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The Just War Ethic in International Law

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Joseph C. Sweeney

Abstract

To the student and practitioner of international law in the twenty-first century, the just war ethic is clearly part of Moral Theology—binding the consciences of ethical people everywhere—but it is not part of international law. Nevertheless, there is today a lingering flavor of the Just War Ethic in debates about issues that are partly moral and partly political, such as: 1. the testing and use of nuclear weapons; 2. combating terrorism; and 3. humanitarian intervention to save lives and the human environment. None of these activities is authorized expressly in the United Nations Charter. What is an unjust war in the twenty-first century? Use of military force in violation of the Charter of the United Nations by a sovereign Nation State. What is a just war in the twenty-first century? Use of military force according to the decisions of the United Nations Security Council. All theories of international law agree on one thing: *Pacta Sunt Servanda* Treaties must be observed. The Charter of the United Nations is such a Treaty. This is the voice of the Just War Ethic in the era of the UN Charter. Only in the inherent right of self defense against armed attack can a Nation be justified in resorting to military force, without the approval of the Security Council. Returning to the basic question: Are there criteria of Just War in the twenty-first century? Yes. Use of military force as directed by the Security Council—or use of military force in self defense against an armed attack are such criteria. These are the just wars of our century and likely to remain so until the United Nations is replaced by a world government. This Article is neither a political endorsement of the 2003 Iraq War nor a political denunciation of decision-making at the highest level. The question is whether international law regulated the outbreak of war by the requirement that it be a just war. The concluding unresolved issue is whether the 2003 Iraq War conducted by the United States and its coalition was a just war in terms of the United Nations Charter.

ARTICLES

THE JUST WAR ETHIC IN INTERNATIONAL LAW

*Joseph C. Sweeney**

MORALITY OR LAW?

To the student and practitioner of international law in the twenty-first century, the just war ethic is clearly part of Moral Theology — binding the consciences of ethical people everywhere¹ — but it is not part of international law. Nevertheless, there is today a lingering flavor of the Just War Ethic in debates about issues that are partly moral and partly political, such as:

1. the testing and use of nuclear weapons;²
2. combating terrorism; and³

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This piece is offered in memory of my friend and colleague, Professor Ludwik A. Teclaff.

1. See generally PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* (1968); MICHAEL WALZER, *JUST AND UNJUST WARS; A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (3d ed. 2000); J. Bryan Hehir, S.J., *Just War Theory in a Post-Cold War World*, 20 *J. RELIGIOUS ETHICS* 237 (1992); J. Bryan Hehir, S.J., *Changing Challenges to the Ethic of War*, Address to Fordham Colloquium, 2002 (on file with author); YEHUDA MELZER, *CONCEPTS OF JUST WAR* (1975).

2. See generally HENRY KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* (1957); MCGEORGE BUNDY, *ANGER AND SURVIVAL CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS* (1988); JOSEPH S. NYE, *NUCLEAR ETHICS* (1986); MCGEORGE BUNDY ET AL., *REDUCING NUCLEAR DANGER* (1993); GEORGE SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WAR* (1958). Advisory Opinion on the Legality of the Threat of Nuclear Weapons, 1996 I.C.J. 226 (noting that customary international law does not prohibit possession of nuclear weapons, although their use is regulated by the U.N. Charter, Articles 2(4) and 51, and treaties).

3. Terrorism: the random destruction of life and property to destabilize a people in order to compel them to change the policies of its government — became notorious in the nineteenth and twentieth centuries. Michael Walzer has defined terrorism as systematic and random murder of innocent people to destroy the morale of a Nation or class and undercut its solidarity. WALZER, *supra* note 1, at 197. The 1965 motion picture, *THE BATTLE OF ALGIERS* (Rialto Pictures 1965), directed by Gillo Pontecorvo dramatized the Algerian War of Independence against French colonial rule (1954-1962). For examples of other practitioners, see TIM PAT COOGAN, *THE IRA: A HISTORY* (1973) (discussing the Irish Republican Army); DOUGLAS PIKE, *VIET CONG: THE ORGANIZATION*

3. humanitarian intervention to save lives and the human environment⁴

None of these activities is authorized expressly in the United Nations Charter. What is an unjust war in the twenty-first century? Use of military force in violation of the Charter of the United Nations by a sovereign Nation State. What is a just war in the twenty-first century? Use of military force according to the decisions of the United Nations Security Council.⁵

All theories of international law agree on one thing: *Pacta Sunt Servanda* Treaties must be observed.⁶ The Charter of the

AND TECHNIQUE OF THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM (1966); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); Lee Mees, *The Basque Peace Process, Nationalism and Political Violence*, in *THE MANAGEMENT OF PEACE PROCESSES* 154 (John Darby & Roger MacGinty eds. 2000) (discussing the Basques); HOWARD M. SACHAR, *HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* (2d ed. 2001) (discussing the Palestinians).

4. HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard Lillich ed., 1973); THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (3d ed. 2002); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239 (2000).

A foretaste of the destruction of a society by political interventions occurred during the Spanish Civil War as Stalin supported the Republic and Hitler and Mussolini supported the fascists. See generally HUGH THOMAS, *THE SPANISH CIVIL WAR* (1961).

Self-determination of peoples was rejected as the reason for the break-up of multicultural Nations not part of a colonial empire. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 5, U.N. Doc. A/4684 (1961). Until the 1971 war between West Pakistan and its break-away portion, East Pakistan, now Bangladesh, secession of portions of non-colonial Nations was clearly discouraged. See Thomas Franck & Nigel Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L. L. 275, 304 (1973).

Concerning humanitarian intervention, the failure of U.N. organs to criticize the intervention of Israeli paratroopers to rescue Israeli and Western passengers held hostage at Entebbe, Uganda, after the hijacking of an Air France aircraft in July 1976, established an arguable exception to Article 2(4) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. For more information on Article 2(4), see *infra* note 5. The facts are reviewed in thirteen years of unsuccessful litigation against the carrier. See, e.g., *People ex rel. Compagnie Nationale Air France v. Gilberto*, 383 N.E.2d 977 (Ill. 1978); *Aboudjid v. Singapore Airlines Ltd. and Gulf Aviation Ltd.*, 489 N.Y.S.2d 171 (App. Div., 1st Dept. 1985).

5. According to the United Nations Charter, the use of force in international relations is denied to Member States. See U.N. CHARTER art. 2(4). A monopoly of the use of force is in the Security Council after a threshold finding of a threat to peace. *Id.* art. 39. The Council has the choice of economic sanctions or military force where economic sanctions, "... would be inadequate or have proved to be inadequate . . ." *Id.* arts. 41-42; see W. Michael Reisman, *Coercion and Self Determination: Construing Charter Art. 2(4)*, 78 AM. J. INT'L. L. 642 (1984); see also Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

6. *Vienna Convention on the Law of Treaties*, U.N. Doc A/Conf 39/28, U.K.T.S. 58

United Nations is such a Treaty. By means of the Charter, 191 governments including the United States have made the following pledges to each other and thereby to all mankind:

- the pledge not to use force in international relations (Art. 2 (4));⁷
- the pledge to settle disputes by peaceful means (Article 33);⁸
- the pledge to refer disputes not settled by peaceful means to the Security Council (Article 37);⁹
- the pledge to use force only pursuant to orders of the Security Council (Article 42);¹⁰ and
- the pledge to carry out the decisions of the Security Council (Art. 25).¹¹

The Charter reserves the use of military force to the Security

(1980), 8 I.L.M. 679, art. 26. *Pacta sunt servanda*—every treaty in force is binding upon the parties to it and must be performed by them in good faith.

7. U.N. CHARTER art. 2(4).

8. *See id.* art. 33. Article 33 states:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Id.

9. *Id.* art. 37. Article 37 states:

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Id.

10. *Id.* art. 42. Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id.

11. *Id.* art. 25. Article 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.*

Council (Article 42)¹² while it prohibits the use of force, including military force, by individual Member States (Article 2(4)), unless such State has suffered an armed attack, against which the inherent right of self defense may be used (Article 51).¹³ This is the voice of the Just War Ethic in the era of the UN Charter. Only in the inherent right of self defense against armed attack can a Nation be justified in resorting to military force, without the approval of the Security Council.¹⁴

I. THE JUST WAR ETHIC IN HISTORY

It has long been recognized that customary international law used the private law of the Roman Empire in *Corpus Iuris Civilis*, promulgated by the Emperor Justinian in 535 A.D.,¹⁵ to fill in the need for written authority in the Middle Ages. It is significant that other customs of Ancient Rome concerning warfare — whether in the Republic or the Empire — were largely ignored in the same period, for Rome was an ever expanding empire for which all conquests were just wars.¹⁶

Medieval Just War theory can be researched most conve-

12. See *id.* art. 42.

13. See *id.* art. 51. Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . ." *Id.* See generally D.W. BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW* (1958); Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 *HARV. J.L. & PUB. POL'Y* 539 (2002).

14. "This primary responsibility [to maintain international peace] is conferred upon the Security Council It is only the Security Council which can require enforcement by coercive action against an aggressor." Advisory Opinion on Certain Expenses of the United Nations, 1962 I.C.J. 151, 156 [hereinafter *Adv. Opinion* 1962]; see Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 *WYO. L. REV.* 663 (2003) (describing divergence in interpretation of the U.N. Charter).

15. An English translation of *Corpus Iuris Civilis* has been published by Professor J.B. Scott in 1932 in *Classics of International Law*, running to 2,342 pages in English. The Emperor Justinian appointed a committee of scholars under Tribonian, his minister of justice to bring order out of 1,000 years of Roman jurisprudence including the legendary kings, the Republic and the Emperors. See Harold J. Berman, *The Origins of Western Legal Science*, 90 *HARV. L. REV.* 894, 903 (1977).

16. In Rome of the Republic (502-44 B.C.) a traditional priesthood (the *fetiales*) made sacrifices and consulted the auguries to discern the will of the gods on the commencement of a war, after which the senate would be authorized to declare a just war. See Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 *U. PA. L. REV.* 678 (1952); JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF*

niently in the post-medieval legal work of the Spanish Jesuit, Francisco Suárez.¹⁷

Where did Suárez get his just war ethic? From Theology — A question by St. Thomas Aquinas¹⁸ in Part II of *Summa Theologiae* —

Q — Is it always a sin to wage war?

A — No — not if there was a just cause.

Aquinas required a concurrence of three elements for a Christian to avoid acting unjustly:

1. Orders by a superior, lawful authority by whose command the war is to be waged;
2. The attack must be due to some fault of those to be attacked; and
3. The right intentions must be present to advance the good or avoid evil.¹⁹

ROMAN LAW (2d ed. 1952); HANS J. WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* (1978).

17. Francisco Suárez, S.J. (1548-1617), born in Granada. He combined philosophy and theology; he taught in Segovia and Valladolid, Spain before spending five years in Rome, then returning to Spain to teach in Alcalá and Salamanca, and Coimbra in Portugal. See John P. Doyle, *Francisco Suárez: On Preaching the Gospel to People like the American Indians*, 15 *FORDHAM INT'L L.J.* 879 (1992). Suárez advised King Philip II of Spain and Pope Paul V in their controversies with modern Nations and Protestants, especially the Church of England.

His posthumous work, *De Triplici Virtute Theologica* (1621), was translated by James Brown Scott in *Selections from Three Works of Suárez* (1944) in the series *Classics of International Law*.

18. Thomas Aquinas (1225-1274), born at the Castle of Roccasecca at Aquino near Naples. He was educated by the Benedictines at Monte Cassino until it was closed by the Holy Roman Emperor, Frederick II. He then entered the new Dominican Order (*Ordo Praedicatorum*, founded in 1216) at the age of 18 in 1243. A brilliant and popular teacher, he traveled great distances to teach at the Universities of Paris, Cologne and Rome. In 1274 he returned to Naples, where he died at age fifty. Fifty years later he was canonized as St. Thomas Aquinas (1323) and declared Doctor of the Church in 1567.

19. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II, Second Part, Question XL. Part II states the following:

ARTICLE I Whether it is always sinful to wage war

* * *

I answer that, In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private person to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private person to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common

Was this "international law" or the moral obligation of ethical people?

