1, at 4. See also, Patrick, 'Multilateralism and its Discontents', in Patrick and Forman, *supra* note 5, at 7.

(the problem of double standards), then ‘exceptionalism’ is a pejorative.<sup>14</sup> But Harold Koh reminds us that there is a positive face to American exceptionalism: leadership in promoting global order and global governance. As Koh argues, the US is the only country capable, and at times willing to commit resources and make sacrifices ‘to build, sustain and drive an international system committed to international law, democracy and the promotion of human rights’.<sup>15</sup> How positive this is, of course, depends on the extent to which one supports those values and the means by which they are advanced. From the perspective of weaker states, selectively promoting democracy and political rights at the point of a gun, while neglecting global economic and social justice, will not be perceived as benign.<sup>16</sup> In Gramscian terms, a hegemonic order is ruled not by brute force but by the dominant group developing an ideology based on values and understandings that come to be seen as legitimate by subordinate groups.<sup>17</sup> Gramscian international relations theorists do not see this as benign, and in fact the main task they have set for themselves is to identify the hidden normative agenda that underlies the existing order in order to challenge, undermine and hopefully transform it.<sup>18</sup>

However, US attempts to universalize its values through institutions have not led to complete domination of those institutions, because the norm-building process is inherently inter-subjective, a point neither the bargain metaphor nor Gramscian notions of hegemony fully capture. To engage in international law formation and interpretation is to engage in a collectively meaningful activity.<sup>19</sup> Because the parties

<sup>14</sup> Nico Krisch sees a pattern of the US actively initiating the negotiation of and then exempting itself from their full application by not signing or ratifying them, or attaching far-reaching reservations. Krisch, ‘Weak as Constraint, Strong as Tool: The Place of International Law in US Foreign Policy’, in Malone and Foong Khong, *supra* note 5, 41 at 45–53. See also, ‘Present at the Creation: A Survey of America’s World Role’, *The Economist*, 29 June 2002, Special Survey, at 20.

<sup>15</sup> Koh, ‘On American Exceptionalism’, 55 *Stanford Law Review* 1479, 1486 (2003). See also, Patrick, ‘Multilateralism and its Discontents’, *supra* note 13, 1, at 7; Burley, ‘Regulating the World: Multilateralism, International Law and the Projection of the New Deal Regulatory State’, in J. Ruggie (ed.), *Multilateralism Matters: The Theory and Practice of an Institutional Form* (1993), at 125–126.

<sup>16</sup> Hurrell, ‘Comment on Chapters 10 and 11’, in Byers and Nolte, *supra* note 5, 348 at 356. See also, Kingsbury, ‘Sovereignty and Inequality’, in A. Hurrell and N. Woods (eds), *Inequality, Globalization and World Politics* (1999) 67.

<sup>17</sup> For an influential application of Gramscian thought to international relations, see R. Cox, *Approaches to World Order* (1996). For an important reminder of what ‘international hegemonic law’ has looked like in the past and a provocative account of what it might look like today, see Vagts, ‘International Hegemonic Law’, 95 *AJIL* (2001) 843.

<sup>18</sup> See for example, E. Augelli and C. Murphy, *America’s Quest for Supremacy and the Third World: A Gramscian Analysis* (1988).

<sup>19</sup> For a fuller discussion of law as an intersubjective enterprise, see Johnstone, ‘Security Council Deliberations: The Power of the Better Argument’, 14 *EJIL* (2003) 437, at 440–450. The most fully developed constructivist account of international legal regimes is provided by Frederich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); see also Kratochwil, ‘How Do Norms Matter?’ in M. Byers (ed.), *The Role of Law in International Politics* (2000) 35. Gerald Postema’s description of friendship as a social practice helps illustrate what I mean by the intersubjective nature of law: ‘The history of the friendship is a common history and the complex meaning of the relationship is collectively constructed [by the friends] over the course of the history. When friends share a common history, Aristotle points out, it is not like cows

to a treaty or customary law regime constitute a collective law-making body, when disputes over interpretation arise, the interpretive task is to ascertain what the law means to the parties collectively rather than to each individually. And through ongoing interaction within the regime, shared understandings about its rules become entrenched in national bureaucratic, legal and political routines, as well as diplomatic practice and the activities of international organizations. Compliance is not automatic, of course, but nor is the choice to comply simply a matter of calculating the costs of defection each time the question arises. For a country like the US, which understands itself as 'a nation under law',<sup>20</sup> its identity as well as interests are implicated in the decision. A 'nation under law' will not casually act outside the accepted parameters of international rules, regardless of the instrumental benefits that may accrue from doing so.

The inter-subjective nature of the international legal process means that the material sources of power are not all that matters. The distribution of military and economic power certainly has a profound influence on the development and implementation of international law. But dominant states cannot simply impose or project their norms on others; the process is interactive and requires the 'offering up of reasonable arguments'.<sup>21</sup> Reasonable arguments are those that fit within a wider context of shared understandings about the rules of international life. If they do not fit, they are not likely to be persuasive and no amount of material power is going to change that. The hegemon may use its power to cause the behaviour of others to change, but that is not the same as changing the law. When the US seeks to reshape international law, the impact of its efforts will depend on the reactions of other influential actors.<sup>22</sup> Whether those other actors acquiesce will depend in part on calculations of interest (including the rewards or punishment the US can mete out), but it will also depend on whether acquiescence can be reconciled within the existing normative and institutional framework. As I will argue in discussions of Kosovo, Afghanistan and Iraq below, the international legal order — including the UN and its Charter — has the capacity to stretch and bend in response to new threats and changing circumstances. But those who seek such adaptation are more likely to succeed if their initiatives are presented — and can be internalized by others — as attempts to *stretch* and *bend* the law rather than abrogate and replace it.

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sharing a pasture, for the shared life of friends engenders common perception, a common perspective, and common discourse . . . . A friend's understanding of the relationship could only be achieved through interaction with the other . . . . To regard the meaning of that relationship as the private interpretive construct of one or the other, or some ideal limit of such constructs, fails to recognize the common perspective and discourse which structures the relationship.' Postema, "'Protestant' Interpretation and Social Practices', 6 *Law and Philosophy* (1987) 283, at 309–310.

<sup>20</sup> Kahn, 'American Hegemony', *supra* note 13, at 2.

<sup>21</sup> This is Stephen Toope's account of customary law-formation and change. Toope, 'Powerful but Unpersuasive? The Role of the US in the Evolution of Customary International Law', in Byers and Nolte, *supra* note 5, 287, at 287. See also, Brunnée and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law* (2000) 19.

<sup>22</sup> Byers, 'Introduction: The Complexities of Foundational Change', in Byers and Nolte, *supra* note 5, 1 at 20.

Finally, Joseph Nye argues that ‘soft power will help the US endure as the dominant state by turning its power into international consensus and US principles into international norms’.<sup>23</sup> The US does have a large store of influence based on the appeal of its ideas, and the world has been moving closer to US values in the post-Cold War era, with increasingly widespread (though not universal) acceptance of democracy, human rights and liberal trading rules.<sup>24</sup> But soft power, like international legal regimes, is inherently inter-subjective; those on whom it is projected must accept and internalize the values, ideas and understandings that are espoused. For three reasons, the UN has been a surprisingly conducive venue for cultivating a climate among Member States that renders them receptive to, or at least hard-pressed to resist, the projection of soft power. First, though not designed to perform legislative functions, the UN has become a centre for global norm-setting.<sup>25</sup> Second, it has become a focal point for interaction not just among states and their representatives, but also a broad range of actors that together comprise a ‘global public domain ... an arena of discourse, contestation and action organized around global rule-making’.<sup>26</sup> I have argued elsewhere that discourse within this global public domain is structured and constrained by ‘interpretive communities’, composed of participants and experts in the relevant field of practice, not only diplomats and legal advisers, but non-governmental experts and lawyers as well.<sup>27</sup> Third, the UN is a good venue for the US to project its soft power because *other* countries value the institution. The permanent members of the Security Council certainly do, not least because the Council enables each to punch above its weight in global affairs.<sup>28</sup> Paradoxically, this gives the US considerable leverage over those countries, knowing the stock they place in keeping the US engaged in the Council. This is a delicate balance, because if the Council is seen merely as a tool of the US with the others serving as rubber stamps, then the credibility and effectiveness of the body will be undermined. The same logic applies, albeit with less force, to the rest of the UN membership. Precisely because weaker states value the UN as a venue for advancing their goals, the US can use the Organization to gain assent to its normative positions (like the ‘universality’ of human rights, or the emerging ‘right to democracy’, discussed below).

