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## The United Nations and the Law of War: Power and Sensibility in International Law

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# The United Nations and the Law of War: Power and Sensibility in International Law

Simon Chesterman

## **Abstract**

This article serves as an introduction to the articles that follow, which examine questions of power and sensibility in four discrete ways. They look variously at the moral limits of international law, the extent to which power has been delegated to or asserted by the U.N. Security Council, the successes and failures of efforts at international criminal prosecution, and the challenge of applying the traditional laws of war in the context of a “Global War on Terror.” This introduction outlines the various contributions that follow and sketches out some potential implications.

# INTRODUCTION

## THE UNITED NATIONS AND THE LAW OF WAR: POWER AND SENSIBILITY IN INTERNATIONAL LAW

*Simon Chesterman\**

Hard cases make bad law, as Oliver Wendell Holmes, Jr., famously warned a century ago.<sup>1</sup> For international law, regulating the use of force is an especially hard case and the body of norms is comparatively new — a general prohibition on war is younger than Holmes' cliché.<sup>2</sup> A more recent corollary is that an international order in which the most powerful country on the planet is also the most frightened — or regards itself as the most vulnerable to attack — will be an unstable one. This instability plays out in the following set of essays that consider whether and how the United Nations and other instruments of international order can and should prevent war, contain its excesses, and recover from its losses.

Law's capacity to restrain power and prevent the co-optation of norms to serve the ends of the powerful has always presented difficulties to those who study and practice it. Writing on the development of the rule of law in eighteenth century England, the historian E.P. Thompson endorsed the Marxist view that law systematized and reified inequality between the classes.<sup>3</sup> Nevertheless, he argued, law also mediated those class relations through legal forms, constraining the actions of the ruling class.<sup>4</sup> For this reason, unusually for a Marxist, he termed the rule of law an "unqualified human good."<sup>5</sup>

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1. See *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904).

2. See U.N. CHARTER art. 2(4); see also Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57 (Kellogg-Briand Pact); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

3. See E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 259 (1975).

4. See *id.* at 262-63.

5. See *id.* at 266.

In contemporary debates about the relevance of the United Nations, there is an unhelpful tendency to focus almost exclusively on the relationship between the world organization and its most powerful member.<sup>6</sup> Within the United States, the United Nations is commonly regarded as an obstacle to — or, at best, a tool for — the implementation of U.S. foreign policy.<sup>7</sup> Few policy-makers seriously believe that the United Nations could play a role in the *formulation* of that foreign policy. Outside the United States, the United Nations is considered either a pawn of the superpower or idealized as the only means by which that superpower, Gulliver-like, might be restrained.<sup>8</sup> Such parodies both understate and overstate the significance of international law and international organizations. The power of international law, such as it is, lies not in its capacity to drive history nor even to provide the language in which it is written; rather, on a good day, international law may provide a grammar for that language: shared rules about what can and cannot be said, whose violation may undermine the legitimacy of an action but may also be challenged on the basis of what does and does not make sense.

The articles that follow examine these questions of power and sensibility in four discrete ways, looking variously at the moral limits of international law, the extent to which power has been delegated to or asserted by the U.N. Security Council, the successes and failures of efforts at international criminal prosecution, and the challenge of applying the traditional laws of war in the context of a “Global War on Terror.” This introduction outlines the various contributions that follow and sketches out some potential implications.

The first group of articles comprises Jean Bethke Elshtain’s

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6. See, e.g., John J. Kavanagh, *U.S. Powers and the United Nations Security Council*, 20 B.C. INT’L & COMP. L. REV. 159 (1997); Joseph Mettimano, *The United Nations Convention on the Rights of the Child and the Political Climate in the United States*, 5 GEO. J. FIGHTING POVERTY 209 (1998); James A.R. Nafziger & Edward M. Wise, *Section IV: The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421 (1998).

7. See Jules Lobel, *American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT’L L. 19, 20-23 (2000); see also Anne-Marie Slaughter, *AEI Conference Trends in Global Governance: Do They Threaten American Sovereignty? Article and Response: Building Global Democracy*, 1 CHI. J. INT’L L. 223, 223 (2000).