What was the international law of the medieval period in which St. Thomas Aquinas wrote?²⁰ There was the Holy Roman

weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the material sword in defending that common weal against internal disturbances when they punish evil-doers, according to the words of the Apostle. *He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil, Romans 13:4*; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority: *Rescue the poor: and deliver the needy out of the hand of the sinner, Psalms 81:4*; and for this reason Augustine says (*Contra Faust. XXii 75*): "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of these who hold the supreme authority."

Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault. Therefore Augustine says (Q. X, *super Jos.*): "A just war is usually described as one that avenges wrongs, when a [N]ation or [S]tate has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."

Thirdly, it is necessary that the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil. Hence Augustine says (*De Verb. Dom.*): "True religion does not look upon as sinful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evildoers, and of uplifting the good." For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says (*Contra Faust. XXii*): "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such things, all these are rightly condemned in war."

Reply Obj. I. As Augustine says (*Contra Faust. XXii*): "To take the sword is to arm oneself in order to take the life of anyone, without the command or permission of superior or lawful authority" On the other hand, to have recourse to the sword (as a private person) by the authority of the sovereign or judge, or (as a public person) through zeal for justice, and by the authority, so to speak, of God, is not to *take the sword*, but to use it as commissioned by another, and so it does not deserve punishment. And yet even those who make sinful use of the sword are not always slain with the sword, but they always perish with their own sword, because, unless they repent, they are punished eternally for their sinful use of the sword.

Id.

20. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (rev. ed. 1958); Arthur Nussbaum, Symposium, *Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century*, University of California (1953); LAW AND POLITICS IN THE WORLD COMMUNITY, ESSAYS IN HONOR OF HANS KELSEN; George Schwarzenberger, *International Law in Early English Practice*, 25 BRIT. Y.B. INT'L L. 74 (1948). International legislation for the pre-Reformation Western Christian Church was decreed at Church Councils of bishops assembled by Popes: The Second Lateran Council (1139) of Pope

Empire — headed by an Emperor and including many kings, princes, dukes, and city States. Holy Roman Emperors were often at war with the Popes and other political challengers.²¹ There were also the kingdoms outside the Holy Roman Empire, often at war with each other and always struggling to survive interminable feuds with powerful vassals.²² These kings were in Aragon, Castile, Denmark, England, France, Poland, Portugal, Sweden, and Russia. There was also another Holy Roman Empire, the Eastern Roman Empire at Constantinople, about to be overwhelmed by the Moslem Turks.²³

The lifetime of Thomas Aquinas was a time of anarchy: civil wars, savage feuds, and ceaseless violence. The losers in battle, defeated prisoners, were usually sold into slavery, or blinded, or mutilated. If they were lucky, they might be ransomed for substantial amounts of gold. It is possible that the just war ethic would have stood out as the only bit of rationality in a world of violence. However, Aquinas's formulation was so counter to prevailing ideology, one might doubt whether the just war ethic could have been part of the international law of the period. Did Aquinas intend to add it to international law? We cannot be sure.

The greatest difficulty with medieval Just War theory was its mandate that in a struggle of two parties, only one was at fault

Innocent II forbade Christians to use the newly developed crossbow. The Third Lateran Council (1179) of Pope Alexander III authorized the practice of the Truce of God — from Wednesday evening to Monday morning each week — to prohibit fighting whether in private feuds or public warfare, and the prohibition on selling Christians into slavery.

21. There were seventeen popes in the twelfth century. Nine served less than four years and five of these served only one year or less. Two long-lived, strong Popes summoned the General Councils of the Church, *supra* note 20: Innocent II (1130-1143) and Alexander III (1159-1181). The Century of Thomas Aquinas witnessed a bitter struggle with secular rulers on the appointment of bishops (The Investiture Controversy) featuring contested papal elections, rival popes, and depositions and excommunications of princes, kings, and emperors, such as Henry IV at Canossa and Frederick II (three times). The popes, as temporal rulers of portions of Central Italy, were often absorbed in Italian politics and warfare with Moslem rulers, especially the struggle to possess Jerusalem — there had already been five crusades before the birth of Thomas Aquinas and there were three more before his death.

22. 1 C. W. PREVITE ORTON, *THE SHORTER CAMBRIDGE MEDIEVAL HISTORY* 418-70, 507-615 (1952); 2 C. W. PREVITE ORTON, *THE SHORTER CAMBRIDGE MEDIEVAL HISTORY* 682-820, 872-936 (1952).

23. See 3 JOHN J. NORWICH, *BYZANTIUM*, 410-37 (1996); see also GEORGE OSTROGORSKY, *HISTORY OF THE BYZANTINE STATE*, 533-72 (1969).

while the other was not at fault. This defies reality in many quarrels that become violent; rage takes over and controls the way human beings treat one another. Yet, Suárez said: "The idea that a war may be just on both sides is absurd."²⁴ While that might have been true in 1500, it does not describe the history of 500 years of dynastic and colonial warfare — with one enormous exception — the attack on the United States by Japan on Dec. 7, 1941. If there ever were a just war, the Second World War was it, despite efforts to reconstruct history to put blame for the war on U.S. economic policy of the 1930s.²⁵

An English author and lawyer, Richard Zouche, however argued that war may be just on both sides,²⁶ and this thought would be reechoed in Grotius and the scholars of the seventeenth and eighteenth centuries.

Claims of universal political authority by the Papacy and the

24. See Francisco Suárez, *De Triplici Virtute Theologica, Fide, Spe et Caritate*, DISPUTATION XIII (On War) 816-23 (1621); see also *Selections From Three Works of Suárez*, in *CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed. 1944).

25. Japanese aggression in China in 1937 was disapproved of in America, but not to the point of interference on behalf of China. However, Japanese militarism pushed the Greater East-Asia Co-Prosperity Sphere in 1938 to encourage nationalism and expel colonial powers (Great Britain, France, the United States, and the Netherlands) just as war broke out in Europe by Germany against Britain and France in September 1939. Shortly Japan signed the Tripartite Pact of September 1940, an alliance with Nazi Germany and Italy followed by Japanese invasion of South China that finally produced an American response in the form of economic sanctions: first on gasoline (July 1940) then on steel and scrap iron (September 1940). Japan's response was the invasion of French Indo China in July 1941. The United States then imposed an embargo on all exports to Japan — a drastic reduction in Japan's access to petroleum that would cause the march to an Asian empire to decelerate rapidly. The plans for attacking the United States had been made many years before, but they were submitted and approved at an Imperial Liaison Conference on September 3, 1941, unless the United States agreed to modify the oil embargo. Rehearsals for the Pearl Harbor attack began immediately but rivalry between the Army (and its seizures on the Asian Continent) and the Navy (eager to protect its potential strength) did not permit a reasonable quid pro quo for any effective negotiation with the United States which continued to demand Japanese withdrawal from Indochina and China. See JOHN K. FAIRBANK, EDWIN O. REISCHAUER & ALBERT M. CRAIG, *HISTORY OF EAST ASIAN CIVILIZATION* 579-612 (1965); see also JOHN TOLAND, *THE RISING SUN, THE DECLINE AND FALL OF THE JAPANESE EMPIRE, 1936-1945* (1970).

26. Richard Zouche (1589-1661), Regius Professor of Law at Oxford and author of *TEXIS: ELEMENTA JURISPRUDENTIAE* (1629) and *IUS FECIALE* ["LAW OF WAR"] (1650); appointed Judge of the High Court of Admiralty (1641) by Charles I, but deprived of office by Cromwell (1649), and briefly restored to office by Charles II (1661).

Zouche wrote, "But it will may be that neither of the belligerents acts unjustly. For none acts unjustly save he who knows that he is acting unjustly." 2 *IUS FECIALE* 112 (F. Brierly trans.), in *CLASSICS OF INTERNATIONAL LAW*, *supra* note 24.

Holy Roman Empire were successfully challenged in the period of the religious wars of the Reformation culminating in the devastation of the Thirty Years War (1618-1648),²⁷ the period during which the father of modern international law, Hugo Grotius, practiced the arts of diplomacy and wrote his understanding of the principles of international law.²⁸

27. The Thirty Years War (1618-1648) was the last of Europe's religious wars, beginning with the Defenestration of Prague and the destruction of Bohemian Protestants at the Battle of White Mountain (1620), then moved to North Germany and Denmark (1625-1630), then to the wars of Gustavus Adolphus of Sweden (1630-1635) and concluding with the French participation under Richelieu (1635-1640). Most of the war was fought on German soil that was ravaged and depopulated. The Peace of Westphalia, concluded after three years of negotiation, was an early example of a multilateral treaty that operated like a constitution for Europe. See Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L. L. 20 (1948).

28. Hugo de Groot (latinized as Grotius) 1583-1645, born in Delft, Holland, studied at Leyden University as a child prodigy, was awarded a doctorate in law from the University of Orleans at age fifteen; admitted to the bar at age sixteen and elected "historiographer" of the States — General of Holland at age twenty. His political career was advanced with appointment as Advocate General (1607) and Pensionary of Rotterdam (Executive, 1613). His vigorous support of the freedom of Holland and liberal Calvinism brought him into conflict with the supporters of the House of Orange and its hereditary prince, Maurice, who procured his trial and sentence to life imprisonment on false, political charges in May 1619. Serving his first two years of prison he wrote a law text and a religious work, but in March 1621 he escaped from prison in the false bottom of a trunk full of books, arranged by his wife. Friends aided his flight to France where he wrote his major treatise, *De Jure Belli ac Pacis* (1625). He entered the diplomatic service of Sweden (1634-1644) as Swedish Ambassador to France. He died after surviving a shipwreck in the Baltic Sea and is buried in the Nieuwe Kerk in Delft. Although a Calvinist, he worked with Lutherans and Roman Catholics and sought the reconciliation of the churches in a non-ecumenical age. He published works of theology, history and drama; his first legal work (1605), published posthumously concerned Prize law (*De Jure Praedae*) and his second work (1609) concerned the Freedom of the High Seas (*De Mare Liberum*).

Today, Grotius is still considered to be the father of International Law, largely because he freed the law from reliance on theology, despite his Christian principles. While searching for the just cause of war, Grotius nevertheless stressed the necessity of a declaration of war by a sovereign authority to justify the total exercise of power needed to suppress the enemy.

True to the humanist studies that preceded the Eighteenth Century Enlightenment, Grotius drew his examples of the proper conduct of Nations from the Greek and Roman classics rather than current State practices.

Hugo Grotius, De Jure Belli ac Pacis (1621), is more than an analysis of the just war as understood in a religious holocaust; the text also develops other aspects of the relations between Nations free of the constraints of belligerency as an expansion of the contents of the Law of Nature. See NUSSBAUM, *supra* note 20; see also Elemér Balogh, *The Traditional Element in Grotius' Conception of International Law*, 7 N.Y.U. L.Q. 261 (1929); Hersh Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946); EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF GROTIUS* (1969).

II. *DECLARATIONS OF WAR*

By the eighteenth century, lawyers and diplomats no longer relied on the medieval theological ethic.²⁹ To these thinkers of the Age of Enlightenment, a Declaration of War by one of the belligerents prior to the start of hostilities was essential to the justification of a war. What was the source of this requirement? Possibly its origins can be found in medieval chivalry, the code of honor of feudal knights that called for a formal notice or challenge before actual combat between knights could begin, or, perhaps, as was noted earlier, in the works of Grotius.³⁰

The custom of the Declaration of War was codified at the Second Hague Peace Conference in 1907—Convention III.³¹ Ef-

29. Eighteenth century international law scholarship on international law is represented by Christian Wolff (1679-1754) and Emmerich de Vattel (1714-1767).

Wolff, from a noble family in Prussia was a polymath whose theological studies branched into the natural sciences and then to law, was expelled from his professorship at the University of Halle in a religious controversy, but was immediately offered a professorship at Marburg for seventeen years before returning to the Enlightenment Court of the absolute ruler, Frederick the Great, where his writings included, *The Law of Nations Treated According to Scientific Method* (1749), in which he tries to distinguish the customary laws and the enlightenment laws of nature so that there can be a just war on the part of both belligerents.

Vattel, from Neuchâtel, Switzerland, a graduate of the University of Basel, spent most of his career as a diplomat for the Elector of Saxony; he added practical experience to the theories of Wolff in his book, *Le Droit des Gens* (1758), its full title being, "The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns." Vattel distinguishes just wars from unjust wars as a practical matter in which the war may be just on both sides. Vattel's published work was readily available in its French original and English translation and was widely read in the early American Republic by Franklin, Adams, and Jefferson and consulted frequently by John Marshall.