These three factors — the normative role of the UN, the growing range and

<sup>23</sup> Nye, *The Paradox of American Power*, *supra* note 1, at 69.

<sup>24</sup> On the appeal of these ideals, see M. Mandelbaum, *The Ideas that Conquered the World: Peace, Democracy and Free Markets in the 21st Century* (2002).

<sup>25</sup> Report of the Secretary-General to the Millennium Assembly, ‘We the Peoples: The Role of the UN in the 21st Century’, paras 8–9, 45 and 320–324. See also, Luck, *Mixed Messages*, *supra* note 5, at 209–210. On the ‘quasi-legislative’ role of the UN generally, see the chapters by Oscar Schachter, Paul Szasz and Frederick Kirgis in C. Joyner (ed.), *The United Nations and International Law* (1996).

<sup>26</sup> Ruggie, ‘Global Governance and American Exceptionalism: A Tale of Two Worlds?’ unpublished paper on file with author (September 2003). On transnational legal process, see Koh, ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181 and ‘Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1997) 2599.

<sup>27</sup> Johnstone, *supra* note 19.

<sup>28</sup> Berdal, ‘The UN Security Council: Ineffective but Indispensable’, 45(2) *Survival* 7 at 10–14. See generally D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004).



influence of transnational actors there, and its value to other states — have existed since the founding of the Organization, but the potential value of all three to the US is greater in the post-Cold War era than ever. It would be deeply ironic if, at this moment of unprecedented opportunity, the US were to undermine one of the principal venues for exercising and extending its soft power.

### 3 The 1990s: The UN and an Evolving Normative Climate

The end of the Cold War had a profound impact on the normative agenda of the United Nations. It was reflected in three inter-related areas of practice: humanitarian intervention, consent-based peace-keeping and peace-building, and the broader human rights, democratization and good governance activities of UN institutions. This agenda was compatible with US definitions of interests in the post-Cold War era, and indeed was largely driven by US leadership in the Security Council and other UN bodies.

The aspect of United Nations activity that gained most attention in the 1990s was the Security Council's progressively expanding interpretation of what constitutes a threat to international peace and security, the threshold for action under Chapter VII of the UN Charter. The trend began with Iraq in the aftermath of the first Gulf War, when the Council declared in Resolution 688 the flow of refugees caused by Iraq's repression of its minority populations to be a threat to international peace. Though not expressly adopted under Chapter VII, the US, UK and France claimed that it plus earlier resolutions were sufficient to build a 'legal bridge' to Operation Provide Comfort in northern Iraq and no-fly zones in both the north and south. This ambivalent start to the practice of humanitarian intervention was followed by humanitarian action in Bosnia, Somalia and Rwanda (though too late to stop the genocide). Perhaps the most significant normative step came in Haiti in 1994, where Chapter VII was invoked to authorize the use of force by a US-led coalition to restore democratically-elected President Jean-Bertrand Aristide.<sup>29</sup> In 1998, the Security Council 'welcomed' action by ECOWAS to restore President Kabah of Sierra Leone to power.<sup>30</sup> These developments occurred not as part of a systematic effort to rewrite the rules of international law, but rather as a case-by-case reaction to crises as they erupted and as a function of the political dynamics within the Security Council. Although no single decision represented a radical departure from existing international law, they added up over the years to a significant evolution in the applicable norms.

In Kosovo, the Security Council did not explicitly authorize NATO's intervention,

<sup>29</sup> While the Haiti resolutions identified a number of factors that contributed to the threat to peace, Resolution 940 authorized the US-led intervention to use 'all necessary means to facilitate the departure from Haiti of the military leadership. . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti'. SC Res. 940 (1994). For an excellent account of the Security Council's role in Haiti, see D. Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990-97* (1999).

<sup>30</sup> SC Res. 1162 (1998).

and the weight of scholarly and official opinion is that the intervention was illegal.<sup>31</sup> On the surface, this looks like a substantial breach of the law on the use of force, but the international reaction suggests that the breach has come to be seen as a provocative moment in the evolution of the Charter-based normative order, rather than a complete rupture. In the debates in and around the Security Council at the time, virtually every participant invoked the law and a range of arguments was made, from straightforward claims of legality and illegality, to more qualified claims on either side. The more qualified claims of *legality* were made by the US, Islamic countries and others, in part because they feared the precedent it could set — that a doctrine of humanitarian intervention could be turned on them or their allies in the future. Paradoxically, this strategy shows that legal rhetoric is not infinitely manipulable, because the notion of precedent assumes there is some basis for issuing credible judgments that like cases are (or are not) being treated alike. The variegated nature of the legal argumentation is circumstantial evidence of a functioning ‘interpretive community’ associated with Security Council practice. If there were no such mechanism, either legal arguments would not be made at all, or they all would be more straightforward claims of (il)legality, since there would be no need to worry about the test of credibility (who would administer that test?).

Moreover, the upshot of the Kosovo case is an emerging consensus on humanitarian intervention: namely, that it is lawful with Security Council approval and unlawful without it, but there may be rare cases in which intervention without Council authorization will in effect be excused.<sup>32</sup> Traces of this notion of humanitarian necessity as an excuse can be found in many of the statements on Kosovo, among Islamic and NAM countries, for example, which were disinclined to accept the legality of the intervention but reluctant to condemn it. Moreover, the fact that a draft resolution introduced by Russia to condemn the NATO action failed by a vote of 12–3 suggests that some members of the Council were prepared to excuse the intervention, even though they were deeply troubled by the lack of explicit authorization (Brazil, Malaysia and Gabon, for example). The failure of the General Assembly either to condemn or support NATO is also indicative. It suggests a willingness to turn a blind eye matched by an unwillingness to announce that is what is going on. This is reinforced by the Council resolution establishing UNMIK and KFOR in June 1999 (Resolution 1244), which did not retroactively approve NATO’s air campaign, but whose implementation has been widely supported.

The East Timor case is also illustrative of an evolving normative climate. The vote for independence on 30 August 1999 led to a spasm of violence that destroyed the territory and left many dead and displaced. Under intense pressure from the US, the UN Secretary-General and other leaders around the world, Indonesian President Habibie consented to the introduction of an Australian-led force to quell the violence. But Indonesia’s agreement was extracted under such pressure, the operation can

<sup>31</sup> I review the arguments and literature in ‘Security Council Deliberations’, *supra* note 19 at 464–466.

<sup>32</sup> The reports of the Independent International Commission on Kosovo and the International Commission on Intervention and State Sovereignty reflect that consensus.

hardly be called 'consent-based', and was certainly not a pure act of volition. Indeed, the East Timor case indicates that this defining characteristic of peacekeeping is problematic in modern peace operations. Although consenting to the presence of peacekeepers is formally a 'sovereign' act, the consent is often gained under intense pressure, highly unreliable or so open-ended that it raises questions about what sovereignty really means in these circumstances.<sup>33</sup>

The implications are especially sharp when the peacekeepers are engaged in peace-building. No longer restricted to ceasefire monitoring and troop withdrawals, most of today's peace operations are complex affairs that involve a range of activities that go to the heart of domestic governance.<sup>34</sup> They include measures to extract military establishments from the political life of a country, which can profoundly affect the distribution of wealth as well as power in war economies. UN operations monitor, train and help to reform local police forces, and on occasion assume direct responsibility for law and order. Civilian policing at its best is based upon a 'social contract' between the police and the local population; by assuming that responsibility, the UN takes over one of the most delicate and basic functions of the state. Human rights monitoring, accountability for past abuses and institutional reforms to prevent future abuses are standard elements of modern peace operations, a development that marks a major shift in attitudes towards the legitimate scope of external involvement in a state's relations with its citizens. The promotion of participatory governance is now a fundamental aim of peace-building. The UN has conducted or certified numerous elections in peace processes, and electoral assistance is often part of a broader peace-building aim of creating more open and inclusive governing institutions. In many operations the UN has assisted in local administration and in a few it has actually taken over major aspects of governance. Cambodia and Eastern Slavonia are examples, both of which were seen as daringly innovative at the time, but they pale in comparison with the ambitious missions in Kosovo and East Timor. In both places the UN was given a comprehensive mandate to run the respective territories for an extended period, with full legislative and executive authority. The UN mission in Afghanistan, which was designed to leave a 'light footprint', lacks executive and legislative powers, but has a substantial role in helping the Afghani transitional administration carry out its functions.