8. See Jan Kavan, *UN, USA, Iraq*, *Assemblée Européenne des Citoyens* (Oct. 24, 2003), at [http://www.reseau-ipam.org/article.php3?id\\_article=434](http://www.reseau-ipam.org/article.php3?id_article=434); see also *U.N. Chief, Iraqi Minister to Meet*, ST. PETERSBURG TIMES, Aug. 27, 1990, at 1A.

lecture on the just war tradition and natural law, together with responses from Thomas Lee and John Davenport. Elshstain's central argument is that a theologically-founded conception of human nature — love for one's neighbor — makes possible, indeed it may demand, the pursuit of "projects of justice" through the use of armed force.<sup>9</sup> Lee's response is a warning against uncritical embrace of unilateral assertions of how such projects are to be determined; institutions such as the U.N. Security Council, he argues, provide a useful check against the imprudent or abusive pursuit of such subjective enterprises.<sup>10</sup> Davenport seeks to map out a "third way" around these concerns through positing a federation of democratic Nations that would replace international vigilantism with "a legitimate global police power."<sup>11</sup>

Though none mentions the word, a consideration of the just war tradition in the context of the 2003 war led by the United States against Iraq surely invites comparison with former just wars fought under a banner unfortunately embraced by President George W. Bush: crusades. It was peculiarly awkward that in both Afghanistan and Iraq the European Crusaders of the Middle Ages were known as "Franks" — coincidentally the surname of General Tommy Franks, the Commander in Chief of U.S. Central Command who oversaw the two battles.<sup>12</sup> The troubling history of the just war goes beyond issues of packaging, however. Though typically identified today with humanitarian intervention, the origin of arguments that war may be waged on behalf of an oppressed population have always overlapped with arguments that war may be waged against the wicked. Such justifications for taking up arms can be found in the writings and practice of most religions and those empires styling themselves as civilized.<sup>13</sup> Wars and interventions over religious differences

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9. See Jean Bethke Elshstain, *The Just War Tradition and Natural Law*, 28 FORDHAM INT'L L.J. 742 (2005).

10. See Thomas H. Lee, *The Augustinian Just-War Tradition and the Problem of Pretext in Humanitarian Intervention*, 28 FORDHAM INT'L L.J. 756 (2005).

11. See John J. Davenport, *Just War Theory Requires a New Federation of Democratic Nations*, 28 FORDHAM INT'L L.J. 763 (2005).

12. U.S. military operations against Afghanistan were referred to initially as "Infinite Justice" — a title that captured the rhetoric of President Bush and the national sentiment in the weeks after September 11th. This was swiftly changed, however, when the Council on American-Islamic Relations and other Muslim groups complained that only Allah could dispense such justice. See Jonathan Weisman, *Mobilization Name Changes*, USA TODAY, Sept. 26, 2001.

13. On Christianity in particular, see ST. THOMAS AQUINAS, THE SUMMA THEO-

were frequent in Europe of the sixteenth and seventeenth centuries; many writers accepted these wars as just, either in themselves or insofar as they were undertaken on the orders of God.<sup>14</sup> Alberico Gentili was unusual among his contemporaries for observing that not merely Christians and Jews, but Ethiopians, Persians, Spartans, and Turks had all been stirred to arms by divine influence.<sup>15</sup>

The modern manifestation of the just war — “humanitarian intervention” — reached a brief high surrounding the Kosovo intervention in 1999, leading among other things to the completion of a path-breaking report entitled *The Responsibility to Protect*.<sup>16</sup> Completed before but published after September 11, 2001, this document both epitomized the heights of humanitarian rhetoric through the 1990s and demonstrated the shallowness with which those values were held by governments. As the war on terror and the axis of evil came to dominate the moral rhetoric of international affairs, saving the oppressed was put on

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LOGICA II, ii, Ques. 40 (Fathers of the English Dominican Province trans., 1947), available at <http://www.ccel.org/a/aquinas/summa/home.html> (last visited Apr. 21, 2005); see also AUGUSTINE, QUESTIONS ON THE HEPTATEUCH, ON JOSHUA, Ques. 10 (419); FRANCISCO SUÁREZ, ON THE THREE THEOLOGICAL VIRTUES: FAITH, HOPE, AND CHARITY Disp. XIII, reprinted in SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ 805 (Gwladys L. Williams et al. trans., Oxford: Clarendon Press 1944); HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES II(i) & (xx) (Francis W. Kelsey trans., Oxford Press 1925) (1646); EMMERICH DE Vattel, THE LAW OF NATIONS: PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS II(iv) (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758). On Islam and the doctrine of *jihad*, see MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 51-73 (1955).

