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## The War Against Iraq and the Future of International Law: Hegemony or Pluralism?

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# THE WAR AGAINST IRAQ AND THE FUTURE OF INTERNATIONAL LAW: HEGEMONY OR PLURALISM?

*Andreas Paulus\**

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## I. INTRODUCTION: A DEFEAT FOR INTERNATIONAL LAW?

The inability of the United Nations Security Council to determine the outcome of the Iraq crisis has been interpreted by many as a—possibly decisive—defeat for international law. Neoconservative intellectuals have denounced the impotence of international institutions and international law to cope with emerging threats to international security. In the words of Pentagon adviser Richard Perle: “[A]s we sift the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions.”<sup>1</sup> In

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1. Richard Perle, *United They Fall*, THE SPECTATOR, Mar. 22, 2003, at 22.

this perspective, international law is, on the one hand, unable effectively to implement its own decisions and thus useless, and, on the other, based on the sovereignty of democratic and 'rogue' states alike, and therefore immoral. Security can only be guaranteed by a strong national state. The checks and balances of power are of a domestic character.

Others, such as Jürgen Habermas,<sup>2</sup> have interpreted the Iraq war not so much as the defeat of international law, but of the normative authority of the United States. By acting without the blessing of the Security Council, the U.S.-led coalition was in breach of international law and the U.N. Charter, an order the United States had itself built after World War II "to save succeeding generations from the scourge of war."<sup>3</sup> By waging an aggressive war in violation of the U.N. Charter, the argument goes, America has lost the persuasive power of the great ideas on which its hegemonic power had as much rested as on its military and economic prowess.

The stakes of the debate go beyond the fight against an evil dictator or the threat of weapons of mass destruction: the nature of the international system and the moral authority of the largest power in the world are in play.<sup>4</sup> The premise of the project of international law, namely the development of international relations from the realm of brute power to the rule of law, seems lost.<sup>5</sup> The combination of impotent law and illegal power bodes badly for the rule of law in international affairs.

2. Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GERMAN L.J. 701 (2003), available at [http://www.germanlawjournal.com/pdf/Vol04No07/PDF\\_Vol\\_04\\_No\\_07\\_701-708\\_European\\_Habermas.pdf](http://www.germanlawjournal.com/pdf/Vol04No07/PDF_Vol_04_No_07_701-708_European_Habermas.pdf).

3. U.N. CHARTER pmb1.

4. For the perception of danger to the legal regulation of the law of force, see Lori Fisler Damrosch & Bernard H. Oxman, *Editors' Introduction*, 97 AM. J. INT'L L. 553 (2003) ("The military action against Iraq . . . is one of the few events of the U.N. Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century."). Thomas Franck presents a particularly bleak outlook:

Now, however, in the new millennium, after a decade's romance with something approximating law-abiding state behavior, the law-based system is once again being dismantled. In its place we are offered a model that makes global security wholly dependent on the supreme power and discretion of the United States and frees the sole superpower from all restraints of international law and the encumbrances of institutionalized multilateral diplomacy.

Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 608 (2003). Even more pessimistic: "Article 2 (4) has died again, and, this time, perhaps for good. . . . Thus has Article 2 (4) taken another hit; this time, however, as part of a much broader plan to disable all supranational institutions and the constraints of international law on national sovereignty." *Id.* at 610.

5. For famous discussions of this progression from war to law, see Immanuel Kant, *The Metaphysics of Morals*, in KANT: POLITICAL WRITINGS 131, 171 (Hans Reiss ed., H.B. Nisbet, trans., 2d ed., Cambridge University Press 1991) (1797); IMMANUEL KANT, *Perpetual*

And yet never before has international law been so popular. Millions of peaceful protesters were marching to uphold it, in Berlin, London, and even New York, the very place the Bush administration purported to defend by its attack. The Security Council, usually a serene, rubber-stamp body for the policies determined elsewhere, was transformed into a parliamentary assembly of the leading nations of the world, in which the U.S. Secretary of State attempted to produce evidence for the alleged Iraqi possession of weapons of mass destruction,<sup>6</sup> and in which the French and British foreign ministers exchanged heated remarks on the nature of the legal order and the legitimacy *vel non* of the use of force in international affairs, winning applause from the usually so tacit audience of diplomats and U.N. officials.<sup>7</sup> The non-permanent members of the Council, frequently intent to further the narrow self-interests of their countries or at least their regional group, resisted the pressure from the only superpower and denied the United States and the United Kingdom even the simple majority they had prematurely announced to be assured.<sup>8</sup> Looking to New York in those days in February and early March, the famous Martian might have come to believe that decisions are nowadays not only taken in Washington or Moscow, but also, if not primarily, in the halls of the U.N. building in Manhattan. Was this the ultimate climax before the curtain-call?