These peace-building functions signify a complicated relationship between the UN and the local authorities. The UN, in effect, becomes an active participant in managing profound social and political transformations within sovereign states. That it does so on the basis of formal consent is an indication of how far the international community has come in accepting the notion of external involvement — not coercive intervention, but deep involvement nevertheless — in domestic affairs. Indeed the

<sup>33</sup> Johnstone, 'UN Peace-building: Consent, Coercion and the Crisis of State Failure', in Canadian Council of International Law, *From Territorial Sovereignty to Human Security* (1999), 186, at 189–91.

<sup>34</sup> Relevant post-Cold War UN or UN-authorized operations include those in Afghanistan, Angola, Bosnia, Cambodia, Central African Republic, Cote d'Ivoire, Democratic Republic of the Congo, East Timor, Eastern Slavonia, El Salvador, Guatemala, Haiti, Iraq, Kosovo, Liberia, Mozambique, Namibia, Nicaragua, Western Sahara and Tajikistan.

scope of involvement has given rise to charges of neo-colonialism.<sup>35</sup> Less caustically, Roland Paris describes UN peace-building as ‘an enormous experiment in social engineering — an experiment that involves transplanting Western models of social, political and economic organization into war shattered states’.<sup>36</sup> This critique is especially telling in light of my point above that consent to peacekeeping/peace-building is rarely an act of pure volition.

As with coercive humanitarian intervention, these developments occurred piecemeal, in reaction to events on the ground and for the most part on the basis of negotiated peace agreements. They did not, however, occur in a normative vacuum. The prevailing normative climate both affects and is affected by the UN’s operational activities; while the various post-Cold War interventions cited above (both coercive and consent-based) would not have been possible had the climate not been ripe, they also gave content to and reinforced inchoate norms.

The most striking evolution of this normative climate has occurred in three inter-related spheres in which the UN has been deeply involved: human rights, democratization, and good governance. The web of global human rights instruments that sprouted from the Universal Declaration of Human Rights now number more than 25, and the most comprehensive of these (the two International Covenants) have over 150 parties. The UN human rights machinery, though still weak, has become progressively stronger with establishment of the post of High Commissioner for Human Rights, the appointment of independent experts to the human rights treaty committees, the increasing use of special rapporteurs and the like by the Commission on Human Rights, the various channels now available for bringing individual petitions to UN bodies, and the so-called ‘mainstreaming’ of human rights in the operational activities of UN agencies like UNICEF, UNHCR, UNESCO, UNDP and the World Bank.<sup>37</sup> Most significantly, the International Criminal Court and its ad hoc predecessors have made international criminal law enforcement against individuals a reality, though not consistently applied or universally welcomed.

Former Secretary-General Boutros-Ghali defined democratization as ‘a process that fosters a more open, more participatory, less authoritarian society’, and framed democracy assistance as analogous to development assistance, enabling him to claim that the UN’s work in this area is not interference in internal affairs.<sup>38</sup> The Commission on Human Rights upped the normative ante by adopting a non-binding

<sup>35</sup> See for example, Chopra, ‘The UN’s Kingdom of East Timor’, 42(3) *Survival* (2000) 27.

<sup>36</sup> Paris, ‘Peacebuilding and the Limits of Liberal Internationalism’, 22(2) *International Security* (1997) 82.

<sup>37</sup> The conceptual basis for a linkage between human rights and development is articulated in the UNDP’s *Human Development Report 2000* (2002).

<sup>38</sup> *Agenda for Democratization*, A/51/761 (1996), paras 1–21. While the word ‘democracy’ does not appear in the UN Charter, Boutros-Ghali argues that the ‘we the peoples’ language in the preamble plus the principles of equal rights and self-determination ‘roots the sovereign authority of states and therefore the legitimacy of the UN in the will of the people’. This is reinforced by the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Peoples (1960).

resolution entitled 'Promotion of the right to democracy' in April 1999.<sup>39</sup> Since 1992, the UN has provided electoral assistance to 70 states, ranging from the conduct of elections, to verification of the results, to coordinating other international and national observers and providing technical assistance to local authorities.<sup>40</sup> Election-monitoring by the UN and regional organizations has given content and precision to the broad right to political participation set out in Article 25 of the International Covenant on Civil and Political Rights.<sup>41</sup> And when the UN certifies an election as free and fair, it confers legitimacy on the new government, a stamp of approval that under a Westphalian concept of sovereignty would have been seen as unnecessary, even offensive. That so many governments now want — even need — this stamp of legitimacy says something important about the evolving nature of sovereignty.

Finally, democratization is related to the 'good governance' agenda of the UNDP, World Bank, and other development agencies and donor governments. Many of these activities are undertaken in the context of post-conflict peace-building, but good governance has become a guiding principle for a broad range of UN development and assistance activities.<sup>42</sup> What is most striking about the UNDP approach is the extent to which it has gone beyond the good governance agenda of the World Bank, whose roots were in structural adjustment and economic liberalization, and whose focus was on public sector management.<sup>43</sup> In the 1990s the UNDP expanded the concept to include the strengthening of legislative and judicial institutions, empowering the poor through participation, promoting decentralization and strengthening local governance, working with civil society organizations, and rebuilding government capacities in post-conflict societies.<sup>44</sup> UNDP's conception goes beyond good economic management to include an emphasis on the political and civic dimensions of governance.

The UN activities described in this section (humanitarian intervention, peace-building, human rights implementation, democratization and good governance) and the normative and institutional framework that makes this agenda possible were promoted, supported, and often led by the US. Indeed, the agenda can be seen as an

<sup>39</sup> The vote was 51–0, with Cuba and China abstaining. Commission on Human Rights Resolution 1999/57. Two very good edited volumes on democratic governance and international law are G. Fox and B. Roth (eds), *Democratic Governance and International Law* (2000) and C.K. and H. Jacobson (eds), *Democratic Accountability and the use of Force in International Law* (2003).

<sup>40</sup> For details on the modes of assistance, see the UN website <http://www.un.org>.

<sup>41</sup> Fox, 'The Right to Political Participation', in Fox and Roth, *supra* note 39, at 85.

<sup>42</sup> UNDP's *Annual Report 2002* says that the bulk of UNDP's resources support democratic governance in some way. The *Human Development Report 2002*, 'Deepening Democracy in a Fragmented World' makes the case for a connection between democracy and development, as well as peace. The UN-backed *Arab Human Development Report* of 2002, prepared by a group of 30 Arab intellectuals, stresses three 'cardinal obstacles' to human development in the Arab world: widening deficits in freedom, women's empowerment and knowledge.

<sup>43</sup> On the good governance agenda of the World Bank, see in particular the *World Development Report* of 1997 'The State in a Changing World'. For a good comparison of the UNDP and World Bank approaches to good governance see Weiss, 'Governance, Good Governance and Global Governance', 21(5) *Third World Quarterly* (2000) 795.