30. See *supra* note 28 and accompanying text; see also THOMAS ALFRED WALKER, *A HISTORY OF THE LAW OF NATIONS* 129 (1899); NUSSBAUM, *supra* note 28 (citing PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1561)). Belli (1502-1575) was a soldier, diplomat and counselor of sovereigns. Chapters 5, 8, 10, and 11 of his treatise are devoted to declarations of war. See PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1561); see also JOHN FREDERICK MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR FROM 1700 TO 1870* (1883) (noting ten instances of formal declarations of war in 170 years); LASSA OPPENHEIM, *INTERNATIONAL LAW* 229 (Hersch Lauterpacht, 7th ed. 1952) (where a declaration of war is "... a communication by one State to another that the condition of peace between them has come to an end, and a condition of war has taken its place").

31. The Second Hague Peace Conference is not intelligible without reference to the First in 1899. During the arms race of the European alliances it became obvious to the Russians that a boundary of 1,050 miles (1,680 kilometers) with potential enemies like the German Empire, the Austro-Hungarian Empire and the Turkish Empire could not be defended effectively, especially in view of the fact that its potential allies, France and the British Empire were hundreds of miles away, accordingly, Tsar Nicholas II

forts to impose a twenty-four hour limitation before the declaration became effective were not successful at this Conference. A Declaration of War was observed in the First World War, although the formal declaration never came as a surprise because it was usually preceded by General Mobilization of Reserves.³²

(1864-1918) invited all powers on August 24, 1898 to attend a conference to deal with issues of peace and war. Twenty-seven Nations (twenty Europeans plus the United States, Mexico, Persia, Siam, China, and Japan) attended a diplomatic conference at the Hague, Netherlands, from May 18 to July 29, 1899. Conventions dealing with the conduct of war (prohibition of poison gas, dum-dum (exploding) bullets, and projectiles from balloons), prisoners of war, and facilitation of the arbitration of disputes by the creation of a Permanent Court of Arbitration at the Hague, were approved.

International tensions increased thereafter as Great Britain waged a war in South Africa with the Boer republics of Transvaal and the Orange Free State where there were suggestions of German intervention on the part of the Boers; the Boxer Rebellion in China (1900) with the intervention of an army of European States (and the U.S.A.) to suppress the anti-foreign "rebels"; and followed by the full-scale war between Japan and Russia (February 1904 - September 1905) in which Russia suffered a series of disastrous defeats on land and sea.

Even before his services as Nobel Laureate peace-maker in the Russo-Japanese War (Conference of Portsmouth, N.H. (August 5 - September 5, 1905)), President Theodore Roosevelt had proposed (October 21, 1904) a second conference to deal with new issues and to reconsider earlier decisions. Roosevelt's 1904 suggestion did not produce a diplomatic conference because of the ongoing war, but formal invitations to the second conference at the Hague were sent by the Tsar and the Conference met from June 15 to October 18, 1907. Forty-five Nations attended.

The Second Hague Conference produced Thirteen Conventions. Convention III required a declaration of war before the commencement of actual hostilities. There were also conventions dealing with naval warfare, rights of neutrals, and rejection of the use of force to collect contract public debts. Efforts at arms limitation and mandatory arbitration of disputes were unsuccessful. See 2 MALLOY'S TREATIES 2259; EDMUND MORRIS, THEODORE REX 312, 338-419 (2001); JOSEPH H. CHOATE, THE TWO HAGUE CONFERENCES (1913); A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES (1909); Ellery C. Stowell, *Convention Relative to the Opening of Hostilities*, 2 AM. J. INT'L. L. 50 (1908).

32. Assassination of Archduke Francis Ferdinand of Austria at Sarajevo, Bosnia, June 28, 1914 led to an expanding war because of alliances, see *infra* note 106:

Austria-Hungary declared war on Serbia, July 28, 1914;
 Germany declared war on Russia, July 30, 1914;
 Germany declared war on France, August 1, 1914;
 Germany declared war on Belgium, August 4, 1914;
 United Kingdom declared war on Germany, August 4, 1914;
 Montenegro declared war on Austria-Hungary, August 5, 1914;
 Austria-Hungary declared war on Russia, August 6, 1914;
 Serbia declared war on Germany, August 6, 1914;
 Montenegro declared war on Germany, August 8, 1914;
 France declared war on Austria-Hungary, August 12, 1914;
 United Kingdom declared war on Austria-Hungary, August 12, 1914; Japan declared war on Germany, August 23, 1914;
 Japan declared war on Austria, August 25, 1914; and
 Austria declared war on Belgium, August 28, 1914.

The laws of war, however, were applied to the belligerents regardless of the presence or absence of a declaration of war.

After the Napoleonic Wars (1793-1815),³³ Europe survived

Thereafter, there were twenty further declarations of war before the U.S. Congress declared war by joint resolution on Germany, April 6, 1917. [The United States had previously declared war on the United Kingdom, June 18, 1812; Mexico, May 13, 1846, and Spain, April 20, 1898]. A further twenty-one declarations of war occurred in 1917-1918 before the Armistice on November 11, 1918. See Manley O. Hudson, *The Duration of the War Between the United States and Germany*, 39 HARV. L. REV. 1020 (1926).

The Institute of International Law considered the requirement of a Declaration of War in a Report of 1906, stressing the function of the declaration as a warning that might avert actual combat.

Convention III (1907); An English translation of the Official French provides:

Article 1. The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war, or of an ultimatum with a conditional declaration of war.

Article 2. The existence of a state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification which may, however, be given by telegraph. Neutral powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

2 JAMES B. SCOTT, *THE HAGUE CONFERENCES OF 1899 AND 1907*, at 362-67 (1909). The United States ratified the Convention March 10, 1908. See Hague Convention, *ratified by Senate Mar. 10, 1908, ratified by President of the United States Feb. 23, 1909*, 36 Stat. 2277, T.S. 539.

Interpreting customary International Law in insurance cases concerning the United States in the Second World War, courts have held that the state of war for insurance purposes began with the Japanese attack on Pearl Harbor at 8 a.m. on December 7, 1941 and not on December 8, 1941 when the Congress declared war by joint resolution, responding to President Roosevelt's address on the "day of infamy."

New York Life Ins. Co. v. Bennion, 158 F.2d 260 (2d Cir. 1946); *Savage v. Sun Life Assurance Co. of Canada*, 57 F. Supp. 620 (W.D. La. 1944). See generally, Edwin Borchard, *Need for Injunctive Relief as Prerequisite for Granting Declaratory Judgment*, 56 YALE L.J. 746 (1947); Clyde Eagleton, *The Form and Function of the Declaration of War*, 38 AM. J. INT'L L. 19 (1944). State practices are reviewed in WILLIAM E. HALL, *INTERNATIONAL LAW* 377-85 (A.P. Higgins ed., 8th ed. 1924).

33. This period covers a number of wars and temporary peace treaties in a confusing array of treachery. After the arrest of King Louis XVI (Flight to Varennes, June 1791), Austria formed a coalition with Prussia to make war on revolutionary France. The French Legislative Assembly declared war on Austria, April 20, 1792. After the trial and execution of the King (January 21, 1793), the National Convention declared war on Great Britain, Holland, and Spain (February 1, 1793). Temporary peace was made with Prussia in 1795 and Austria, in 1797 while the war with Great Britain continued, leading to a second coalition with Great Britain, Austria, Russia, Portugal, and Turkey in 1798 against France. It was at this point that Napoleon seized power in France in the Coup d'état of 18 Brumaire (November 9, 1799). A series of brilliant French victories led to the temporary Peace of Amiens (May 27, 1802 - May 16, 1803). In 1805, Napoleon's forces crushed the coalition forces at Austerlitz, leading to another temporary peace with Prussia and Austria, but war resumed with Russia in the lead the next year until Napoleon's victory at Friedland, leading to the Treaty of Tilsit (1807) suspending

almost one hundred years without a general war,³⁴ although there were ferocious wars in the Americas³⁵ and in the struggle for colonial empire in Asia and Africa.³⁶ Europe, armed to the teeth, began the First World War by a series of declarations of war in July and August of 1914.³⁷ The United States remained neutral until April 6, 1917 when the United States declared war on the German Empire.³⁸ In justification of this "War to end all wars," President Woodrow Wilson's Fourteen Points speech of January 8, 1918 demanded, "A general association of [N]ations to be formed to afford mutual guaranties of political independence and territorial integrity to great and small [S]tates alike."³⁹ Wilson's dream prevailed at the Peace Conference at which the Covenant of the League of Nations was incorporated

the French war with Prussia and Russia and allowing Napoleon to crush Austria, but this would reignite war between France and Russia and Napoleon's invasion of Russia (1812). All previous enemies resumed war with France until the allied armies entered Paris and Napoleon abdicated (April 11, 1814). This was not the end, however, when Napoleon returned suddenly from exile and reassembled an army for a last battle with Great Britain, Austria, Prussia, and Russia at Waterloo (June 18, 1815).

34. The closest Europe came to a general war was the Crimean War which began with renewed war between Russia and Turkey (October 1853), which Great Britain and France joined, allegedly to protect Turkey (March 28, 1854 - February 1, 1856). Prussia expanded into the German Empire in a series of wars conducted by Bismarck: Denmark (1864), Austria (1866), and France (1870-71); and a united Italy was formed in a series of wars: Piedmont-Sardinia against Austria (1848); Piedmont-Sardinia and France with Austria (1859), and the new Kingdom of Italy with Austria (1866).

As a result of the Crimean War restraints on the traditional law of the sea concerning privateers and neutral shipping were prepared in the 1856 Declaration of Paris, initially among the recent belligerents. See Stockton, *The Declaration of Paris*, 14 AM. J. INT'L L. 356 (1920).

35.

- 1) War between Brazil and Argentina (1825-1828)
- 2) The American Civil War (April 1861-April 1865)
- 3) Invasion of Mexico by France (1861-1867)
- 4) War of Paraguay with Brazil, Argentina, and Uruguay (1865-1870)
- 5) Peru, Ecuador, and Chile at war with Spain (1866-1871)
- 6) War of the Pacific between Chile, Bolivia, and Peru (1879-1884)

36. These are conveniently discussed in THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* (1991).

37. See *supra* note 32.

38. *Declaration of War between Germany and the United States*, Apr. 6, 1917, 40 Stat. 1 (1917).

39. Wilson speech of April 2, 1917 to the Joint Session of Congress. This speech used the expression "political independence and territorial integrity" that would be a constant component of State sovereignty and reemerge in Article 2(4) of the U.N. Charter.

in the Treaty of Versailles.⁴⁰

The League of Nations did not outlaw war,⁴¹ and statesmen of the post-war period thought that this failing could be corrected by a treaty for the renunciation of aggressive war by Nations, whether or not members of the League. This was accomplished in the Pact of Paris of August 27, 1928, known as the Kellogg-Briand Pact which declared that, “. . . they condemn recourse to war . . . and renounce it as an instrument of national policy”⁴² It would be as ineffective as the League itself in preventing the Second World War where declarations of war usually *followed* the commencement of hostilities.⁴³ Thus, declarations of war became as outmoded as the theory of the just war.

That Second World War experience brought international law itself into disrepute—Nations could no longer be trusted to justify their actions by declarations of self-defense and just wars. Thus, the 1945 United Nations Charter looked to conduct, not labels. Article 2(4), “No Nation shall use force in international relations.”⁴⁴ “War” was banished from the Charter. Even “international law” was almost banished.⁴⁵

Returning to the basic question: Are there criteria of Just War in the twenty-first century? YES. Use of military force as directed by the Security Council⁴⁶ — or use of military force in self defense against an armed attack are such criteria.⁴⁷ These

40. MARGARET McMILLAN, PARIS 1919 (2001).

41. Article 11 of the Covenant of the League of Nations, provides for meetings of the League Council in case of war. Subsequent treaties dealt with Germany's co-belligerents. See FRANCIS PAUL WALTERS, HISTORY OF THE LEAGUE OF NATIONS (1952).