14. See Coleman Phillipson, *Introduction*, in 2 ALBERICO GENTILI, DE JURE BELLI 34a (J. Rolfe trans., Oxford: Clarendon Press 1933) (1612) (listing Bartolus, Baldus, Joannes da Lignano [Giovanni de Legnano], John Wycliffe, Domingo Soto, Covarruvias, and Ayala); see also GIOVANNI DA LEGNANO, TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO 224-31 (James Leslie Brierly trans., Oxford Univ. Press 1917) (1447). BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III, I, ii, § 28 (John Pawley Bate, Carnegie Inst. 1912) (1582), states that war may not be declared against infidels merely because they are infidels, but that a just war may be waged on heretics who abandon the Christian faith. He then goes on to state that another just cause of war is where infidels “are found hindering by their blasphemies and false arguments the Christian faith and also the free preaching of the Gospel rule.” *Id.* I, ii, § 30 (citing ALPHONSUS DE CASTRO [Alfonso of Castile], DE JUSTA HÆRETICORUM PUNITIONE [On the Lawful Punishment of Heretics] bk. 2 (1547)).

15. See GENTILI, *supra* note 14, at 36.

16. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), at <http://www.iciss.gc.ca> (last visited May 2, 2005). See generally SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 211-18 (2001).

hold in favor of oppressing the wicked.<sup>17</sup>

The second mode of analysis of power and legitimacy in this collection considers the role of the U.N. Security Council. Eric Rosand discusses the emerging legislative role of the Council in the context of the war on terror, focusing in particular on the Council's adoption of resolutions of general rather than specific application. He argues, in essence, that this is a necessary and pragmatic response to such threats as terrorism and weapons of mass destruction.<sup>18</sup>

One of the most important transformations in international law through the twentieth century was the shift from predominantly bilateral treaty relations to multilateral institutional relations.<sup>19</sup> This has been an evolutionary process — a metaphor chosen carefully as it indicates the essentially random nature of many of the major changes and the tendency to judge them by reference to their effectiveness or capacity to survive. This ends-driven approach to international institutions may explain the current fascination with the role of the Security Council. Drawing an analogy with the centralization of authority in the modern State, comparisons may be drawn with Thomas Hobbes' argument that the necessary end of security in a state of nature requires the transfer of the means to maintain that security to a Leviathan.<sup>20</sup>

But is that what has happened in the current system? If there were some conscious effort to elevate the Security Council to the status of an international Leviathan, it would be necessary to provide it with the resources and the information necessary to do its job effectively. This has not happened. Instead, the Council operates with minimal Secretariat resources and depends almost entirely on the member States for information.<sup>21</sup> Lack of

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17. Responsibility to Protect may yet have a deeper and more lasting impact, following its endorsement by a major U.N. reform initiative in 2004-05. See High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 1, 2004), at <http://www.un.org/secureworld>.

18. See Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 *FORDHAM INT'L L.J.* 542 (2005).

19. See James P. Muldoon, Jr., *Introduction*, in *MULTILATERAL DIPLOMACY AND THE UNITED NATIONS TODAY* 1-2 (James P. Muldoon et al. eds., 1999).

20. See THOMAS HOBBS, *LEVIATHAN* ch. 17 (C.B. MacPherson ed., Penguin Books 1985) (1651).

21. See Eric Rosand, *Current Development: Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 *AM. J. INT'L L.* 333, 341 (2003).

independent capacity has not, of course, prevented the Council from acting. It is clear that the delegates to the San Francisco conference in 1945 did not intend to establish a world government, but the Council's powers have nonetheless grown exponentially through practice.<sup>22</sup> Surprises for the delegates from San Francisco would include the Council's role in delimiting borders, establishing international criminal tribunals, governing territory, and passing laws of general application on terrorism and nuclear proliferation.<sup>23</sup>

In part this activism is tolerated due to the Charter mechanism of each organ determining its own competence (rather than having the International Court of Justice operate as a constitutional court, for example);<sup>24</sup> in part it is encouraged by the Council's primary responsibility for international peace and security; and in part it is driven by the modest size of the Council and its domination by a small group of countries — especially during the periods of broad agreement among those countries on the appropriate response to certain incidents in the early 1990s and immediately following the September 11th attacks in 2001.