The following Article is devoted to the question of the future relevance of international law at a time when the idea of a “rule of law” in international affairs seems to be waning. Why should the sole superpower look to international law in its quest for protection from dangers

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*Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS, *supra*, at 93, 102–05 (1795); Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT: POLITICAL WRITINGS, *supra*, at 41, 47–49 (1784).

6. See U.N. SCOR, 58th Sess., 4701st mtg., at 2–17, U.N. Doc. S/PV.4701 (2003). For the later discovered inaccuracy of some of his statements, see the discussions of the testimony of Dr. David Kay, *infra* note 72.

7. See U.N. SCOR, 58th Sess., 4707th mtg., at 11, 18–21, U.N. Doc. S/PV.4707 (2003). Also note the open debate under Rule 37 of the Council’s Provisional Rules of Procedure. Council’s Provisional Rules of Procedure, U.N. SCOR, 58th Sess., 4717th mtg., U.N. Doc. S/PV.4717 (2003). But note the absence of the U.S. Secretary of State and the U.K. Foreign Secretary in the last debate of the Council before the war. U.N. SCOR, 58th Sess., 4721st mtg., UN Doc. S/PV.4721 (2003).

8. Note the alleged U.S. belief that, absent the French veto, it had a majority in the Council. Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defense*, 97 AM. J. INT’L L. 576, 577 (2003). Wedgwood’s source, a “veteran American diplomat,” is however contradicted by virtually every other observer. See the accounts by HANS BLIX, *DISARMING IRAQ* 7–8, 246–53 (2004); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT’L L. 607, 621, 626 (2003); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 629 n.3, 631 n.17 (2003) (citing additional sources). For further accounts of the backroom dealings see BOB WOODWARD, *PLAN OF ATTACK* 342–45 (2004) [hereinafter *PLAN OF ATTACK*]; James Rubin, *Stumbling into War*, FOREIGN AFF. Sept.–Oct. 2003, at 46, 46–57.

of weapons of mass destruction and terrorists? Is the European insistence on questions of legality, which was visible in the dramatic British attempts to secure some kind of Security Council backing and to advance international legal arguments for its participation in the invasion of Iraq, more than a fig leaf for a quest for political relevance in spite of military ineptitude?<sup>9</sup> First, we will look back to the debate on the lawfulness of the attack on Iraq. Before we can deal with the role and influence of international law on political decision-making, the arguments of the coalition in favor of the lawfulness of its invasion need to be taken at face value. Maybe the changed realities of international life, in the era of terrorism and the proliferation of weapons of mass destruction, require a reinterpretation of the law—a law that may be not so ironclad as some European powers wanted to make their audiences believe.<sup>10</sup> Or maybe we should give up the legal enterprise altogether, following those who regard law in general, and international law in particular, as the “ideology of the status quo.”<sup>11</sup>

Secondly, we will try a glimpse into the future of international law. Two contradictory options appear on the horizon: 1) the pluralist international order transforms into a “hegemonic international law,” in which the law translates the will of the hegemon into prescriptions binding on the others;<sup>12</sup> or 2) pluralism is maintained, but the superpower withdraws from multilateral institutions in matters dealing with the use of force, if not formally, then in substance; substituting permanent commitments by ad hoc “coalitions of the willing.” In conclusion, I argue that there are considerable stakes involved in whether the United States participates in multilateral processes, and that the United States ultimately has an interest in remaining within the system, just as much as the rest of the world has in the United States’ upholding the international legal order. Thus, instead of opting for one of two bad alternatives—power without legitimacy or legitimacy without power—we need to maintain a balance between them.

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9. This was the argument used by Robert Kagan in *Power and Weakness*, 113 POL’Y REV. 3 (2002), available at <http://www.policyreview.org/JUN02/kagan.html>. For responses to Kagan from a legal perspective, see Special Issue, *New Transatlantic Tensions and the Kagan Phenomenon*, 4 GERMAN L.J. 863 (2003), available at [http://www.germanlawjournal.org/pdf/Vol04/pdf\\_vol\\_04\\_no\\_09.pdf](http://www.germanlawjournal.org/pdf/Vol04/pdf_vol_04_no_09.pdf). In a recent article, Kagan emphasizes the importance of legitimacy, but charges the Europeans with ignorance of the threats. See Robert Kagan, *America’s Crisis of Legitimacy*, FOREIGN AFF., Mar.–Apr. 2004, at 65 (2004).

10. See, e.g., W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003); Wedgwood, *supra* note 8, at 582–84; John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 571–76 (2003).

11. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 86–87 (4th ed. 1967); cited in MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 5 (2001) [hereinafter *LIMITS OF LAW*].

12. See Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001); José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003).

## II. THE DEBATE ON THE LAWFULNESS OF THE INVASION OF IRAQ

In this Section, I will review the arguments leading towards the invasion of Iraq in the light of international law. However, this Article will not arrive at a definitive conclusion as to the lawfulness of the attack.<sup>13</sup> Rather, the goal is to show that the arguments on both sides are pre-determined by competing conceptions of the international legal order—conceptions which may switch from argument to argument, but which nevertheless demonstrate a certain cohesion on each side. For the opponents of the war, ‘international law administered by international institutions’ is not a mere illusion, but constitutes the only avenue towards a peaceful and just international order. For the supporters of military action against Saddam, international law and institutions are only valuable if they contribute to the effort to protect the world citizenry from terrorism and weapons of mass destruction. For the advocates of the war, there is no inherent value in the use of institutional means as opposed to unilateral action.

Some analysts have claimed that the purported reasons for the war were a sham, not worthy of serious debate. In the view of New York Times columnist Thomas Friedman, we have to distinguish between “the real reason, the right reason, the moral reason and the stated reason.”<sup>14</sup> Needless to say, to Friedman, the stated reasons were irrelevant. Rather, he argues:

[T]he “real reason” for this war, which was never stated, was that after 9/11 America needed to hit someone in the Arab-Muslim world. . . . The only way . . . was for American soldiers, men and women, to go into the heart of the Arab-Muslim world, house to house, and make clear that we are ready to kill, and to die, to prevent our open society from being undermined by this terrorism bubble.

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13. See Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot*, 41 ARCHIV DES VÖLKERRECHTS 255 (2003); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590 (2003); Farer, *supra* note 8; Franck, *supra* note 4; Richard N. Gardner, *Neither Bush nor the “Jurisprudes”*, 97 AM. J. INT’L L. 585 (2003); Dietrich Murswiek, *Die amerikanische Präventivkriegsstrategie und das Völkerrecht*, 56 NEUE JURISTISCHE WOCHENSCHRIFT 1014 (2003); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599; Stromseth, *supra* note 8; Christian Schaller, *Massenvernichtungswaffen und Präventivkrieg—Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 641 (2002); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557 (2003); Wedgwood, *supra* note 8; Yoo, *supra* note 10.

14. Thomas Friedman, *Because We Could*, N.Y. TIMES, June 4, 2003, at A31.

There is considerable evidence that Friedman may not be so far from the truth.<sup>15</sup> But the “stated reasons” are far from irrelevant. Rather, they reveal the legal and moral concepts behind the action, the reasons believed to work for the international audiences of governments, diplomats, and the general public, including the U.S. bureaucracy.<sup>16</sup> For those who believe in the vision of a rule of law in international affairs, the “stated,” most of the time legal, in any event publicly advanced reasons are at least as relevant as the allegedly “real,” psychological or political ones. The law must distinguish itself from politics to maintain its relevance. From that perspective, a legal analysis of the “stated” reasons for the war remains valid and important.<sup>17</sup> And yet, an exclusive focus on official legal representations, which will be designed to appease rather than provoke, may run into the danger of underestimating the extent and the depth of the challenge to international law. Thus, the following Article attempts to present the “Bush critique” of international law not only with reference to official pronouncements by the Bush administration, but also to speeches as well as policy documents explaining the position of the administration to the general public.

### 1. Iraq’s Violation of the Cease-Fire

The main argument of a legal nature advanced both by the United States<sup>18</sup> and the United Kingdom<sup>19</sup> consisted in the “material breach” by

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15. See, e.g., Interview by Sam Tannenhaus, Vanity Fair with Paul Wolfowitz, Deputy Secretary of Defense (May 9–10, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030509-depsecdef0223.html> [hereinafter Wolfowitz Interview]. Wolfowitz argues that “[t]he most significant thing that has produced what is admittedly a fairly significant change in American policy is the events of September 11th.” Accordingly, the threat emanating from weapons of mass destruction was not the only reason for war. “The truth is that for reasons that have a lot to do with U.S. government bureaucracy we settled on the one issue that everyone could agree on which was weapons of mass destruction.” Among other issues, he names the alleged connection between weapons of mass destruction and support for terrorism and the “criminal treatment of the Iraqi people.” For a careful assessment, see John B. Judis & Spencer Ackerman, *The First Casualty*, THE NEW REPUBLIC, June 30, 2003, at 14. For the failure to find weapons of mass destruction, see *infra*, notes 58, 72.