42. 46 Stat 2343, 94 L.N.T.S. 57, in force July 24, 1929. In the trial of major Nazi war criminals at Nuremberg in 1945-1946, prosecutors and even judges refer to the waging of aggressive war in violation of Kellogg-Briand. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 166, 191, 295, 580 (1992).

43. Japan began hostilities against China in 1931 in its seizure of Manchuria, establishing it as the new Nation, Manchukuo. War in China began without a declaration on June 7, 1937. Italy began its war with Ethiopia without a declaration of war on October 3, 1935.

Germany began the invasion of Poland without a declaration of war on September 1, 1939, asserting its right of self defense. Japan began hostilities against the United States before the declaration of war and ultimatum were received in Washington on December 7, 1941.

44. Art. 2(4) Travaux Préparatoires.

45. The Dumbarton Oaks draft contained no references to “war” or “international law.” At the San Francisco Conference, international law was inserted in the Charter in the Preamble and Article 1(1).

46. See *supra* note 5 and accompanying text. See also *infra* Part III.

47. In the Falkland-Malvinas War of 1982, Great Britain reported the Argentine

are the just wars of our century and likely to remain so until the United Nations is replaced by a world government.

III. *THE SECURITY COUNCIL WAGES WAR*

In the golden dawn of the U.N. Charter in 1945-1948, it appeared that the Charter might work as had been intended with the "Four Policemen"⁴⁸ continuing their wartime alliance to preserve international peace and security. There were indeed incidents in which cooperation of the policemen appeared to exist.⁴⁹ By 1948, however, the Cold War between the United States and its allies and the Soviet Union and its allies produced stalemate in most U.N. operations.⁵⁰

Yet during the Cold War stalemate, a political accident created the first opportunity for the Security Council to wage war to preserve peace, properly called Security Council enforcement action.⁵¹ Mao Tse-Tung's communist victory over Chiang Kai-Shek's nationalists in 1949 set the stage for the U.S. refusal to abandon its wartime ally, Chiang. There followed a twenty-two year campaign by the United States to preserve Chiang's seat on the Security Council and in the General Assembly and denying

invasion to the Security Council immediately on April 2, 1982 when a force of 5,000 Argentines attacked the 114 British troops on the islands. Britain responded on May 21, 1982 with a task force that compelled Argentine surrender on June 14, 1982. No action of the Security Council was taken.

48. The Four Policemen concept originated at the beginning of the Second World War. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* 40-46 (2003). It would not become the five permanent members until 1945 after the liberation of France. See *id.*

49. See STANLEY MEISLER, *UNITED NATIONS: THE FIRST FIFTY YEARS* 36-74 (1995). Such incidents include:

- India-Pakistan Division (1947)
- Indonesia Independence (1949)
- Palestine - Dissolution of British Mandate and Independence of State of Israel, May 14, 1948 and recognition by USSR and USA on the next days.
- UNRRA established in 1944.

UN High Commissioner for Refugees, established by G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950).

Id.

50. Exclusion of non-communists from the Czechoslovak government in February and the Soviet Blockade of West Berlin (April 1948 - September 1949) are considered the first actions of the Cold War. See WILLIAM J. HITCHCOCK, *THE STRUGGLE FOR EUROPE: THE TURBULENT HISTORY OF A DIVIDED CONTINENT 1945-2002*, at 94-96, 110-15 (2003).

51. Enforcement is described as a unique function of the Security Council. See *Adv. Opinion* 1962, *supra* note 14.

the same to Mao's government.⁵² Stalin came to the support of Mao with a campaign to paralyze the United Nations until Mao replaced Chiang. Thus in June 1950, the Soviet Union was deliberately absent from the Security Council when the United States brought the issue of North Korea's invasion of South Korea to the Council.⁵³

In the absence of a veto by the Soviet Union, the Security Council authorized the use of force against North Korea.⁵⁴ While the constitutionality of this action could be challenged,⁵⁵ there has been acquiescence in the incident as the first Security Council enforcement action.

The Suez crisis of 1956⁵⁶ witnessed the creation of new

52. Mao's Communist forces fled Nationalist attacks by the "long March" to escape into the wilderness in 1934-1935. Chiang Kai-Shek's Nationalist Army and his Kuomintang Political Party were in nominal control of most of the mainland until the Japanese invasion (July 7, 1937). After the Japanese surrender, civil war between Communists and Nationalists resumed. Aided by the USSR, the communist armies overcame the Nationalists, aided by the United States, and the Peoples Republic of China was proclaimed October 1, 1949; the Nationalist evacuation of the mainland was completed by December 8, 1949 when the Kuomintang established itself on the island of Taiwan.

53. The artificial division of Korea occurred almost accidentally in 1945 when the Big Three met at Potsdam to plan for Soviet entry into the Japanese War by breach of the Soviet-Japanese Non-Aggression Pact of 1941. American troops would invade from the south while Soviet troops would invade from the north and each would occupy its area up to the 38th parallel. The Soviets established a communist government in its military zone which took the name Democratic People's Republic of Korea, May 1, 1948. In the American zone, the Republic of Korea was established at the same time in the traditional capital of Seoul under Dr. Syngman Rhee. North Korean troops invaded South Korea on June 25, 1950 with an army of 60,000. The South Korean army was driven out of Seoul to a limited area around Pusan in the next two months, but General MacArthur landed a large U.S. force at Inchon on September 15, 1950 that rapidly reoccupied South Korea and pushed into North Korea. A new war, however, began on November 26, 1950, as United Nations forces neared the Chinese border and China sent new armies into a war which continued until an armistice was signed on July 27, 1953.

54. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg. at 4-5, UN Doc. S/1501 (1950), of June 25, 1950, (adopted by vote of 10-0, Soviet Union absent); S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/1511 (1950), of June 27, 1950, (adopted by vote of 7-1 (Yugoslavia), Soviet Union absent, Egypt and India present, but refused to vote). The United States was appointed to lead a unified command by S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. S/INF/5/Rev.1 (1950), of July 7, 1950, adopted by a vote of 7-0 with three absentions (Egypt, India, and Yugoslavia; Soviet Union absent).

55. Conflicting provisions of the Charter create the problem; Article 27(3) provides for an affirmative vote of nine members "including the concurring votes of the permanent members. . . ." while Article 30 provides the Security Council shall adopt its own rules of procedure. Under its rules, absence and abstention are not negative votes.

56. The Suez crisis began when Egypt's President Gamal Abdel Nasser announced

methodology to deal with non-enforcement peace-keeping between two belligerents;⁵⁷ this creative diplomacy having been necessary because of vetoes by France and the United Kingdom on the Suez issue.⁵⁸

The collapse of the new government of the former Belgian Congo was initially referred to the Security Council on August 9, 1960⁵⁹ until Cold War tensions produced a series of crises that paralyzed the Security Council and could have disrupted the organization permanently with the Soviet demand for a TROIKA Secretariat to represent the communist world, the capitalist world, and the non-aligned world.⁶⁰

The rebirth of the original concept of the Security Council predated the collapse of Communism when the Security Council compelled a cease-fire in the eight-year war between Iran and Iraq,⁶¹ but this lesson was not understood in Iraq as it prepared to subdue and incorporate Kuwait.

The second Security Council enforcement action developed

the intention of his government to nationalize the Suez Canal, then owned by a corporation in which the majority ownership was British and French. Great Britain, France and Israel met at Sèvres, France to coordinate military action to prevent this seizure. Israel invaded Sinai on October 29, 1956. British forces were landed to secure the canal safety on October 29, 1956, after Egypt rejected a cease fire demand. Security Council action was vetoed by Great Britain and France, but the General Assembly was convened under the Uniting for Peace Resolution, G.A. Res. 337A, UNGAOR, 5th Sess., Supp. No. 20 at 10, U.N. Doc. A/1775 (1951) of Nov. 3, 1950, to make recommendations for the maintenance of peace.

57. The cease fire became effective November 6, 1956, and UNEF I was established on Egyptian territory. The Egyptians demanded withdrawal of UNEF from Egyptian soil, effective May 19, 1967. The war between Egypt and Israel resumed on June 5, 1967, and ended six days later with Israeli forces on the banks of the Suez Canal, in the Golan Heights of Syria and in control of Jordan's West Bank territory. A cease fire went into effect June 10, 1967, and continued until the Yom Kippur War that began on October 6, 1973 and ended with another ceasefire on October 24, 1973.

58. It is hard to be exact about Cold War vetoes; some estimate that the Soviet Union exercised its veto 234 times, the United States 68 times, the United Kingdom 30 times, France 18 times, and China 3 times. Threats of veto often led to the withdrawal of proposals.

59. The Belgian Congo, a colony since 1908, became independent June 30, 1960. Civic disturbances and army mutiny caused foreigners to flee widespread violence.

60. The death of Secretary General Dag Hammarskjöld in a plane crash occurred on September 17, 1961 en route to meetings with the belligerents in the Congo.

61. Secretary General Javier Perez de Cuellar (1982-1992) first determined that neither the United States nor the Soviet Union saw any Cold War implications in an end to the eight year war, begun by Iraq on September 22, 1980. The Security Council ordered a cease fire on August 20, 1988.

when Iraq invaded Kuwait on August 2, 1990.⁶² The same day, the Security Council denounced the invasion and demanded that Iraq withdraw immediately and unconditionally.⁶³ A cascade of economic sanctions over the next four months did not produce Iraqi withdrawal.⁶⁴ Accordingly, the Security Council authorized the use of force to compel Iraqi withdrawal.⁶⁵

The successful liberation of Kuwait in 1991 should have produced repetitive enforcement actions whenever international peace and security were threatened. It did not. Freed from actual communist vetoes, the Security Council operated under the threat of vetoes, making the Security Council a virtual copy of the General Assembly where business is done through consensus resolutions.⁶⁶ The Security Council cannot claim that it preserved international peace and security in Bosnia,⁶⁷ Somalia,⁶⁸

62. The invasion had been preceded by unfruitful negotiations between Iraq and Kuwait concerning oil-drilling activities in the unmarked border region.

63. S.C. Res. 660, U.N. SCOR, 46th Sess., 2932d mtg., U.N. Doc S/RES/660 (1990). The vote was 14 in favor, 0 opposed, 1 abstention (Yemen).

64. S.C. Res 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/PV.2933 (1990), of Aug. 6, 1990, the vote was 13-0 with 2 abstentions (Cuba and Yemen); S.C. Res 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/Res/662 (1990), of Aug. 9, 1990, the vote was 15-0. S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg., U.N. Doc. S/Res/664 (1990), of Aug 18, 1990, the vote was 15-0; S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/Res/665 (1990), of Aug. 25, 1990, the vote was 13-0 with 2 abstentions (Cuba and Yemen). S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/Res/666 (1990), of Sept. 13, 1990, the vote was 13-2 (Cuba and Yemen); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg., U.N. Doc. S/Res/667 (1990), of Sept. 16, 1990, the vote was 15-0; S.C. Res. 669, U.N. SCOR, 45th Sess., 2942d mtg., U.N. Doc. S/Res/669 (1990), of Sept. 24, 1990, the vote was 15-0; S.C. Res. 670, U.N. SCOR, 45th Sess., 2943rd mtg., U.N. Doc. S/Res/670 (1990), of Sept. 25, 1990, the vote was 14-1 (Cuba); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/Res/674 (1990), of Oct. 29, 1990, the vote was 13-0 with 2 abstentions (Cuba and Yemen).

65. S.C. Res. 678 U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/PV.2963 (1990), of Nov. 29, 1990; the vote was 12 in favor, 2 opposed (Cuba and Yemen) and 1 abstention (China). See Burns H. Weston, *The Gulf Crisis in International and Foreign Relations Law, Continued: Security Council Resolution 678 and Persian Gulf Decision Making Precarious Legitimacy*, 85 AM. J. INT'L. L. 516 (1991).

66. Consensus resolutions in the General Assembly became customary after 1965 because of the effect of Article 19 of the Charter depriving States, delinquent in paying their assessed contributions, of their votes in the General Assembly. Even after an Advisory Opinion, *supra* note 14, determined that the UNEF and UNOC operations were proper expenses of the United Nations, France and the Soviet Union, two permanent members of the Security Council, indicated they would continue to refuse to pay these assessments. (Article 19 does not affect votes in the Security Council). For a critique of the Council, see Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF., May-June 2003, at 16 (2003).