<sup>44</sup> For a recent statement of UNDP's work in this field, see Malloch Brown, 'The UNDP Outlook: Governing for the 21st Century', *Choices*, March 2004.

extension of the institution-building project the US began in the 1940s. The Security Council would never have acted as it did in Somalia, Bosnia and Haiti without US leadership, nor would the Kosovo intervention have occurred. The National Security Strategies (NSS) of 1994 and 1996 describe multilateral peace operations that ‘support democracy or conflict resolution’ as a means of protecting US national security, and refer to Angola, Bosnia, Cambodia, El Salvador, Guatemala, Haiti, Liberia, Namibia and Sierra Leone as places where the US committed resources to achieve these ends.<sup>45</sup> The 1994 paper describes democracy, respect for human rights and the expansion of markets, ‘not [as] a democratic crusade; [but as] a pragmatic commitment to see freedom take hold where that will help most’.<sup>46</sup> The US was the driving force behind the creation of the post of High Commissioner for Human Rights, and it was the main sponsor of the Commission on Human Rights resolution on the right to democracy.

The UN-centred ‘global governance’ agenda has broadened and now projects more deeply into the domestic policy sphere of states.<sup>47</sup> The US has taken the lead in creating the normative climate and institutional framework that made this agenda possible. International law and institutions play a role in legitimizing this ever-deeper intrusion in domestic affairs, by acting as ‘buffer between powerful states and the implementation of agreed international rules and norms’.<sup>48</sup> Any ambivalence the US had in engaging with these humanitarian, democratization and state-building activities was not because the UN was seen as a hostile place for advancing US values, but mainly because the US was ambivalent about a value-based foreign policy.

## 4 September 11 and the War on Terrorism

If there had been a struggle between multilateralist and unilateralist impulses in US foreign policy throughout the 20th century, the victory of President Bush in 2000 seemed to mark the triumph of the latter. American foreign policy was revolutionized, if not in its goals, then in how to achieve them.<sup>49</sup> The strategy of liberal internationalism appeared to have lost out to what Ikenberry describes as ‘a more unilateral, even imperial, grand strategy’.<sup>50</sup> In expressing his support for national missile defence, Newt Gingrich characterized the distinction between the strategies as ‘the difference between those who would rely on lawyers to defend America and those

<sup>45</sup> *A National Security Strategy of Engagement and Enlargement*, The White House, July 1994; *A National Security Strategy of Engagement and Enlargement*, The White House, February 1996.

<sup>46</sup> NSS 1994, Part II, at 19. John Ikenberry argues that Clinton’s doctrine of ‘enlargement’ was much like Bush Sr.’s post-Cold War strategy of using international institutions to enhance America’s influence by encouraging democracy and open markets, and can be traced to the ‘institution-building’ agenda of 1945. Ikenberry, in Foot, MacFarlane and Mastanduno, *supra* note 3, at 65–66.

<sup>47</sup> John Ruggie, *supra* note 26, at 8.

<sup>48</sup> Hurrell, in Byers and Nolte, *supra* note 5, at 355.

<sup>49</sup> Daalder and Lindsay, *supra* note 11, at 2.

<sup>50</sup> Ikenberry in Foot, MacFarlane and Mastanduno, *supra* note 3, at 67.

who rely on engineers and scientists'.<sup>51</sup> This lack of faith in lawyers was reflected in US rejection of the Kyoto Protocol, withdrawal from negotiations on a verification protocol for the Biological Weapons Convention, its restrictive stance on the proposed Convention on Small Arms, its withdrawal from the Anti-Ballistic Missile Treaty (a critical component of multilateral arms control regimes) and redoubled efforts to undermine the International Criminal Court.<sup>52</sup>

Yet there remained a strong Wilsonian streak in Bush's foreign policy, animated by neo-conservative goals to spread 'freedom, democracy and free enterprise' around the world.<sup>53</sup> As John Gaddis points out in analysing the National Security Strategy of 2002, the ultimate goal is to 'finish the job that Woodrow Wilson started. The world quite literally must be made safe for democracy'.<sup>54</sup> The principal difference is that Wilson believed strongly in the utility of international institutions and law as mechanisms for promoting US values, whereas the neo-conservatives do not.<sup>55</sup> The question raised squarely by September 11 and its aftermath is whether Wilson's idealistic ends can be achieved through unilateral means.

The response to September 11 features three especially revealing normative developments: the US-led military campaign against Al-Qaeda and the Taliban, justified on the basis of self-defence;<sup>56</sup> the UN-led political process that culminated in the Bonn Agreement and the subsequent peacekeeping and peace-building efforts in Afghanistan; and the adoption of Resolution 1373, an unprecedented legislative act

<sup>51</sup> Quoted in Ikenberry, *ibid.*, at 69. This deep suspicion of international law and institutions is echoed in the 'new sovereigntist' defence of US institutions and policy against international constraints. Spiro, 'The New Sovereigntists: American Exceptionalism and its False Prophets', 79 *Foreign Affairs* (Nov./Dec. 2000).

<sup>52</sup> There is an irony that one of the Bush Administration's most aggressive moves to insulate itself from the impact of the International Criminal Court was through the Security Council of the UN. See SC Resolutions 1422 (2002) and 1487 (2003), which provide a one-year renewable deferral of investigation and prosecution of nationals of non-ICC parties engaged in peace operations. An added irony is that these resolutions actually created an incentive for the US to seek Security Council authorization for its military operations, since the deferral applied only to 'UN-established' or 'UN-authorized' operations. An effort to renew the deferral in the summer of 2004 failed.

<sup>53</sup> These words appear in the first sentence of The National Security Strategy of the United States of America. (17 Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. See also Bush's 2002 State of the Union address, 29 January 2002, available at <http://www.whitehouse.gov>. For a defence of the invasion of Iraq that concludes with neo-Wilsonian appeals to 'the ideals of freedom and self-government', see Paul Wolfowitz, 'Remarks as Prepared for Delivery at the Fletcher Conference', Washington D.C., 16 Oct. 2002. This Wilsonian streak became even more pronounced in late 2003 when the Bush Administration sought to launch its 'Greater Middle East Initiative', aimed at spreading democratic reforms throughout the region. Weisman, 'US to Present Revised Program for Democracy in MidEast: Skepticism is Widespread', *New York Times*, 13 May 2004, at A12.

<sup>54</sup> Gaddis, 'A Grand Strategy of Transformation', *Foreign Policy* (Nov.-Dec. 2002), available at [http://www.foreignpolicy.com/issue\\_novdec\\_2002/gaddis.html](http://www.foreignpolicy.com/issue_novdec_2002/gaddis.html).

<sup>55</sup> Max Boot, a self-described neo-conservative, makes this point in his primer on neo-conservative thinking. Boot, 'Think Again', *Foreign Policy* (Jan/Feb 2004) 20, at 24. See also Joseph Nye's description of neo-conservatives as 'Wilsonians of the right' who are allied with 'Jacksonian unilateralists'. Nye, 'US Power and Strategy after Iraq', 82(4) *Foreign Affairs* (2003) 60, at 65.

<sup>56</sup> Letter by the Permanent Representative of the US to the President of the Security Council, S/2001/946, 7 Oct. 2001.

by the Council that bypasses the laborious process of multilateral treaty making by selecting provisions from various terrorism conventions and converting them into universally binding obligations.<sup>57</sup> There is an undeniable element of opportunism in these developments. The US wanted the Security Council to condemn the September 11 attacks, but it worked hard to preclude any language in the resolutions that would constrain its ability to strike at terrorists or states harbouring them wherever they may be.<sup>58</sup> The US wanted political support for its military action in Afghanistan, but it marginalized any decision-making role of NATO allies and regional partners. The US wanted UN civilians and international peacekeepers to help stabilize Afghanistan, but did not want them to interfere with Operation Enduring Freedom (OEF) and thus resisted the deployment of the International Security Assistance Force (ISAF) beyond Kabul until late 2003. The US tacitly accepted Russia's long-standing position that its Chechnya policy is a war against terrorists to gain support for Resolution 1373, whose implementation has been described as 'hegemonic international law in action'.<sup>59</sup>

Nevertheless, a good case can be made that the response to September 11 is evidence of the US pushing the limits of international rules on the use of force, while not stretching them so far that others could not be brought along. Consider for example the surprisingly supportive international reaction to the US claim that it had been the victim of an armed attack within the meaning of UN Charter Article 51:

- Security Council Resolutions 1368 and 1373 both contain preambular paragraphs reaffirming 'the inherent right of individual and collective self-defence'.
- Prior to the US action in Afghanistan, both NATO and the Organization of American States (OAS) adopted statements indicating that the acts were armed attacks that could be met by a proportional military response.<sup>60</sup> The Gulf Cooperation Council did not go that far, but expressed a 'willingness to participate in any joint action that has clearly defined objectives'.<sup>61</sup>
- On the day OEF began, the President of the Security Council said to the press that the unanimous support for the US expressed in earlier resolutions 'is absolutely

<sup>57</sup> For a description of the 'legislative' nature of Resolution 1373, see Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002) 901.

