

What Future for the UN Charter System of War Prevention?

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The position favored here is that the United States would be best served by adhering to the UN Charter system. This system is flexible enough to accommodate new and genuine security imperatives as well as changing values, including a shifting balance between sovereign rights and world community responsibilities. In both settings of humanitarian intervention and responses against mega-terrorism the Charter system can be *legally vindicated in appropriate factual circumstances*.

From this perspective recourse to war against Iraq should not have been undertaken without a *prior* mandate from the Security Council, and rather than “a failure” of the United Nations, the withholding of such a mandate represented a responsible exercise of constitutional restraint. The facts did not support the case for preemption, as there was neither *imminence* nor *necessity*. As a result, the Iraq war seemed, at best, to qualify as an instance of *preventive war*, but there are strong legal, moral, and political reasons to deny both legality and legitimacy to such a use of force. Preventive war is not an acceptable exception to the Charter system, and no effort was made by the U.S. government to claim such a right, although the highly abstract and vague phrasing of the preemptive war doctrine in the *National Security Strategy of the United States of America* would be more accurately formulated as a “preventive war doctrine.” But even within this highly dubious doctrinal setting, to be at all convincing the evidence would at least have to demonstrate a credible future Iraqi threat that could not be reliably deterred, and this was never done.

My legal constructivist position is that the United States (and the world) would benefit from a self-imposed discipline of adherence to the UN Charter system governing the use of force. Such a voluntary discipline would overcome the absence of geopolitical limits associated with countervailing power in a unipolar world. It would also work against tendencies of the United States and others to rely too much on military superiority, which encourages the formation of defensive alliances, and possibly arms races. International law is flexible enough to allow the United States, and other countries, to meet novel security needs. Beyond this, neither American values nor strategic goals should be construed to validate uses of force that cannot win support in the UN Security Council. If one considers the course of American foreign policy over the course of the last half century, adherence to the Charter system with respect to the use of force would have avoided the worst policy failures, including that of Vietnam. Deviations from the Charter system of prohibitions on the use of force can be credited with no clear successes.

It is not the Charter system that is in disarray, providing sensible grounds for declaring the project of regulating recourse to war by states a failed experiment that should now be abandoned. It is rather leading states ... that need to be persuaded that their interests are served and their values realized by a more diligent pursuit of a law-oriented foreign policy. The Charter system is not a legal prison that presents states with the dilemma of adherence (and defeat) and violation or disregard (and victory). Rather adherence is the best policy, if understood against a jurisprudential background that is neither slavishly legalistic nor cynically nihilistic. The law can be stretched as new necessities arise, but the stretching must to the extent possible be in accord with

procedures and norms contained in the Charter system, with a factually and doctrinally persuasive explanation of why a particular instance of stretching is justified. Such positive constructivist attitudes will renew confidence in the Charter system. It is also true that constructivism can work negatively, and so if the disregard of the legal framework, public opposition, and governmental resistance present in the Iraq case is repeated in the future, then indeed the Charter system will be in a shambles before much longer.