The absence of formal review mechanisms may appear to be a prohibitive barrier to establishing any check on the Council's expansive interpretation of its powers. Limits do exist, however. First, at the very least, the Council's own voting rules are a check on the unfettered exercise of those powers.<sup>25</sup> Second, the General Assembly can challenge the Council's actions through a censure,<sup>26</sup> question them through a request for an advisory opinion

22. See Lori Fisler Damrosch, *Recent Security Council Actions Concerning Internal Conflicts: Economic Sanctions*, AM. SOC. INT'L L. NEWSLETTER (Jan. 1994); see also Miguel Angel Gonzalez Felix, *Fifth Legal Advisers' Meeting at UN Headquarters in New York*, 89 AM. J. INT'L L. 644, 649 (1995).

23. See, e.g., Press Release, Council Decides to Establish Third Trial Chamber of International Criminal Tribunal For Former Yugoslavia, U.N. Doc. SC/6514 (1998); Blake Klein, *"Bad Cop" Diplomacy & Preemption: An Analysis of International Law and Politics Governing Weapons Proliferation*, 14 DUKE J. COMP. & INT'L L. 389 (2004)

24. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 66 (1963); see also YEHUDA BLUM, *GRADING THE UNITED NATIONS CHARTER* 251 (1993).

25. At least 9 of 15 Security Council members must vote in favour of a resolution in order for it to be binding on all Member States, and will fail if one permanent Security Council Member vetoes the measure. See U.N. CHARTER art. 27.

26. Cf. G.A. Res. 377A(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (1950) (the "Uniting for Peace" procedure, where the General Assembly asserted that it



of the International Court of Justice,<sup>27</sup> or curtail them through its control of the United Nations budget.<sup>28</sup> And third, ultimate accountability lies in the respect accorded to the Council's decisions: if the Council's powers were stretched beyond credulity, States retain the power simply to ignore the expression of those powers and refuse to comply.<sup>29</sup>

A third set of essays consider a specific example of efforts to enforce law through United Nations auspices in the form of international criminal prosecution. Daryl Mundis and James Cockayne survey the range of institutional forms that such prosecutions have taken. A decade into the work of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, as pressure on the Tribunals to wind up their business builds, Mundis looks to the experience of the Nuremberg Trials which completed their work in a mere four years.<sup>30</sup> One harsh reality of the international system is that the lessons that are most thoroughly learned tend to be those which are expensive. Whatever insights may be drawn from the Nuremberg process, the lesson from the 1990s experience of war crimes trials that has actually been internalized is that *ad hoc* tribunals on the scale of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda are unlikely to be repeated — primarily for reasons of cost.<sup>31</sup> Given the United States' ongoing allergic reaction to the International Criminal Court, hybrid tribunals such as that which Cockayne describes are sometimes proposed as a suitable compromise. Such tribunals, operating in theater with limited resources and a

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could meet to recommend collective measures in situations where the veto prevented the Council from fulfilling its primary responsibility for the maintenance of international peace and security). An untested corollary is that the Assembly could equally assert that the Council has exceeded its authority.

27. See U.N. CHARTER art. 96(1).

28. See U.N. CHARTER art. 17(1).

29. See *Certain Expenses Case*, [1962] I.C.J. Rep. 151, 230 (Winiarski J., dissenting); *Advisory Opinion, Namibia*, [1971] I.C.J. Rep. 16, 293 (Fitzmaurice J., dissenting); *Advisory Opinion, Namibia*, [1971] I.C.J. Rep. at 340 (Gros J., dissenting); *Preliminary Objections, Lockerbie Case*, [1998] I.C.J. Rep. 9, 24-25, ¶¶ 40-45.