<sup>58</sup> Malone, 'US-UN relations in the UN Security Council in the Post-Cold War Era', in Foot, MacFarlane and Mastanduno, *supra* note 3, 73 at 89. See especially S/RES/1368 (2002). Note also that in the letter of 7 October, the US reserved the right to take similar action against 'other organizations and countries'. *Supra*, note 56.

<sup>59</sup> Alvarez, 'Hegemonic International Law Revisited', 97 *AJIL* (2003) 873, at 875. The term 'hegemonic international law' was revived by Detlev Vagts, *supra* note 17, who in turn relies on Konrad Ginther's 'Hegemony', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (1995) 685.

<sup>60</sup> NATO Press Release No. 124, Statement by the North Atlantic Council (12 Sept. 2001); Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.4/RC.24/RES.1/01 (21 September 2001).

<sup>61</sup> Quoted in Murphy, 'Terrorist Attacks on the World Trade Center and Pentagon', 96 *AJIL* (2002) 244, at 245.



maintained'.<sup>62</sup> Many states provided the US with access to airspace and facilities, and Russia, China, and a number of Arab states announced support for the US campaign. APEC, the OIC and Arab League did not express support, but all three organizations pointedly refrained from condemning it.<sup>63</sup>

As Antonio Cassese concludes, in a matter of days, practically all states came 'to assimilate a terrorist attack by a terrorist organization to an armed aggression by a state, entitling the victim state to resort to individual self-defence'.<sup>64</sup> He questions whether 'instant custom' can develop in this way, but it is hard to contest that September 11 and its aftermath signal a movement of the law of self-defence in that direction. Moreover, this interpretation of Article 51 does not represent a complete break with the past. While the International Court of Justice had implicitly rejected that interpretation in the *Nicaragua* case,<sup>65</sup> the US cruise missile attacks on a pharmaceutical plant in Sudan and a base in Afghanistan were justified as self-defence in connection with the Al-Qaeda sponsored bombings of US embassies in Kenya and Tanzania in August 1998.<sup>66</sup> The reaction of other governments to the US strikes was muted, suggesting some support for the proposition that self-defence against terrorists or terrorist bases in certain situations would be legal.<sup>67</sup>

Similarly, the US' support for peace operations in Afghanistan represents a dramatic about face for the Bush Administration, after the hostility towards 'nation-building' expressed in the early days. It is a return to the ambivalent engagement of the Clinton years, driven by a belated recognition of the threats that can emanate from so-called 'failed states'.<sup>68</sup> As argued above, intrusive peace-building had become a fairly common practice for the UN and US in the 1990s, although the principal US motivation for doing so may have changed in the aftermath of September 11. And the Afghanistan experience reinforces the notion that effective peace-building requires not only military and economic commitment, but also the multilateral exercise of 'soft' power to build stable governing institutions. Resolution 1373, however innovative it may be, is directed at Member States of the UN. It imposes

<sup>62</sup> Quoted in *ibid.*, at 246.

<sup>63</sup> Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter', 43 *HILJ* (2002) 42, at 48–49. For a compatible review of the reaction to the US-led action in Afghanistan, see Ratner, 'Jus Ad Bellum and Jus in Bello after September 11', 96 *AJIL* (2002) 905, at 909–910; Beard, 'America's New War on Terror: The Case for Self-Defense under International Law', 25 *Harvard Journal of Law and Public Policy* (2002) 559.

<sup>64</sup> Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories', 12 *EJIL* (2001) 993, at 996–997.

<sup>65</sup> See Schachter, 'The Lawful Use of Force by a State against Terrorists in Another Country', 19 *Israel Yearbook on Human Rights* (1989), at 216.

<sup>66</sup> Letter to the President of the Security Council, S/1998/780, 21 August 1998.

<sup>67</sup> Questions about the legality of the action in Sudan stemmed mainly from doubts that the targeted plant really was a chemical weapons factory as claimed. See T. Franck, *Recourse to Force* (2002), at 95; Murphy, *supra* note 63, at 50; C. Gray, *International Law and the Use of Force* (2000), at 118; Wedgwood, 'Responding to Terrorism: The Strikes against bin Laden', 24 *Yale Journal of International Law* (1999) 559.

<sup>68</sup> James Dobbins sees the US reconstruction effort in Afghanistan as part of a continuum that includes Germany, Japan, Somalia, Haiti, Bosnia, and Kosovo, see Dobbins, 'America's Role in Nation-building: from Germany to Iraq', 45 *Survival* (Winter 2003–2004) 87. See also Traub, 'Making Sense of the Mission', *New York Times Magazine*, 11 April 2004, at 32.

obligations on governments and therefore its effectiveness as a counter-terrorism tool depends on the effectiveness of the governments which must implement it.

Thus in the immediate aftermath of September 11, the US was consciously, though obviously not wholeheartedly, multilateralist. After NATO voted its support for the American campaign in Afghanistan, Secretary Powell remarked that 50 years of steady investment in the alliance had paid off.<sup>69</sup> When the Security Council adopted Resolutions 1368 and 1373, the US rediscovered the Council's usefulness as a channel through which major international security crises are 'interpreted' for the world.<sup>70</sup> The US rightly calculated that it did not need much military help to defeat the Taliban or chase Al-Qaeda into the mountains, but it wanted and benefited from the political support and economic help it was able to garner by working within the UN. It was able to stretch without breaking existing norms on self-defence, it reinforced the perceived legitimacy of 'state-building' by external actors, and it carved out a new legislative role for the Security Council based on a degree of consensus among the P5 that had rarely — if ever — been seen since 1945.

## 5 Iraq: A Bridge Too Far

If the actions in Kosovo and Afghanistan tested the limits of the fragile post-Cold War normative framework, intervention in Iraq was a bridge too far. It was a bridge too far not because the action itself was a dramatic departure from that framework, but because of the context and manner in which it was presented. The US relied mainly on two legal arguments to justify the military action: self-defence against terrorism; and enforcement of Security Council resolutions to rid Iraq of weapons of mass destruction (ending Saddam Hussein's human rights abuses was never pressed as an adequate legal justification in itself and only became a prominent rationalization for the war after-the-fact). In his 5 February briefing to the Security Council, Secretary Powell presented forensic evidence to support the case on both counts. He failed to persuade the interpretive community of the merits of the first, terrorism-based claim. While there was substantial international support for the legality of military action in Afghanistan, the argument could not be stretched to Iraq 17 months later. The debate was waged intensely in and around the Security Council between September 2002 and March 2003; in the end, most participants in, or knowledgeable observers of, that debate were not convinced that the links between Iraq and the events of September 11 were sufficiently tight to justify military action on the basis of self-defence. When that became obvious, the Bush Administration largely gave up trying to make its case in those terms — at least to international audiences. There is no better evidence than the US letter of 20 March to the President of the Security Council setting out the legal

<sup>69</sup> Secretary of State Colin Powell, public statement (10 October 2001).