67. Bosnia (UNPROFOR) S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N.

Rwanda,⁶⁹ and Kosovo,⁷⁰ where violence went unrestrained by the Council. The U.S. invasion of Afghanistan, a response to the September 11, 2001 attacks on New York and Washington by terrorists, met the modern "Just War" criteria of self-defense and Security Council authorization.⁷¹ However, the wisdom and legality of the 2003 war against Iraq is being judged in a different context — the inaction of a politically divided Security Council.

IV. REHEARSAL FOR IRAQ: KOSOVO AND THE SECURITY COUNCIL

The 2003 uses of force against Iraq and the 1999 uses of force against Serbia because of Kosovo are, in some ways, similar. Two months of air war against Serbia by NATO forces led by the United States (March-June 1999) were followed by the occupation of Kosovo by NATO forces to separate the Yugoslav and Kosovar armies. Four years later, two months of air and ground war against Iraq by "coalition" forces led by the United States (March-May 2003) brought an end to battlefield warfare, but not to sudden death and injury to soldiers and civilians. Differences based on history exist as well: an all-Muslim State in Iraq and a

Doc. S/RES/743 (1992), of Feb. 21, 1992, adopted by a vote of 15-0; (UNMIBH) S.C. Res. 1035, U.N. SCOR, 50th Sess., 3613th mtg. P 3, U.N. Doc. S/RES/1035 (1995), of Dec. 21, 1995, adopted by a vote of 15-0. *See infra* notes 84-88.

68. Somalia (UNOSOM I) S.C. Res. 751, U.N. SCOR, 3069th mtg., at 3, U.N. Doc. S/RES/751 (1992), of Apr. 24, 1992, adopted by a vote of 15-0; (UNOSOM II) S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993), of Mar. 26, 1993, adopted by a vote of 15-0.

69. Rwanda S.C. Res. 812, U.N. SCOR, 48th Sess., 3183rd mtg., U.N. Doc. S/RES/812 (1993), of Mar. 12, 1993, adopted by a vote of 15-0; S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), of May 25, 1993; S.C. Res. 872, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/872 (1993), of Oct. 5, 1993, and S.C. Res. 955, of Nov. 8, 1994.

70. Kosovo S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/Res/1160 (1998), of Mar. 31, 1998; S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998), of Sept. 23, 1998; S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/Res/1203 (1998), of Oct. 24, 1998; S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011 mtg., U.N. Doc. S/RES/1244 (1999), of June 10, 1999. *See Jules Lobel, American Hegemony and International Law: Benign Hegemony? Kosovo and Art. 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (2000); *see also* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention*, 93 AM. J. INT'L L. 824 (1999). *See infra* notes 90-100.

71. S.C. Res. 1368 of Sept. 12, 2001, adopted by a vote of 15-0. G.A. Res. 56/1, of Sept. 12, 2001. S.C. Res. 1373, of Sept. 28, 2001, adopted by a vote of 15-0. S.C. Res. 1378, of Nov. 14, 2001, adopted by a vote of 15-0. S.C. Res. 1383, of Dec. 6, 2001, adopted by a vote of 15-0. S.C. Res. 1386, of Dec. 20, 2001, adopted by a vote of 15-0.

multi-ethnic Balkan region cursed by religious, linguistic, and cultural differences.

Security Council ineptitude may be listed as the reason for NATO's use of force, but this is only partially correct. Kosovo must be seen against centuries of Balkan horrors and ten years of world-wide frustration at the actions of the Serb and Yugoslav leader Slobodan Milosevic, belatedly and unexpectedly supported by Russia's failed leader, Boris Yeltsin.

Russia became an important part of Balkan problems in the nineteenth century, as protector of Orthodox Christian Slavs to prevent Islamic Turkey from reasserting the claims of sixteenth century conquests⁷² and to prevent Roman Catholic Austria-Hungary from expanding its empire deeper into the Balkans.⁷³ In fact, Russian moves to protect Serbia after the assassination of the heir to the thrones of Austria-Hungary by a Serb in 1914 began the chain reaction of alliances that produced the First World War.⁷⁴

In the deep background was the creation in 1918 of an artificial union of various Balkan peoples, mutually antagonistic at least, but prone to ethnic violence: murder, rape, torture, and destruction. After the dissolution of the Austro-Hungarian Empire at the end of the First World War, the victorious allies encouraged the creation of the Kingdom of the Serbs, Croats, and Slovenes under the royal house of Serbia.⁷⁵ (Serbs and Croats speak the same language, but it is spelled in the Cyrillic alphabet in Serbia and in the Latin alphabet in Croatia). The kingdom was renamed Yugoslavia in 1929; but ethnic tensions persisted, driven by religion: the Orthodox serbs versus the Roman Catholic Croats and a substantial Muslim population inherited from

72. While there was an intellectual movement known as Pan-Slavism, it does not appear to have affected foreign policy. Russia fought eleven wars with Turkey between 1677 and 1918. See NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA* 428-64 (1963); HUGH SETON-WATSON, *THE RUSSIAN EMPIRE 1801-1917*, at 445-60, 686-98 (1967).

73. Turkey's enfeebled sultanate lost control over the non-Turkish parts of the Balkans in the nineteenth century as Orthodox and Slavic nationalism advanced. Austria-Hungary advanced from its base in Croatia and acquired virtual control in Bosnia by the Congress of Berlin in 1878. Austria-Hungary annexed Bosnia-Herzegovina outright in 1908. See EDWARD CRANKSHAW, *THE HAPSBURGS* 251-59 (1971).

74. The assassination of the Austrian heir, Franz Ferdinand and his wife in Sarajevo, Bosnia, by a Serb on June 28, 1914 began the rush to the First World War. See *supra* note 32.

75. McMILLAN, *supra* note 40, at 109-24.

five hundred years of Turkish rule.⁷⁶

During the Nazi occupation of 1941-1945 there was a civil war between Tito's "partisans," mostly Serb communists (although Tito, Josip Broz, was a Croat) and the "Chetniks" of Draja Mikhailovic, largely Croat. Furthermore, there was also active collaboration with the Nazis by a Croat regime led by Ante Pavelic, leader of the Ustashe [Revolutionary] Party. The Nazis broke up pre-war Yugoslavia, awarding portions to their allies; Hungary, Albania, Bulgaria, Italy, and German-annexed Austria.⁷⁷

At the end of the Second World War, Marshall Tito was in firm control of the country; the monarchy was abolished and a new federal Nation of six constituent republics (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia), was established in 1946 under communist control with Serbs the largest ethnic group in the federal union.⁷⁸

After Tito's death in May 1980, a collective leadership succeeded, alternating the presidency between the constituent republics. A new Serb strongman, Slobodan Milosevic, gradually emerged along with a fiery Serb nationalism seeking to establish a "Greater Serbia" cleansed of non-Serb populations.⁷⁹

Even under Tito, Yugoslavia did not respond to every demand of Stalin and his successors and Yugoslavia developed its own brand of socialism until the supremacy of the Communist Party ended in January 1990, seventeen months before the collapse of the Communist Party in the Soviet Union. Without the compulsive force of Communist centralization, Slovenia and Croatia seceded from Yugoslavia on June 25, 1991, and the Soviet Union broke up in December 1991 as the independence of the sixteen Soviet republics was recognized.⁸⁰

The Yugoslav Army attempted to prevent the secession of Slovenia, unsuccessfully, and threatened to use force against

76. Interwar Yugoslavia was given memorable treatment by the late Rebecca West in *BLACK LAMB AND GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA* (1941).

77. Croatia's short-lived independence was recognized by Nazi Germany and its allies. The Nazis awarded Bosnia-Herzegovina to Croatia, but gave the Dalmatian coast to Italy.

78. *THE CREATION OF YUGOSLAVIA, 1914-1918* (Dimitrije Djordjevic ed., 1980).

79. LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997).

80. See DAVID REMNICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* (1993); see also MICHAEL BESCHLOSS & STROBE TALBOTT, *AT THE HIGHEST LEVELS* (1993).

Croatia, but the European Union persuaded the parties to agree to a cease fire on August 31, 1991.⁸¹ Slovenia and Croatia became members of the United Nations on May 22, 1992.

While independence of Slovenia was achieved with little violence, Croatian independence had occurred after a long period of Croat terrorism against federal Yugoslavia.⁸² The 1991 E.U. cease fire did not hold in Croatia as Serbs sought to join a portion of Croatia (Krajina) to a greater Serbia. Civil war, aided by Serbia, continued in 1993 and 1994 until Croats regained control of Serb-occupied portions of Croatia.⁸³

It was in the background of the Serb-Croat war in Croatia that Bosnia-Herzegovina ("Bosnia") sought independence by a referendum on February 29, 1992. A series of violent confrontations between the three ethnic components of the province developed.⁸⁴ A full civil war began in 1992 with "ethnic cleansing" of Moslems by Serbs and genocidal massacres of Moslems and a Serb siege of the capital Sarajevo.⁸⁵ The European Union and the United States recognized the new Bosnian republic on April 7, 1992. Bosnia became a member of the United Nations on May

81. European Union (formerly European Community). Slovenian independence is discussed in SILBER & LITTLE, *supra* note 79, at 105-18, 154-69.

82. See generally MARCUS TANNER, *CROATIA: A NATION FORGED IN WAR* 276-98 (2d ed. 2001).

83. The Security Council made a threshold finding of threat to the peace in Yugoslavia in S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991), of Sept. 25, 1991, adopted by a vote of 15-0. Yugoslavia requested a peace-keeping operation on November 26, 1991, to authorize a peace-keeping force as soon as peace could be restored. The Security Council established the interim peace-keeping force (UNPROFOR) by S.C. Res. 743, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992), of Feb. 21, 1992, adopted by a vote of 15-0. UNPROFOR's mandate was renewed by S.C. Res. 871, U.N. SCOR, 48th Sess., 3286th mtg., U.N. Doc. S/RES/871 (1993), of Oct. 4, 1993, and S.C. Res. 947, U.N. SCOR, 49th Sess., 3434th mtg., U.N. Doc. S/RES/947 (1994), of Sept. 30, 1994. Thereafter UNPROFOR was replaced by UNCRO (United Nations Confidence Restoration Operation in Croatia) by S.C. Res. 981, U.N. SCOR, 50th Sess., 3512th mtg., U.N. Doc. S/RES/981 (1995), of Mar. 31, 1995, adopted by a vote of 15-0. UNCRO's functions were to separate the hostile forces, supervise the ceasefire, and facilitate humanitarian assistance. Further Security Council Resolutions concerned specific areas where demilitarization was necessary after the withdrawal of UNCRO. See S.C. Res. 1037, U.N. SCOR, 51st Sess., 3619th mtg., U.N. Doc. S/RES/1037 (1996), of Jan. 15, 1996, adopted by a vote of 15-0. For the Croat war, see SILBER & LITTLE, *supra* note 79, at 134-53, 169-204.

84. Bosnia's population of four million is approximately 40% Serb, 38% Muslim, and 22% Croat. See *THE WORLD ALMANAC AND BOOK OF FACTS 2003*, at 765 (William A. McGeever, Jr. ed., 2003).

85. Sieges of Sarajevo, Srebrenica, and Gorazde occurred during this time period. The Bosnia war is discussed in SILBER & LITTLE, *supra* note 79, at 222-75.

22, 1992, and the rump of former Yugoslavia (Serbia and Montenegro) was denied the membership formerly held by Yugoslavia in the United Nations by General Assembly Resolution 47/1,⁸⁶ thereby effectively expelling Yugoslavia and requiring the rump Nation to apply for membership.