30. See Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?*, 28 *FORDHAM INT'L L.J.* 591 (2005).

31. See Margaret Sewell, *Freedom From Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 *ST. THOMAS L. REV.* 365, 386 (2004); see also Lori Sinanyan, *The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)*, 73 *S. CAL. L. REV.* 1171, 1180 (2000).

defined lifespan, are in many ways asked to do more with less, as Cockayne argues.<sup>32</sup> The Special Court for Sierra Leone faces special difficulties due to its mandate to focus on those bearing the greatest responsibility for the trauma of that country's recent history — made difficult by the fact that those presumed most responsible are either dead or in Nigeria.<sup>33</sup>

These two articles are helpful checks on a literature that tends to idealize international criminal processes or truth and reconciliation commissions as the only appropriate coda to a bloody history. The comparison with Nuremberg is instructive in other ways, however. Even at the conclusion of World War II, it was not clear that the Allies would pursue legal avenues to punish the Nazi leadership. British Prime Minister Winston Churchill, for example, had favored the summary execution of fifty or so leading members of the Nazi apparatus.<sup>34</sup> Stalin approved: in a “semi-jocular” recommendation he suggested that 50,000 German general staff officers be shot.<sup>35</sup> This exchange tends to be dismissed as an aberration, but the serious reasons behind Churchill's proposal bear examination. It enjoyed the virtues of simplicity and candor. It would avoid a time-consuming and potentially embarrassing process of presenting a watertight case against the accused. And, crucially, the victors would not be required to pretend that a punishment imposed by one sovereign upon another required appeal to the neutral instrument of the law.<sup>36</sup> The decision to push for trials was largely driven by the United States: Henry Stimson, the U.S. Secretary for War, argued that a duly constituted international tribunal

32. See James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT'L L.J.* 616 (2005).

33. See Aryeh Neier, *Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years*, 35 *CASE W. RES. J. INT'L L.* 351, 351 (2003); see also Human Rights First, International Justice, The Special Court for Sierra Leone, at [http://www.humanrightsfirst.org/international\\_justice/w\\_context/w\\_cont\\_04.htm](http://www.humanrightsfirst.org/international_justice/w_context/w_cont_04.htm) (last visited Apr. 22, 2005).

34. See Justice Richard Goldstone, *The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?*, 27 *FORDHAM INT'L L.J.* 1490, 1492 (2003).

35. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 30 (1992).

36. See Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal*, 105 *YALE L.J.* 449, 457 (1995). In the case of the Israeli prosecution of Adolf Eichmann, the difficulties in extraditing him from Argentina led to “frequent” mention of the alternative of “kill[ing] him there and then, in the streets of Buenos Aires.” HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 265 (1963).

would better serve history than a repeat of the Treaty of Versailles, which had enabled Germans to claim that admissions of war guilt had been exacted under duress.<sup>37</sup> U.S. President Franklin Delano Roosevelt wavered, but his successor, Harry S. Truman, had utter contempt for the idea of summary executions. In the event, the final decision to cede “Power . . . to Reason,” as U.S. Chief of Counsel Justice Robert H. Jackson later termed it,<sup>38</sup> was formalized on a particularly inauspicious date. In one of history’s more brutal ironies, the treaty that established the Nuremberg trials was signed by the Allies the day before the United States dropped its second atomic bomb on Japan.<sup>39</sup>

The tension between power and law is most strained in the subject matter of the fourth subject considered in this collection: What laws should limit the actions by a Great Power seeking to defend itself against a potential catastrophic attack by an unseen enemy? Much has been written on the U.S. response to terrorism and actions taken in the name of preventing it. This encompasses accounts of the stretching of rules on the use of force, the impact on the laws of war including revitalization of the law of military occupation and the creation of new categories of detainees, the reconsideration of torture as a legitimate tool in a “war on terror,” and new constraints on civil liberties within the United States itself.<sup>40</sup> To this burgeoning literature, Lieutenant Colonel Paul E. Kantwill and Major Sean Watts add an important perspective from the ranks of those tasked with managing the tension between power and law on a daily basis: the Judge Advocates of the U.S. military. Kantwill and Watts examine the legal and political background to the U.S. decision to limit applica-

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37. See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 212-13 (1999).

38. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1949).

39. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed Aug. 8, 1945, 82 U.N.T.S. 279; see also 1945: *Atom Bomb Hits Nagasaki*, BBC ON THIS DAY (U.K.), at [http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid\\_3580000/3580143.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_3580000/3580143.stm) (last visited Apr. 22, 2005) (noting that the second atomic bomb hit Nagasaki on August 9, 1945).

40. See, e.g., Alexandra V. Orlova & James W. Moore, “Umbrellas” or “Building Blocks”?: *Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT’L L. 267 (2005); David L. Sloss, *Availability of U.S. Court to Detainee at Guantanamo Bay Naval Base — Reach of Habeas Corpus — Executive Power in War in Terror*, 98 AM. J. INT’L L. 788 (2004).

tion of the Geneva Convention to the “Global War on Terror” and the creation of a category of “unlawful combatants” (or extra-conventional persons); they juxtapose this with the institutional question of how the Judge Advocate General’s Corps has responded to this and other challenges presented by the war on terror.<sup>41</sup>

The assertion that those with moral right on their side enjoy special legal rights has frequently extended beyond the law regarding the decision to use force (*jus ad bellum*) to embrace those rules that govern how such coercive means are exercised (*jus in bello*). Indeed, in 1952 a committee of the American Society of International Law expressed doubts that international humanitarian law was fully applicable to U.N. forces, concluding that the United Nations should “select such of the laws of war as may seem to fit its purposes.”<sup>42</sup> Similar arguments were made (unsuccessfully) at Nuremberg concerning the Allied forces.<sup>43</sup> It has been assumed by most writers that even States involved in U.N.-authorized enforcement actions remain bound by their individual obligations under the *jus in bello*.<sup>44</sup> This would be true for actions authorized by the U.N. Security Council, but it would be less clear if the Council deployed forces made available to it under Article 43 agreements — a hypothetical proposition since no such agreements have been concluded.<sup>45</sup> Remaining doubts about the applicability of international humanitarian law to the United Nations have been removed by the United Nations itself.<sup>46</sup>

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41. See Paul E. Kantwill & Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons”: How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT’L L.J. 681 (2005).

42. *Should the Laws of War Apply to United Nations Enforcement Action?*, Report of Committee on Study of Legal Problems of the United Nations, 46 AM. SOC’Y INT’L L. PROC. 220 (1952).

43. See Bernard D. Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455, 461-62 (1947).

44. See DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE 503-06 (1964).

45. See generally Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT’L L. 185 (1996); Julianne Peck, *The UN and the Laws of War: How Can the World’s Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT’L L. & COM. 283 (1995); Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61 (1997).

46. See *Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), at [http://www.un.org/peace/st\\_sgb\\_1999\\_13.pdf](http://www.un.org/peace/st_sgb_1999_13.pdf); see also 1971 Zagreb Resolution of the Institute of Interna-

Agitation from within the military, a slow awakening by the U.S. judiciary, and the need for international support in counter-terrorist activities and the ongoing difficulties in Iraq have led to a reassessment of some of the decisions made in the early days of the war on terror. A cynic might attribute this to Churchill's observation that the United States is a country that can always be relied upon to do the right thing — once it has exhausted the alternatives.<sup>47</sup> An alternative view is that power and law are always in tension and that the present historical moment is just a particularly testing period for those norms that would constrain the capacity of the United States — a Great Power whose military budget is half of all global defense spending — to determine when and how to use the coercive means at its disposal.

Justice Holmes' observation about hard cases, quoted earlier, seems especially apt here. But the context from which the cliché is typically lifted also bears examination. As Holmes observed, the hard cases are frequently the great ones:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.<sup>48</sup>

How the current historical period will be viewed, what effects the war on terror will have on norms that limit humanity's proven capacity for destructiveness, and whether humanity's most powerful collectivity will ever regard multilateralism as an end rather than simply a means depends very much on the consequences of the hydraulic pressure currently at work on the international system.

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tional Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged, in ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 371 (2d ed. 1989).

47. "The Americans will always do the right thing . . . after they've exhausted all the alternatives." Winston Churchill (1874-1965).

48. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). Holmes, of course, was writing a dissent.