<sup>70</sup> Malone in Foot, MacFarlane and Mastanduno, *supra* note 58, at 91. See also Hurd, 'Legitimacy, Power and the Symbolic Life of the UN Security Council', 8 *Global Governance* (2002) 35.

justification for the war, which does not say a word about terrorism or self-defence.<sup>71</sup> It was based entirely on the enforcement of existing Security Council resolutions.

That legal case turns on the reading of Resolutions 678 (1990), 687 (1991) and 1441 (2003). The US/UK argument in a nutshell is that Resolution 687 merely suspended the right to use force granted by Resolution 678, and the right was revived by the declaration in Resolution 1441 that Iraq was in 'material breach' of its obligations. The counter-argument is that Resolution 687 extinguished the grant of authority in Resolution 678; the right to use force would require a new explicit authorization, which Resolution 1441 did not provide. My own reading is that the latter argument is more persuasive, but the case is not open and shut.<sup>72</sup> The language of the resolutions, explanations of votes and practice since 1991 (which at least until Operation Desert Fox in 1998 suggested acquiescence to the threat or use of force) are sufficiently ambiguous that the legal case is not as far-fetched as the argument based on self-defence. Moreover, it is not fatally undermined by the subsequent failure to find any weapons of mass destruction. Unlike the connection with Al-Qaeda, US/UK claims about the status of Iraq's weapons programmes were not completely out of line with what others — including UN inspectors — believed. The sharpest differences of opinion concerned the urgency and magnitude of threat those programmes posed and how to deal with them, not whether they existed.<sup>73</sup>

More to the point, the case for intervening in Iraq to enforce Council resolutions comes from within the existing normative and institutional framework.<sup>74</sup> Iraq was not one of any number of 'rogue states' to be pulled out of a hat and picked off at moments of US choosing. It was one 'rogue state', virtually defined as such by the UN after committing a flagrant act of aggression in 1990. In the aftermath of the first Gulf War, the Security Council imposed binding obligations on Iraq and, by November 2002 (when Resolution 1441 was adopted), there was little disagreement among UN Member States, UN inspectors and the Secretariat that Iraq had failed to live up to those obligations. The Iraq issue had been on the agenda of the international

<sup>71</sup> S/2003/351, 21 March 2003. See also UK letter to the President of the SC, S/2003/350, 21 March 2003.

<sup>72</sup> See I. Johnstone, *Aftermath of the Gulf War* (1994). For a thorough recent assessment of the arguments on both sides, which concludes that the action was illegal, see Murphy, 'Assessing the Legality of Invading Iraq', 92 *Georgetown Law Journal* (2004) forthcoming. For a range of views, see Lori Fischler Damrosch and Bernard Oxman (eds), 'Agora: Future Implications of the Iraq Conflict', 97 *AJIL* (2003) 553; Warbrick and McGoldrick, 'Current Developments: The Use of Force against Iraq', 52 *ICLQ* (2003) 811.

<sup>73</sup> Even Hans Blix admits he believed Iraq was hiding weapons and weapons programmes at least until January 2003, when he submitted his first report to the Security Council following the adoption of Resolution 1411. H. Blix, *Disarming Iraq* (2004). Interestingly, the US is now defending its mishandling of the intelligence by pointing to the assessments not of American analysts, but those of other countries and the UN inspectors. See in particular President Bush's interview with Tim Russert on 'Meet the Press', transcript in *The New York Times*, 9 February 2004, at A19. See also the comments of the Deputy Prime Minister of Spain. Dale Fuchs, 'Spain Decides Against an Intelligence Inquiry', *New York Times*, 5 Feb. 2004.

<sup>74</sup> As Tom Farer suggests, Iraq was no greater a stretch than the one made by NATO when it bombed Serbia over Kosovo. Tom Farer, 'Toward an Effective International Legal Order: From Coexistence to Concert?', draft book chapter on file with author. See also Nye, *supra* note 55, at 63.

community for 13 years and the entire debate about the role and relevance of the UN only arose because the UN had been so deeply involved in the matter from the start.

It is not the action against Iraq itself that is so disturbing to the normative order, but how it was presented and understood. The US case was cast against the backdrop of the doctrine of pre-emption, outlined in the National Security Strategy of September 2002.<sup>75</sup> The most controversial aspect of the doctrine goes beyond even the most liberal interpretations of anticipatory self-defence. The NSS claims the notion of ‘imminent threat’ must be adapted to allow action ‘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.’ This is not pre-emption of a truly imminent attack, when there is clear evidence that it is about to be launched, but rather *prevention* of a possible future attack. That stretches the concept of ‘armed attack’ so far beyond its moorings that it becomes virtually meaningless as a legal analytical tool.<sup>76</sup>

Moreover, the diplomacy in the lead-up to the war at times seemed deliberately designed to challenge the existing normative and institutional order. Precisely because the US chose not to restrict its case to the enforcement of existing Security Council resolutions, others found it hard to vote for the so-called second resolution that would have explicitly authorized military action. In late January, the US and UK largely gave up trying to win French and Russian support directly and instead focused on the non-permanent members, hoping they could get majority support and argue that they had been blocked by an ‘unreasonable veto’.<sup>77</sup> The six ‘swing vote’ countries (Pakistan, Cameroon, Angola, Guinea, Chile and Mexico) came under intense pressure and yet, despite the threats made and incentives proffered, few if any were won over.<sup>78</sup> Joseph Nye reports that ‘a number of close observers — such as British Ambassador to the UN Sir Jeremy Greenstock — believe that with a little more patience and diplomacy, the administration could have obtained another resolution

<sup>75</sup> While the doctrine of pre-emption was never part of the explicit case made at the UN, it was a contextual feature of the deliberations in and around the Security Council. I would like to thank Alan Henrikson for drawing my attention to the important distinction between narrow deliberative process at the UN and the broader US discourse through diplomatic channels and in the press.

<sup>76</sup> The literature on the legality of the doctrine of pre-emption is large and growing. See for example, the various contributions to Damrosch and Oxman, *supra* note 72; W. H. Taft, Legal Adviser, Department of State, *The Legal Basis for Pre-emption*, (18 Nov. 2002), available at <http://www.cfr.org/publication.php?id=5250>; O’Connell, ‘The Myth of Preemptive Self-Defense’, paper prepared in conjunction with the ASIL Presidential Task Force on Terrorism 9–10 (2002), available at <http://www.asil.org>; Sofaer, ‘On the Necessity of Pre-emption’, 14 *EJIL* (2003) 209; Bothe, ‘Terrorism and the Legality of Pre-emptive Force’, 14 *EJIL* (2003) 227; Clark Arend, ‘International Law and the Preemptive Use of Military Force’, *Wash. Quarterly* (Spring 2003) 89; Paust, ‘Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond’, 35 *Cornell International Law Journal* (2002) 533; Byers, ‘Pre-emptive Self-defence: Hegemony, Equality and Strategies of Legal Change’, 11 *Journal of Political Philosophy* (2003) 171.

<sup>77</sup> Baker *et al.*, ‘Blair’s Mission Impossible: The Doomed Effort to Win a Second Resolution’, *Financial Times*, 29 May 2003, at 4.

<sup>78</sup> *Ibid.*, at 4. See also Rubin, ‘Stumbling into War’, 82 *Foreign Affairs* (Sept.–Oct. 2003) 55.

...<sup>79</sup> Instead of hammering away at the one issue on which all members of the Council had already agreed — namely the need to rid Iraq of its weapons of mass destruction and related programmes — the Bush Administration spoke at diplomatically inopportune moments about tenuous linkages to acts of terrorism, a doctrine of pre-emption that was hard to square with existing law and the desire to transform the entire Middle East. This made it very difficult for those six swing vote leaders to sign on to a war that would look to their constituents like the first step in a US effort to remake the world, through force, in a manner that served US rather than collective interests.<sup>80</sup> Whether these were diplomatic missteps or part of a frontal challenge to the existing legal order is hard to say,<sup>81</sup> but there is no doubt that by casting the Iraq invasion in those terms, it was seen by many not as an effort to adapt existing norms and institutions to new threats, but rather to tear down those norms and institutions and start again from scratch.