Civil war between Moslems and Croats in Bosnia was resolved by a cease fire on February 23, 1994. These groups patched together an agreement to form a single autonomous federal State, an important step towards the eventual reunification of Bosnia, but Serb warfare against Moslems and Croats was highly successful at this time, aided by the Serb remnant of Yugoslavia, and Serb forces occupied much of Bosnia.⁸⁷

E.U. efforts at peace-keeping could not possibly succeed as long as Serb sieges of Sarajevo and supposedly safe areas continued. Peace-making would have to take the place of peace-keeping and this function was assumed by NATO which threatened to use force against Bosnian Serb forces to make peace. Encouraged by Serbia to persevere there was no move by the Serbs to end the fighting until NATO began air attacks on Bosnian Serb forces at the end of August 1995.⁸⁸ Several weeks of NATO's air war produced proposals for peace talks which were

86. See G.A. Res. 47/1, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/1 (1992).

87. The Security Council had recognized the threat to peace in the region (see *supra* note 83 and accompanying text) and ordered that safe-haven areas be established in places of heavy fighting by S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993), of Apr. 16, 1993, and S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc. S/RES/824 (1993), of May 6, 1993, both adopted unanimously, but decided to take action under U.N. Charter Chapter VII in S.C. Res. 836, U.N. SCOR 48th Sess., 3228th mtg., U.N. DOC. S/RES/836 (1993), of June 4, 1993, adopted by a vote of 13-0 with 2 abstentions (Pakistan and Venezuela), having become alarmed at the grave and intolerable situation; gravely concerned with Serb unwillingness to accept peace proposals and condemning Serb obstruction to humanitarian relief. The Security Council decided to extend the mandate of UNPROFOR to protect safe areas and ensure humanitarian relief by ". . . necessary measures, including the use of force . . . including close air support." U.N. SCOR, 48th Sess., 3286th mtg., U.N. Doc. S/RES/871 (1993).

Finally, after the Dayton Peace Agreement, the Security Council created a civilian police force (UNMIBH) after UNPROFOR was withdrawn by S.C. Res. 1035, 50th Sess., 3613th mtg., U.N. Doc. S/RES/1035 (1995), of Dec. 21, 1995, adopted by a vote of 15-0.

88. See SILBER & LITTLE, *supra* note 79, at 311-63. S.C. Res. 836, U.N. SCOR 48th Sess., 3228th mtg., ¶10, U.N. DOC. S/RES/836 (1993) decides that: "Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary General and the Force, all necessary measures, through the use of air power, in and around the safe areas . . ."

held at Dayton, Ohio, leading to an agreement on November 21, 1995, achieved by U.S. Ambassador Richard Holbrooke to end the war and reconstitute Bosnia as a federal Nation. With peace achieved, peace-keeping again became possible and 60,000 NATO troops ("IFOR" or "Implementation Force") moved into Bosnia to separate the armies and attempt to return or relocate thousands of refugees.⁸⁹

It was in this 1991-1995 period that allegations of "ethnic cleansing," war crimes, and genocide were made and proven. Accordingly, the Security Council, acting under Chapter VII of the U.N. Charter, established an International Criminal Tribunal for Yugoslavia ("ICTY") by S.C. Res. 827.⁹⁰ The Tribunal began its work at the Hague with indictments for war crimes and crimes against humanity by October 1994. The Tribunal did not appear to be able to deal effectively with the Serbian atrocities until Serbia surrendered its former president, Milosevic on June 28, 2001.

Just as it seemed that violence in the former Yugoslavia had ended, and United Nations sanctions were lifted, a new war began in the southern part of Serbia, Kosovo, which had been an autonomous part of Serbia in the Yugoslav federation.⁹¹ While Serbs regard Kosovo as the Serb homeland, they had ceased to live there in large numbers and the inhabitants were mostly Albanians, divided by religion into Moslems, Orthodox, and Roman Catholic communities. In 1989, Serbia removed the autonomous status of Kosovo and began direct rule.⁹² Kosovo Albani-

89. See S.C. Res. 836, U.N. SCOR 48th Sess., 3228th mtg., U.N. DOC. S/RES/836 (1993). For a discussion of the Dayton talks see SILBER & LITTLE, *supra* note 79, at 364-79. The Implementation Force ("IFOR") was established by S.C. Res. 1031, U.N. SCOR 50th Sess., 3607th mtg., U.N. DOC. S/RES/4031 (1995), of Dec. 15, 1995, by a vote of 15-0. That resolution authorized IFOR to take "all necessary measures" to keep the fragile peace. *Id.*

90. See S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg., U.N. DOC. S/RES/827 (1993), of May 25, 1993, adopted by a vote of 15-0. The resolution notes flagrant violations of humanitarian law: "... mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing'" *Id.*

91. Resolving ethnic conflict within a multi-cultural State by creation of an autonomous unit within the State was a technique of the League of Nations in the Aland Islands dispute between Finland and Sweden in 1920. See *generally* NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* 334-56 (1999).

92. See GREG CAMPBELL, *THE ROAD TO KOSOVO: A BALKAN DIARY* (1999) (discussing the Serb elimination of autonomy).

ans responded by a declaration of independence in July 1990,⁹³ just before Bosnia, Croatia, Macedonia, and Slovenia declared their independence. Yugoslavia responded with military force and civil war between the Yugoslavs and Kosovo Albanians became a reality.

The Kosovo Liberation Army was organized to protect Albanian communities and began a direct challenge to Serb forces in 1997. It soon appeared that ethnic cleansing of Albanians (especially Moslems) was recurring in Kosovo as it had earlier in Bosnia. Full scale war with charges and counter-charges of genocide and war crimes raised the issue of United Nations involvement in the peace-making process.⁹⁴

The possibility of renewed use of force against Serbia provoked Russia to threaten to veto United Nations enforcement action. Thus, the first Kosovo resolution of the Security Council, acting under Chapter VII, imposed an embargo on the sale or supply of weapons to Yugoslavia (Serbia and Montenegro), but no interposition of United Nations forces. The action paragraphs "call upon" both sides to do something almost impossible: Serbia to resolve its problems with Kosovars by means of unacceptable proposals made by a powerful group of States (France, Germany, Italy, Russia, United States, and United Kingdom); the Kosovars to reject all forms of terrorism and to pursue their goals only through peaceful means.⁹⁵

The next year (1998) the Security Council tried again to become involved in the Kosovo civil war by demanding a cease-fire and decided, "to consider further action and additional measures" if a political solution cannot be achieved.⁹⁶ No steps for a political solution were taken and the violence continued, so NATO threatened to take collective action to fulfill S.C. Res.

93. Kosovar Independence is not a goal of the United Nations.

94. See ANDREW J. BACEVICH & ELIOT A. COHEN, *WAR OVER KOSOVO: POLITICS AND STRATEGY IN A GLOBAL AGE* (2001); Mary Ellen O'Connell, *The U. N., NATO and International Law After Kosovo*, 22 *HUM. RTS. Q.* 57 (2000). For a view of the Kosovo war as a healthy development, expressed by the former Legal Adviser to the State Department, see Abraham D. Sofaer, *International Law and Kosovo*, 36 *STAN. J. INT'L L.* 1 (2000).

95. See S.C. Res. 1160, U.N. SCOR 53d Sess., 3868th mtg., U.N. DOC. S/RES/1160 (1998), of Mar. 31, 1998, adopted by a vote of 15-0.

96. S.C. Res. 1199, U.N. SCOR 53d Sess., 3930th mtg., U.N. DOC. S/RES/1199 (1998), of Sept. 23, 1998, adopted by a vote of 15-0. For further discussion on S.C. Res. 1199, see *infra* note 102. The resolution contained sixteen paragraphs of demands and warnings to Yugoslavia.

1199. But NATO also did nothing immediately while both sides continued the violence and Albanians fled. Peace talks on Kosovo resumed in a desultory fashion in the new year (1999), while threats of renewed force against Saddam Hussein in Iraq were circulated by the United Kingdom and the United States.

As in Bosnia in 1995, NATO air power began an air war over Serbia on March 24, 1999 without a specific Security Council resolution authorizing use of force, but suggesting that it was a humanitarian intervention possibly authorized by S.C. Res. 1199. There had been an escalation of violence in the ground war by Serbia, causing more Albanians to flee across the borders to Albania or Macedonia.

Questions of the legality of the use of force became part of the tragedy of Kosovo as the Milosevic government of Serbia began law suits in the International Court of Justice against ten of the then sixteen NATO Member Nations, alleging illegal use of force in violation of the United Nations Charter, Article 2(4), and the 1949 Genocide Convention.⁹⁷ Under Article 38 of the Statute of the ICJ, the court had no compulsory jurisdiction over the United States⁹⁸ and Spain. Belgium filed an answer suggesting justification for the use of force as a humanitarian intervention.⁹⁹ The future of this litigation is uncertain; brought by Milosevic in the name of Serbia just before Milosevic was defeated for reelection and handed over to the International Tribunal, it is doubtful that Serbia, now again a member of the United Nations, will pursue it with the zeal it demands. This would obviously be a good time for the ICJ to interpret Articles 2(4) and 51 of the Charter, in the context of a humanitarian tragedy.

Another unusual legal maneuver after the beginning of NATO's war against Serbia was the resolution proposed by Russia in the Security Council for a condemnation of the NATO air war as a threat to peace and a violation of the Charter.¹⁰⁰ The

97. *Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal and United Kingdom*, 1999 I.C.J.

98. See Letter from George Schultz, former U.S. Secretary of State, to Perez de Cuellar, former Secretary-General of the United Nations (Oct. 7, 1985) (concerning the International Court of Justice).

99. Belgium responsive pleading, dated July 5, 2000, a 120 page document.

100. See JOHN NORRIS, *COLLISION COURSE: NATO, RUSSIA AND KOSOVO* (2004); HALL GARDNER, *DANGEROUS CROSSROADS: EUROPE, RUSSIA AND THE FUTURE OF NATO* (1997).

resolution failed on a vote of 3 to 12 (vetoes by France, the United Kingdom, and the United States). The positive votes were those of China, Namibia, and Russia. This Russian maneuver is at least unusual. A physically and morally weakened Yeltsin had to deal with a Russian army humiliated by civil war in Chechnya, a collapsing economy which had defaulted on its debts and the uncertain future of Russia's relations to NATO which would shortly expand to the borders of the former Soviet Union in Byelorussia (Belarus) and Ukraine.

Nothing stopped the war — seventy-eight days of air assault on Serbia's military and industrial capacity. Milosevic could no longer sacrifice his people to the demands of Greater Serbia and by June 10, 1999, Serbia acceded to NATO's demands, including Kosovo Force ("KFOR"), a force of 50,000 NATO troops to observe the demilitarization of Kosovo and the return of the Albanian Kosovars to their ravaged homes.¹⁰¹

Certainly S.C. Res. 1199 comes very close to authorizing the use of force by its demand of "further action" and it is a source of wonder that it did not provoke vetoes by Russia and China.¹⁰²

The effect of NATO's Kosovo War as regional self-defense, humanitarian intervention, or anticipatory self-defense is unclear; the words of Secretary General Kofi Annan were not denunciatory, merely mysterious in his remarks: "[N]ormally a U.N. Security Council Resolution is required."¹⁰³

V. *THE IRAQ WAR OF MARCH-APRIL 2003*

One year after the attacks on New York and Washington, and during the war against the Taliban and Al Qaeda in Afghanistan, the President of the United States addressed the General Assembly of the United Nations on September 12, 2002, demanding that the Security Council enforce its resolutions against

101. See MALCOLM, *supra* note 91. See also S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011 mtg., U.N. Doc. S/RES/1244 (1999), of June 10, 1999 (providing for KFOR in a lengthy resolution). Annex 2, paragraph 4 of this resolution noted that: "The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control . . ." *Id.* at ann. 2(4).

102. See S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998), of Sept. 23, 1998, adopted by a vote of 15-0. S.C. Res. 1199, paragraph 16 states: "*Decides*, should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region . . ." *Id.* at ¶16.

103. O'Connell, *supra* note 94 (quoting Secretary General Kofi Annan).

Iraq.¹⁰⁴ The speech also threatened “unavoidable action” if Security Council resolutions were ignored.¹⁰⁵

Congress supported the threat of action on October 16, 2002, authorizing use of United States Armed Forces “. . . to defend the national security of the United States against the continuing threat posed by Iraq”¹⁰⁶

It is uncertain which Security Council Resolutions were intended. Clearly there were at least twenty-eight Security Council resolutions beginning on August 2, 1990 that might have been involved, although the continuing validity of some might be challenged.¹⁰⁷

Interpreting U.S. complaints as demanding exclusively the disarming of Iraq and removing “Weapons of Mass Destruction” (“WMD”), the Security Council adopted S.C. Resolution 1441 unanimously on November 9, 2002, offering a “final opportunity” to disarm, requiring a new effort at international inspection for weapons and demanding a complete history of all Iraqi efforts to develop chemical, biological, and nuclear weapons, and ballistic missiles.¹⁰⁸

Disagreement as to the results of the inspections and the completeness of Iraq’s Report demonstrated a split in the unity of the Security Council. The United States assisted by the United Kingdom, Spain, and Australia sought authorization for the use of force against Iraq to compel disarmament (also a change of regime). Momentarily setting aside potential vetoes by France, Russia, and China, there did not seem to be the nine affirmative votes to mandate the use of force, thus the issue was taken out of its proper legal context and politicized.

104. President George W. Bush, *THREATS AND RESPONSES: In Bush’s Words: On Iraq, U.N. Must Face Up to Its Founding Purpose*, N.Y. TIMES, Sept. 13, 2002, at A10.

105. *Id.*

106. Authorization For Use Of Military Force Against Iraq Resolution Of 2002, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498 (2002).

107. See Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and an 800 Pound Gorilla*, 26 HASTINGS INT’L. & COMP. L. REV. 159 (2003); see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 470, 471 (1992).

108. See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002), of Nov. 8, 2002, adopted by a vote of 15-0; see also *infra* notes 134-36. The record of Iraqi deception and defiance on disarmament can be reviewed in HANS BLIX, *DISARMING IRAQ* 215-75 (2004).

The United States delivered an ultimatum¹⁰⁹ to Iraq that President Saddam Hussein and his two sons (Qusay and Uday) must leave Iraq within forty-eight hours. No positive response was received. Accordingly, U.S. forces, assisted by a coalition of others — chiefly the United Kingdom — began an invasion and an air attack on Iraq on March 20, 2003.¹¹⁰ The military campaign was swiftly concluded and largely complete against organized resistance by May 1, 2003, when an end to major combat activity in Iraq was proclaimed by the President of the United States. This was hardly the end of war; death and casualties as gun battles and explosions continue even after the capture of former Iraqi President Saddam Hussein on December 13, 2003.

The argument against lawfulness of the U.S. invasion requires a *tabula rasa* [a clean slate] free of any previous history or relationship between Iraq and the United States. In that context, the United States used force in international relations to compel a change of regime in Iraq, without the Charter method to legitimize that use of force which would have been a new Security Council resolution under Article 42 to enforce compliance with previous Security Council resolutions.¹¹¹

In the absence of a 2003 Security Council Resolution, newly authorizing military force, the other alternative in this clean slate scenario is the inherent right of self-defense under Article 51, but that authority requires an armed attack by Iraq. Without an armed attack, can possession of weapons of mass destruction qualify as armed attack or an imminent threat of attack?

Here we confront the central ambiguity of Article 51. The inherent right of self-defense in customary international law

109. President George W. Bush, *THREATS AND RESPONSES; Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave'*, N.Y. TIMES, Mar. 18, 2003, at A14.

110. Elisabeth Bumiller & David Johnston, *A NATION AT WAR: BAGHDAD; Surprise Strike at Outset Leaves Urgent Mystery: Who Was Hit?*, N.Y. TIMES, Mar. 21, 2003, at A1. Two thousand bombs and forty cruise missiles were used the first day of combat. *See id.* The "coalition" forces are made up of contributions in men and materiel from thirty-six members of the United Nations. According to *globalsecurity.org*, Nations contributing more than 500 personnel were: United States, United Kingdom, Italy, Poland, Ukraine, Spain, Netherlands, Australia, Republic of Korea, Romania, and Japan. *See also* Anne Wickersham, *A Week at War*, ST. LOUIS POST-DISPATCH, Apr. 13, 2003, at A9.

111. *See* S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990). S.C. Res. 678 of November 29, 1990 authorized the use of military force. *See id.* S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991), of April 3, 1991, imposed a conditional cease fire. *See also infra* notes 122-27.

must have included anticipatory self-defense,¹¹² yet the requirement of an armed attack in the U.N. Charter implies a suicidal wait for a nuclear first strike that might obliterate the means of defense. While the International Court of Justice has not construed Article 51, there are Security Council opinions and decisions that clearly reject the idea of anticipatory self-defense.¹¹³ U.N. law does not permit the preemptive strike favored in current U.S. thinking, and it remains to be seen whether the Security Council will endorse the Iraq invasion retroactively in the same way as the Kosovo bombings were sanitized.¹¹⁴

A further difficulty for those who propose retroactive approval of military force is the apparent requirement in Article 42 itself that there must be proof that economic sanctions have failed before military force is used — a questionable interpretation that might frustrate international security. In the absence of Iraqi weapons of mass destruction, it is doubtful that economic sanctions to force disarmament could have failed to produce disarmament.

In contrast, to the *tabula rasa* or clean slate, scenario, however, is the cascade of Security Council resolutions from 660 to

112. The Caroline Affair of December 29, 1837 led to a serious crisis between the United States and the United Kingdom when a British military expedition entered the United States at Niagara Falls during an uprising in Canada in order to destroy an American vessel chartered by Canadian rebels. Self defense was argued by the United Kingdom but was refuted by U.S. Secretary of State Daniel Webster who responded to British assertions that “. . . exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation.’” 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 409-14 (1906).

113. In *Nicaragua v. United States*, the Court had refused to expand the case to include Honduras and El Salvador. See 1986 I.C.J. 4 (1986). Accordingly, the Vandenberg Reservation to the U.S. Consent to jurisdiction of the Court prevented a consideration of the United Nations Charter and the Charter of the Organization of American States.

S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/RES/487 (1981), of June 19, 1981 (Ossirac); S.C. Res. 573, U.N. SCOR, 40th Sess., 2615th mtg., U.N. Doc. S/RES/573 (1985), of Oct. 4, 1985 (Tunis); and S.C. Res. 517, U.N. SCOR, 37th Sess., 2389th mtg., U.N. Doc. S/RES/517 (1982), of Aug. 4, 1982 (Lebanon) condemn anticipatory self-defense assertions by Israel.

114. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999), of June 10, 1999. A step towards *nunc pro tunc* was taken in S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003) of May 22, 2003, adopted by a vote of 14-0 (Syria absent), a clear recognition of the consequences of the use of force against Iraq. See Richard A. Falk, *What Future for the United Nations Charter System of War Prevention?*, 97 AM. J. INT'L. L. 590 (2003); see also *supra* note 106 and accompanying text.

1441 on Iraq. In considering each of these, the question is whether a resolution has expired by specific termination date or because its purpose has been fully achieved.¹¹⁵ Beyond these types of deliberate terminations, are resolutions "calling upon" or "demanding" certain conduct, for which Security Council silence about termination is ambiguous. It may be argued that the passage of time alone terminates the effectiveness of resolutions. On the other hand, it can be argued that having not provided for termination, the Security Council had no intent on termination whatsoever and was content to allow the situation to develop in a manner to be determined later by the Council, having retained jurisdiction of the issue.

To understand the flood of resolutions on Iraq, it is necessary to return to the Gulf War of 1990-1991. Security Council Resolution 660 of August 2, 1990 contained the Council's threshold finding of threat to international peace and security by Iraq's invasion of Kuwait, and demanded Iraqi withdrawal from Kuwait immediately.¹¹⁶ When there had been no immediate Iraqi withdrawal, resolutions under Article 41 imposed and enforced economic sanctions on Iraq.¹¹⁷ Thereafter the Security Council cited its Chapter VII authority, thus imposing compliance by all members, pursuant to Article 48.¹¹⁸ Resolution 661 established a Special Committee to regulate the embargo on exports and imports imposed therein and a freezing of Iraqi as-

115. See U.N. CHARTER art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate . . .").

116. Expiration dates are rarely used, but terminations may be implied from conditions dependent on "if," "until," or similar words. Cf S.C. Res. 1031, U.N. SCOR 50th Sess., 3607th mtg., at ¶19, U.N. DOC. S/RES/4031 (1995), of Dec. 15, 1995 (terminating the authority of previous resolutions when IFOR replaced UNPROFOR). The Security Council has also imposed time limits on certain actions, see S.C. Res. 954, U.N. SCOR, 49th Sess., 3447th mtg., U.N. Doc. S/Res/954 (1994), of Nov. 4, 1994 (terminating the Somalia Mission on March 31, 1995).

117. S.C. Res. 660, U.N. SCOR, 46th Sess., 2932d mtg., U.N. Doc S/RES/660 (1990), of Aug. 2, 1990, adopted by vote of 14-0 (Yemen abstained). The Council invoked its Chapter VII powers by the words, "Acting under Articles 39 and 40 of the Charter . . ." Shaw J. Dallal, *International Law and the United Nations Role in the Gulf Crisis*, 18 SYRACUSE J. INT'L. L. & COM. 111 (1993).

118. See U.N. CHARTER art. 48(1). The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.

sets.¹¹⁹ Resolution 662 nullifies Iraq's annexation of Kuwait.¹²⁰ Resolution 665 authorizes the use of force to halt all Iraqi shipments inward or outward.¹²¹ Resolution 666 provides an humanitarian exception for imports, and Resolutions 667 and 674 protect diplomats accredited to Kuwait.¹²² None of these resolutions had a time limit except Resolution 674 which notes that the Council will, "remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored"¹²³

The crucial Resolution 678¹²⁴ moves from Article 41 authority to Article 42, use of military force, in the broadest possible terms, use of "all necessary means."¹²⁵ Instead of the predicted "mother of battles" the First Gulf War began with a devastating air attack and quickly concluded with a ground offensive of four days that produced a preliminary cessation of the allied attack in Resolution 686 of March 2, 1991.¹²⁶

There followed a second conditional cease fire Resolution (S.C. Res. 687)¹²⁷ to impose an effective end of Iraq's presence in Kuwait and the effective disarmament of Iraq so as to remove Iraq's threat to its neighbors. This complex resolution, in nine

119. See S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990), of Aug. 6, 1990, adopted by a vote of 13-0 (Cuba and Yemen abstaining).

120. See S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/RES/662 (1990) of Aug. 9, 1990, adopted by a vote of 15-0.

121. See S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990), of Aug. 25, 1990, adopted by a vote of 15-0.

122. See S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/RES/666 (1990), of Sept. 13, 1990, adopted by a vote of 15-0; S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg., U.N. Doc. S/RES/667 (1990), of Sept. 16, 1990, adopted by a vote of 15-0; S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/Res/674 (1990), of Oct. 29, 1990, adopted by a vote of 13-0 (Cuba and Yemen abstained).

123. S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/Res/674 (1990).

124. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990), of Nov. 29, 1990, adopted by a vote of 12-2 (Cuba and Yemen), with 1 abstention (China).

125. See *id.*

126. S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991), of Mar. 2, 1991, confirmed the suspension of offensive combat operations, simultaneously confirming Iraq's agreement to comply fully with twelve prior Security Council resolutions. The Resolution sets out four demands of a military nature and four demands to restore the status quo, including liability for all losses to Kuwait and third States as a result of the invasion of Kuwait. See Christopher John Sabec, *The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait*, 21 GA. J. INT'L & COMP. L. 63 (1991).

127. See *infra* note 128 and accompanying text.

parts, affirms all previous resolutions (necessarily including the use of force in Resolution 678) excepting the lifting of the sanctions that had applied to Kuwait during Iraqi occupation, thus all the sanctions already imposed on Iraq remain in force until full compliance by Iraq is achieved. The Council's decision to remain seized of the matter provides that it will take, "such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area," — hardly a termination of authority to use military force.

Unlike the Second World War, when defeated Germany and Japan were occupied by the victorious allies, the Iraqi dictator Saddam Hussein and the Baath Party remained in control of Iraq and during the ensuing twelve years Iraq repeatedly defied and deceived the United Nations Security Council, crippling all efforts to carry out the thorough inspections and monitoring of facilities decreed by the Security Council in Resolution 687. At the same time as 687, the Security Council broke the precedent of Charter Article 2(7), non-interference in domestic affairs, and ordered the Iraqis to cease attacking its Shi'ite citizens in the south and its Kurdish citizens in the north, allegedly domestic affairs.¹²⁸ In Resolution 688, the Council protected the humanity and human rights of a Member State's own citizens against attacks by its sovereign.¹²⁹ The resolution condemns Iraqi repression of its own citizens and demands an end to the repression; there is no time limit on the resolution.