The normative and institutional framework embodied in the UN Charter has been damaged by the Iraq episode.<sup>82</sup> Even as he turned to the UN, President Bush used rhetoric designed to minimize the legitimating role of the Security Council. The humility of his presidential campaign ('if we're an arrogant nation, they'll resent us...[W]e've got to be humble and yet project strength in a way that promotes freedom'<sup>83</sup>) gave way to a more unabashedly assertive tone after September 11. His message to the world on September 12, 'either you are with us, or you are with the terrorists,' was in effect a declaration of American hegemony.<sup>84</sup> When he spoke to the General Assembly in September 2002, his language suggested not that the US needed UN support for military action, but that the UN was being given a last chance to prove its 'relevance' and usefulness to the US.<sup>85</sup> In a 6 March 2003 press conference, President Bush insisted that the US would put the proposed second resolution to a vote 'no matter what the whip count is', implying he would feel no compunction about going to war regardless of the outcome.<sup>86</sup>

<sup>79</sup> Nye, *supra* note 55, at 63. See also Zakaria, 'I Needed Evidence', *New York Times*, 11 April 2004, Section 7, at 8.

<sup>80</sup> As Fareed Zakaria said about Bush Administration policy more generally, '[w]hat worries people above all is living in a world shaped and dominated by one country — the US. And they have come to be deeply suspicious and fearful of us'. Zakaria, 'The Arrogant Empire', *Newsweek*, 24 March 2003.

<sup>81</sup> Tom Farer argues that the 'warriors of the right' are launching a revolutionary challenge on the Charter-based global order. Farer, *supra* note 74, at 19. John Lewis Gaddis also sees a transformational vision in the Bush foreign policy, Gaddis, *supra* note 54.

<sup>82</sup> Michael Glennon states this most starkly in claiming that 'with the dramatic rupture of the UN Security Council [over Iraq], it became clear that the grand attempt to subject the use of force to the rule of law had failed'. 82 *Foreign Affairs* (May/June 2003) 16, at 16; Jürgen Habermas regards the use of force against Iraq as a step towards replacing 'justification through international law' with the policies of hegemonism. Habermas, 'Interpreting the Fall of a Monument', 4 *German Law Journal* (2003) 701, at 706.

<sup>83</sup> Transcript of Presidential debates, *New York Times*, 12 October 2000.

<sup>84</sup> Hirsh, *supra* note 9, at 19.

<sup>85</sup> Address to the United Nations General Assembly, New York City, 38 *Weekly Comp. Pres. Doc.* (16 Sept. 2002), 1529, at 1529–1532.

<sup>86</sup> The President's News Conference, 39 *Weekly Comp. Pres. Doc.* (6 March 2003) 295, at 301.

The policy of ‘multilateralism à la carte’ suggested by the above remarks does not take seriously the proposition that institutions can legitimize the use of power.<sup>87</sup> The legitimating power of the UN and other international institutions derives from the fact that they are seen as something more than an instrument dominant states can use when helpful and ignore when convenient. Indeed, Condoleezza Rice wrote in an article before she became Bush’s National Security Adviser that the US should not get deeply involved in peacekeeping or humanitarian interventions because ‘we will find ourselves looking to the UN to sanction the use of American military power in these cases, implying that we will do so even when our vital interests are involved, which would be a mistake’.<sup>88</sup> In other words, the habit of seeking the blessing of the Security Council should not be allowed to develop, even if it may be helpful in a particular case, because it will infect the US’ ability to act unilaterally in other cases. This line of thinking, which runs deep in US political culture,<sup>89</sup> is proof that the legitimating power of the Security Council is well understood in the highest circles of the US government — and deeply resented by some.

But if one considers diplomatic deeds rather than words, the unilateralist rhetoric of the Bush Administration looks like ‘cheap talk’:

- By turning to the UN in September 2002, President Bush launched an extended and highly public deliberative process from which the US had something to lose as well as gain, not least because from that moment on the American public much preferred Security Council endorsement for military action.<sup>90</sup>
- The US worked hard to secure the unanimous passage of Resolution 1441 in November 2002, which included what it saw as critical language declaring Iraq in ‘material breach’ of its obligations.
- In that resolution, the US committed itself to further Security Council deliberations to ‘consider the situation’ should Iraq fail to comply, thereby opening itself to another round of public persuasion, criticism and justification at the UN — though not another vote.

<sup>87</sup> Richard Haass, former Director of Policy Planning in the US State Department used the term to suggest the US would act alone when necessary and with others (preferably in ad hoc coalitions) when so doing served its interests. Quoted in Tom Shanker, ‘White House Says the US is not a Loner, Just Choosy’, *New York Times*, 31 July 2001. This conception does not capture the essence of multilateralism as an institutional form that ‘coordinates relations among three or more states on the basis of generalized principles . . . which specify appropriate conduct for a class of actions, without regard to the particular interests of the parties or the strategic exigencies that may exist in any specific occurrence’. Ruggie, ‘Multilateralism: The Anatomy of An Institution’, in Ruggie, *supra* note 15, 3, at 11.

<sup>88</sup> Rice, ‘Promoting the National Interest’, 79 *Foreign Affairs* (2000) 54.

<sup>89</sup> Luck, ‘The United States, International Organizations, and the Quest for Legitimacy’, in Patrick and Forman, *supra* note 5, 47 at 61.

<sup>90</sup> In a February 2003 poll, 56 per cent of the American people said the President should wait for Security Council authorization before going to war. Tyler and Elder, ‘Poll Finds Most in US Support Delaying a War’, *New York Times*, 14 Feb. 2003, at A1 (reporting on a NYT/CBS news poll). See generally Kull, Ramsay and Lewis, ‘Misperceptions, the Media and the Iraq War’, 118 *Political Science Quarterly* 2003–04 569–98.

- The US chose not to put the draft 'second resolution' to a vote in March 2003, in part because it agreed with Spain (a supporter of the US) and France (an opponent) that a failed resolution would do more damage to the Security Council and international law than for the US to act on the basis of its own interpretation of existing resolutions.<sup>91</sup> Thus despite President Bush's bold claim that he would put the matter to a vote no matter what the whip count, he was convinced by the reasoning later articulated by Richard Haass: '...we can [still] argue that we are acting pursuant to the UN, in 1441. This is a way, I believe, quite honestly, of preserving the UN's potential viability in the future. We've not destroyed it.'<sup>92</sup>

This diplomatic manoeuvring highlights the critical role of the Security Council as a venue for discourse about the meaning and implementation of legal norms relating to the use of force.<sup>93</sup> The Council can be conceived as a four-tier deliberative setting, with the five permanent members occupying the top tier, the ten non-permanent members occupying the second, and the UN membership as a whole composing the third. The fourth tier is the constellation of international lawyers, engaged representatives of non-governmental organizations, organs of international public opinion and others who have a stake in, knowledge about and keep a close watch on what is going on in the Security Council. Together, these four tiers function as an interpretive community, which sets the parameters of acceptable discourse and in effect passes judgment on legal claims. The deliberations matter, they are not epiphenomenal. A price is paid for an adverse judgment of the interpretive community. It is hard to quantify what the US is paying for acting outside the legal and Security Council framework, but Turkey's decision not to permit the use of its territory to open a northern front certainly complicated military strategy. Moreover, two respected military analysts calculate roughly that maintaining security and reconstructing Iraq between summer 2003 and 2007 could cost the US \$100 billion more than what its share of a multilateral effort modelled on Bosnia or Kosovo would be.<sup>94</sup>

The catalogue of multilateral initiatives taken since the conclusion of the combat phase of the Iraq war suggests that those costs are sinking in. The US has gone back to the Security Council four times for resolutions, which authorize the presence of coalition forces, give a role to various international institutions in the economic reconstruction of Iraq, ask the Special Representative of the Secretary-General to play a 'leading role' in the future political developments in Iraq, and call for a distinct multinational entity to provide security for the UN presence in Iraq, which it was

<sup>91</sup> Baker, *supra* note 77.