Seventeen months later, another Resolution (Res. 778)

128. See S.C. Res. 687, U.N. SCOR 46th Sess., 2981st mtg., U.N. DOC. S/RES/687 (1991), of Apr. 3, 1991, adopted by a vote of 15-0. This resolution created the United Nations Special Commission on Iraq ("UNSCOM") to inspect present and future sites of biological, chemical, and missile capabilities. See *id.* The nine parts deal with: the Iraqi-Kuwait borders deployment of UN observer unit to monitor the demilitarized zone; mandating destruction of chemical, biological, and nuclear weapons, and a Special UN Commission to monitor Iraqi compliance; return of Kuwaiti property previously looted by Iraq; creation of a fund so that the UN Compensation Commission can pay claims against Iraq; exemption of medicine and food stuffs from the embargo; repatriation of refugee Kuwaitis and prohibition of terrorist organizations. See Nigel D. White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?*, 29 CAL. W. INT'L. L.J. 243 (1999); see also Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724 (1998).

129. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/Res/688 (1991), of Apr. 5, 1991, adopted by a vote of 10 in favor, 3 opposed (Cuba, Yemen, and Zimbabwe), and 2 abstentions (China and India).

dealt with Iraqi assets, those frozen abroad and the receipts from sales of oil, in order to fund the U.N. Compensation Commission and the expenses of the United Nations. A further series of Resolutions dealt with deliberate Iraqi impediments to the weapons inspection activities of the United Nations Special Commission on Iraq ("UNSCOM").¹³⁰

Iraqi planning to assassinate former President George Herbert Walker Bush on a visit to Kuwait produced a U.S. attack on Iraqi Military Headquarters at Baghdad on June 26, 1993. Further U.S. missile attacks on Iraqi air defenses occurred in 1996. No resolution of the Security Council considered these uses of military forces, presumably under the authority of S.C. Res. 687 (cease-fire).¹³¹

In November, 1998 Iraqi intransigence on weapons inspection produced further threats of U.S. military action that the Security Council sought to head off by a new Resolution, (Res. 1205)¹³² again recalling all previous resolutions (including 678 and 687) and again acting under Chapter VII, the Council condemned Iraq's flagrant violation of Resolution 687 and demanded unconditional cooperation with the U.N. inspection, but, in pitifully weak language the Security Council merely remained actively seized of the matter. This resolution followed the bombing in August 1998 of U.S. embassies in Kenya and Tanzania resulting in U.S. guided missile attacks on Afghanistan's Al Qaeda training camps and a Sudan factory, allegedly self-defensive actions.

Iraq's continued defiance and rejection of Security Council demands for renewed inspection led to a brief renewal of the Gulf War when President Clinton ordered another missile attack on Iraq on December 17, 1998, known as Operation Desert Fox

130. S.C. Res. 778, U.N. SCOR, 47th Sess., 3117th mtg., U.N. DOC. S/RES/778 (1992), of Oct. 2, 1992, adopted by a vote of 14-0 (China abstained).

131. See S.C. Res. 687, *supra* note 128.

132. See S.C. Res. 1205, U.N. SCOR, 53rd Sess., 3939th mtg., U.N. Doc. S/RES/1205 (1998), of Nov. 5, 1998, adopted by a vote of 15-0; see also Michael Matheson et al., Symposium, *Legal Authority for the Possible Use of Force Against Iraq*, 91 AM. SOC'Y INT'L L. PROC. 136 (1998); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraq Inspection Regime*, 93 AM. J. INT'L L. 124 (1999). See generally *United States v. Usama Bin Laden et al.*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (prosecution of Al Qaeda associates accused in the bombing of the embassies).

that terminated after four days, but was condemned by Russia, China, and, unexpectedly, by France.

The year 1999 was a year of difficult negotiations that finally produced S.C. Res. 1284, approved by only two of the permanent members.¹³³ The preamble reviewed the eight years of failed efforts to inspect Iraq's weapons, noted the Anglo-American bargaining chip (continuation of economic sanctions), and noted the possible restoration of Iraq's oil industry (of interest to France and Russia).

The principal reason for the Resolution was the creation of the United Nations Monitoring, Verification, and Inspection Commission ("UNMOVIC") to replace the defunct UNSCOM created by S.C. Res. 687 in 1991. UNMOVIC was to have "immediate, unconditional, and unrestricted access to any and all areas . . . which they wish to inspect"

The obvious intention was an inspection system that would not permit evasion and would demonstrate Iraqi deception, deceit, and defiance in inspections under UNSCOM. This unbreakable obligation of Iraq was a substitute for the threat of force.

While the Resolution was not opposed by three permanent members (Russia, China, and France), they nevertheless abstained, betraying Security Council weakness. To the Iraqis, these abstentions must have signaled a return to the familiar deceptions and deceits of UNSCOM. To the authors of S.C. Res. 1284, Iraq's failures to comply with UNMOVIC would be an invitation to renew Operation Desert Fox. To the abstainers, UNMOVIC's failures would merely reopen another year of negotiation.

The Security Council Resolution closest in time to the 2003 Iraq War is Security Council Resolution 1441,¹³⁴ which was the consequence of the failure of UNMOVIC inspections and merits

133. See S.C. Res. 1284, U.N. SCOR, 54th Sess., 4084th mtg., U.N. Doc. S/RES/1284 (1999), of Dec. 17, 1999, adopted by a vote of 12-0 with 3 abstentions (China, France, and Russia).

134. See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002), of Nov. 8, 2002, adopted by a vote of 15-0; see also Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233 (2003). The changing positions of the European allies and the permanent members of the Council are reviewed in PHILIP H. GORDON & JEREMY SHAPIRO, *ALLIES AT WAR: AMERICA, EUROPE, AND THE CRISIS OVER IRAQ* 96-154 (2004).

close inspection. All previous resolutions were recalled, specifically 678 and 687. S.C. Resolution 678 (authorizing military force in 1990) is not only renamed but its key words, "all necessary means" to uphold and implement S.C. Resolution 660 are repeated. This is followed by a repeat recitation of the conditional cease fire resolution (Resolution 687) and its unfulfilled obligations by Iraq which are detailed. The Security Council then acts under Chapter VII: to declare Iraq in material breach of S.C. Resolution 687, but to afford, "a final opportunity," to comply with the enhanced inspection regime, and to furnish a complete history of weapons acquisitions. Opinions will differ about the meaning of "final;" Americans see the end of a process, others see a continuing process. The Council concluded with the threat of "serious consequences" as a result of Iraq's continued violation of its obligations. Again, opinions will differ; does the imposition of "serious consequences" differ significantly from the use of "all necessary means"? Nevertheless, there is no mention of the need for another resolution; rather, an ambiguous reference to a future meeting of the Council without stating its purpose.

Objections are made that S.C. Res. 1441 never ordered an attack on Iraq, but the Council has previously ordered the use of military force by indirection:

1950 "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace"

1990 "use all necessary means to uphold and implement Security Council Resolution 660"

Precision of language has never been regarded as a necessity in the Security Council, given the compromises in drafting that are essential to achieve the consensus of at least nine members with vetoes by none of the five permanent members. Possibly the drafters saw distinctions that could not be expressed in English (or any other modern language).

The problem with the use of Resolution 1441 as the authorization of military force is the ambiguity between the Council's threats of "final opportunity" and "serious consequences as a result of its continued violations" on the one hand¹³⁵ and the deci-

135. S.C. Res. 1441 states:
Acting under Chapter VII . . .

sion, "to convene immediately upon receipt of a report [of Iraq's deceit and disobedience]." This language seems to imply "no force yet," but its theatricality is limited by the fact that the Security Council is always in session in accordance with Article 28 of the Charter and there is no difficulty in convening a Council session at any time.¹³⁶

There are also textual problems with citation to Resolution 678 because of its reference to Resolution 661 and the latter's requirement that Iraq be expelled from Kuwait. There is, however, no explicit limitation on the use of force only to expel Iraq from Kuwait. There is also the argument that Resolution 687 must have intended to terminate the use of force at the Kuwait-Iraq border because that is what the military commanders did. Yet the demands on Iraq never ceased after 687, even though there was no military occupation. The inconsistencies of Resolution 1441 verge on incoherence and the resolution might be described as the nadir of the U.N. Charter system of international peace and security because of its ambiguities. Nevertheless, the series of resolutions from 687 to 1441 clearly imposes obligations on Iraq on the threat of resuming the war.

VI. SECURITY COUNCIL ACQUIESCENCE: NUNC PRO TUNC?

The Security council reemerged on May 22, 2003, somewhat uncertain of the future because of the cessation of warfare between organized armies after only three weeks of battle and maneuver. The war had begun March 20, 2003, with a cruise missile attack on Baghdad designed to kill Saddam Hussein and his government. U.S. Army and Marines moved into Iraq simultaneously, headed for Baghdad. Uniformed Iraqi forces evaporated,

(2) Decides . . . to afford Iraq by this resolution a final opportunity to comply with its disarmament obligations under relevant resolutions . . .

(13) Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.

See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Use of Military Force to Disarm Iraq*, 97 AM. J. INT'L L. 419 (2003); see also John Yoo, *Agora: Future Implications of the Iraq Conflict — International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

136. See U.N. CHARTER art. 28. Art. 28(1) states: "The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization."

so that by April 4, 2003, coalition ground forces surrounded Baghdad, which they occupied on April 8, 2003.

In the lengthy Resolution 1483,¹³⁷ of May 22, 2003, the Security Council noted the acceptance by the United States and the United Kingdom of the status as “occupying powers” in international law under the unified command labeled “The Authority,” to which other States may contribute personnel, equipment, and other resources. Twenty-seven action paragraphs under its Chapter VII authority followed. The Council “calls upon” the Authority to promote Iraqi welfare through effective administration of the territory. The Council calls upon “all concerned” to comply with the laws of war and the Geneva Conventions, furthermore to repatriate Kuwait personnel and property from the 1991 war. The Council then encouraged the United States and United Kingdom to keep the Council informed of the disarmament of Iraq. The Council also supported a transitional Iraqi administration leading to a representative government to assume the responsibility of The Authority.

Resolution 1483 requests the Secretary General to appoint a Special Representative to accomplish a series of nine tasks and requested the Secretary General to coordinate the approved “Oil for Food” Program with The Authority.

Resolution 1500¹³⁸ welcomed the new Iraqi Governing Council and established an Assistance Mission for Iraq. Five days later on August 19, 2003, disaster struck the United Nations effort as the Secretary General’s Representative, Sergio Viera de Mello, was killed along with twenty-two others when a truck bomb was detonated at U.N. headquarters.

Security Council Resolution 1511¹³⁹ deplored and condemned the loss of innocent lives in terrorist attacks, but called upon The Authority to return the government to the Iraqi people as soon as practicable. In these resolutions, the Security Council has accommodated itself to the consequences of a war it did not authorize.

The important point about the cascade of Security Council

137. See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003), of May 22, 2003, adopted by a vote of 15-0.

138. See S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc. S/RES/1500 (2003), of Aug. 14, 2003, adopted by a vote of 15-0.

139. See S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003), of Oct. 16, 2003, adopted by a vote of 15-0.

Resolutions is that there has never been a U.N. condemnation of the use of force by the United States, although there has been no endorsement either.

It may be at last that legal reasoning — especially the interpretation of texts — is inappropriate for the resolution of what is basically a political problem. Certainly the Security Council is not a court, and it has long been apparent that statements made by governments in the Council do not reflect the actual intentions of the governments. It is not inconceivable that a future Security Council may consider that the 2003 Iraq War was not an unjust war in terms of the requirements of the United Nations Charter.

CONCLUSION

This Article is neither a political endorsement of the 2003 Iraq War nor a political denunciation of decision-making at the highest level. The question is whether international law regulated the outbreak of war by the requirement that it be a just war.

Despite medieval theories that may have been part of moral theology rather than international law, it is apparent that the modern era was only concerned with the outbreak of war in the formality of a declaration of war before commencement of hostilities. We observed the decline of this formality in the Second World War and the subsequent operation of the U.N. Charter to protect international peace and security against illegal force by non-compliant Nations since 1945. The concluding unresolved issue is whether the 2003 Iraq War conducted by the United States and its coalition was a just war in terms of the United Nations Charter. Sufficient ambiguities are now present to impair an answer free of hesitations.