<sup>92</sup> Quoted in 'How it Came to War,' Lehman, *The New Yorker*, 31 March 2003.

<sup>93</sup> This argument is more fully developed in my 'Security Council Deliberations', *supra* note 19, which draws on Jurgen Habermas' theory of communicative action. See also Stahn, 'Enforcement of the Collective Will After Iraq', 97 *AJIL* (2003) 804.

<sup>94</sup> Brainard and O'Hanlon, 'The Heavy Price of America's Going It Alone', *Financial Times*, 6 August 2003, at 17. And of course if the Iraq adventure complicates efforts to achieve other security goals like curbing terrorism and WMD proliferation elsewhere, as Madeleine Albright suggests it will, the costs will rise. Albright, 'Bridges, Bombs or Bluster?' 82 *Foreign Affairs* (Sept.-Oct. 2003) 4.

hoped would draw in other states.<sup>95</sup> In the summer of 2003, the US urged the UN Secretary-General to send one of its most accomplished peace-builders to Iraq as a Special Representative (Sergio Vieira de Mello, who died in the August 2003 bomb blast). In early 2004, the US asked the Secretary-General to send a team to help work out arrangements for the transition of authority to Iraqis once it became obvious that the US caucus-based scheme would be resisted.<sup>96</sup> It urged the SG to appoint Lakhdar Brahimi to lead the team<sup>97</sup> and relied heavily on him to work out the post-June 30, 2004 transitional arrangements.

Moreover, some members of the Bush Administration are playing down the most far-reaching implications of the 'doctrine of pre-emption' and playing up the need for strategic partnerships within institutions. In a recent article, Secretary Powell wrote:

Some observers have exaggerated both the scope of pre-emption in foreign policy and the centrality of preemption in US strategy as a whole ... The US NSS does commit us to preemption under certain limited circumstances. We stand by that judgment, *the novelty of which lies less in its substance than in its explicitness*. But our strategy is not defined by preemption. Above all, the president's strategy is one of partnerships that strongly affirms the vital role of NATO and other US alliances — including the UN.<sup>98</sup>

Rhetorical style matters because the interpretation and application of international law is an inter-subjective enterprise. Secretary Powell is signalling that the doctrine of pre-emption should not be interpreted or understood as a revolutionary challenge to the normative and institutional order. He is making a case for this 'novel' feature of US foreign policy from within the existing Charter framework, not outside it. This discursive move is a subtle rebuke to those in the Administration who believe US interests and values are better served by tearing down that framework.

## 6 Conclusion

Tearing down the normative and institutional framework embodied in the UN Charter is not in the US interest. As John Ikenberry wrote before Iraq, 'unchecked US power, shorn of legitimacy and disentangled from post-war norms and institutions of the international order, will usher in a more hostile international system, making it far harder to achieve American interests'.<sup>99</sup> Conversely, as Harold Koh puts it, 'the process of visibly obeying international norms builds US soft power, enhances its moral authority, and strengthens US capacity for global leadership in a post-

<sup>95</sup> SC Resolutions 1483, 1500 and 1511 (2003) and SC Res. 1546 (2004).

<sup>96</sup> Weisman, 'Bush Presses UN to Mediate Iraqi Clash on Rule', *New York Times*, 4 Feb. 2004, at A1.

<sup>97</sup> Farley, 'UN Nation-builder was a reluctant Envoy to Iraq', *Los Angeles Times*, 11 Feb. 2004, at A8.

<sup>98</sup> Powell, 'A Strategy of Partnerships', 83 *Foreign Affairs* (Jan./Feb. 2004) 22, 24 (emphasis added). Similarly, Vice President Dick Cheney, in one of his rare visits to Europe, gave a speech at the World Economic Forum stressing the need for cooperation in the war on terrorism, including in 'effective international institutions, [which] are even more important than they have been in the past'. Schmitt and Landler, 'Cheney Calls for More Unity in Fight against Terrorism', *New York Times*, 25 January 2004, at A4.

<sup>99</sup> Ikenberry, 'America's Imperial Ambition', 81 *Foreign Affairs* (Sept./Oct. 2002) 44, 56.



September 11 world'.<sup>100</sup> While the US may be able to fight the military war on terrorism alone, it has a great stake in preserving the prohibitions embodied in Resolution 1373 and related sanctions resolutions. It has an interest in extending those initiatives to the proliferation of weapons of mass destruction, as President Bush demonstrated by his appeal to the UN in September 2003 to pass a resolution criminalizing proliferation activities, which was achieved in April 2004 with the unanimous passage of Resolution 1540.<sup>101</sup> In its policies towards North Korea and Iran, the US has dropped the 'axis of evil' label and has been using the IAEA and the threat of Security Council action to deal with the proliferation threats they pose. The US also has a substantial stake in the success of UN-established or –authorized peace operations in places like Afghanistan, Bosnia, Kosovo, the DRC, Haiti, Liberia, Sierra Leone and Sudan, as well as Iraq. The US benefits from the UN doing (or coordinating) the long-term work of peace-building because the US does not have the patience to do so itself, and because that kind of intrusive involvement in domestic affairs is more likely to be perceived as legitimate if undertaken multilaterally.<sup>102</sup> If the new US security agenda is presented and carried out in brazen disregard for the existing normative and institutional framework, it will destroy the already fragile support that exists for these 'state-building' efforts. To the extent that UN peace operations are seen as associated with that agenda, charges of 'neo-imperialism' are bound to become more acute, and efforts to forge a consensus around what an effective and well-governed state is, and what external actors can do to act on that consensus, will suffer.

Undermining the UN would make it marginally easier for the US to act alone when it feels it must, but the multilateral, institutional, rule of law impulse in US foreign policy thinking will not easily be overcome. This impulse could find expression in institutions other than the UN, but the evidence does not indicate the emergence of an alternative soon.<sup>103</sup> Recent events highlight three ironies: the irony that the US

<sup>100</sup> Koh, 'On American Exceptionalism', *supra* note 15, at 1480.

<sup>101</sup> The US would also benefit from raising the strategy embodied in the US' Proliferation Security Initiative to the level of the Security Council, requesting or obliging all states to interdict suspicious vessels in their territorial waters or even authorizing them to do so on the high seas. China threatened to veto Resolution 1540 if language calling for interdiction of ships at sea was returned. Hoge, 'Ban on Weapons of Doom is Extended to Qaeda-style Groups', *New York Times*, 29 April 2004. But the UK has not given up on bringing the Proliferation Security Initiative under UN auspices. Adams, 'UK Warns UN Must Evolve to Tackle Terrorism Threat', *Financial Times*, 3 Feb. 2004, at 8.

<sup>102</sup> The Greater Middle East Initiative of the Bush Administration was 'dead on arrival' when launched in November 2003, according to Richard Clark, because appeals to democratization of the Arab world fall on deaf ears when 'they originate from a leader who is trying to impose democracy on an Arab country at the point of an American bayonet'. Clarke, 'The Wrong Debate on Terrorism', *New York Times*, 25 April 2004, at 15. See also Weisman, *supra* note 53.

<sup>103</sup> The legitimating power of a 'community of democracies' is one alternative, but many democratic countries were opposed to the US on Iraq suggesting that it may be even harder to rally such a community around US goals than the Security Council of the UN. A more realistic alternative suggested by Tom Farer is for 'collective great power decisions' to be made outside the Security Council by a group of 12 'consequential states', and then brought to the Council for endorsement. Farer, *supra* note 74, at 21–22.

created the very UN-based order that current US policy may destroy; the irony that the more other states seek to preserve the viability of the UN, the more valuable it is to the US; and the irony that the more dominant the US gets, the greater the incentive to legitimize its power through multilateral mechanisms in order not to provoke resistance. It is difficult to be half-Wilsonian, seeking to spread US values but not using accepted institutions to do so; for the foreseeable future, the UN will remain a useful vehicle for the US to transform its values into a global consensus and put its power behind broader collective purposes.