16. See Wolfowitz Interview, *supra* note 15.

17. See Jochen A. Frowein, *Ist das Völkerrecht tot?*, FRANKFURTER ALLGEMEINE ZEITUNG, Jul. 23, 2003, at 6 (arguing that formal pronouncements to the Security Council are more relevant for legal purposes than statements of a political character by the U.S. president).

18. Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (2003) [hereinafter *United States Letter*]. For a presentation of the relevant documents, see *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT’L L. 419 (Sean D. Murphy ed., 2003).

19. Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/350 (2003); see also Iraq: Legality of Armed Force, 646 PARL. DEB., H.L. (5th Ser.) (2003) WA2-WA3, available at

Iraq of the conditions of the ceasefire imposed by Security Council Resolution 687 of April 3, 1991. And indeed, the Security Council itself determined, in Resolution 1441 of November 8, 2002, “that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA.”<sup>20</sup> However, it “afford[ed] Iraq, by this resolution, a final opportunity to comply with its disarmament obligations” and set up “an enhanced inspection regime.”<sup>21</sup> Any further violations of Iraq’s disarmament obligations, however, would not only be considered another “material breach,”<sup>22</sup> but Iraq would face “serious consequences as a result of . . . continued violations.”<sup>23</sup> However, except the decision that the Security Council would “convene immediately” after respective reports by the Executive Chairman of the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC), the resolution neither contained an explanation of the serious consequences nor an explicit authorization of member states to use of force.

The U.S. State Department Legal Adviser, William H. Taft IV, and the Assistant Legal Adviser for Political-Military Affairs, Todd F. Buchwald, have recently argued that the determination of a material breach alone rendered the unilateral use of force lawful.<sup>24</sup> Others have maintained that the ambiguities of the resolution opened up both lines of argument: either in favor of unilateral measures because they were not expressly excluded, or in favor of collective measures by the Council.<sup>25</sup> However, in light of the requirement of a positive authorization according to Chapter VII of the Charter, it seems impossible to maintain the equal status of these two options. Indeed, the *travaux* of the resolution strongly support this point of view. Three permanent members, who could have vetoed Resolution 1441 and later refused to endorse U.S. and British proposals for a resolution authorizing the use of force, declared that their support of Resolution 1441 was premised on the absence of any “hidden trigger” for the unilateral use of force:

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[http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm#30317w01\\_snew2](http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm#30317w01_snew2) [hereinafter Lord Goldsmith] (answer of Lord Goldsmith).

20. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., at 3, U.N. Doc. S/RES/1441 (2002).

21. *Id.*

22. *Id.*

23. *Id.* at 5.

24. Taft & Buchwald, *supra* note 13, at 561; *see also* Lord Goldsmith, *supra* note 19 (making a similar argument).

25. *See, e.g.,* Bruno Simma, *Interview*, SÜDDEUTSCHE ZEITUNG, Feb. 1, 2003, at 11 (expressing, however, an unambiguous “legal-political” argument in favour of the latter solution).



Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on Iraq's weapons of mass destruction disarmament.<sup>26</sup>

Indeed, both the United States and the United Kingdom had declared that the resolution did not in any way authorize the use of force.<sup>27</sup> Contrary to the assertions of the U.S. Legal Advisors,<sup>28</sup> Resolution 1441 (2002) cannot be equated with the famous Resolution 678 authorizing the use of force for the liberation of Kuwait in 1990, because it does not authorize "Member States . . . to use all necessary means to uphold and implement" the relevant Security Council resolutions. The very fact that the United States and the United Kingdom sought another resolution expressly authorizing what they intended to do anyway shows that they found—or at least part of their political audiences found—that the legitimacy that such an authorization would have provided was worth taking the risk of refusal.<sup>29</sup> In the words of Thomas Franck:

In fact, what Resolution 1441 did was to purchase unanimity for the return of the inspectors by postponing to another day, which the sponsors hoped might never be reached, the argument as to whether Resolutions 678 and 687 had authorized further en-

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26. Iraq: Joint statement from the Popular Republic of China, the Federation of Russia, and France, Nov. 8, 2002, at [http://www.un.int/france/documents\\_anglais/021108\\_cs\\_france\\_iraq\\_2.htm](http://www.un.int/france/documents_anglais/021108_cs_france_iraq_2.htm) (last visited May 27, 2004).

27. See U.N. SCOR, 57th Sess., 4644th mtg., at 3, U.N. Doc. S/PV.4644 (2002) (statement of U.S. Ambassador Negroponte) ("[T]his resolution contains no "hidden triggers" and no "automaticity" with respect to the use of force.") In the foregoing meeting, Negroponte reserves for the U.S. the right to act unilaterally, but this claim is *not* derived from the resolution: "If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member state from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security." *Id.*; see also *id.* at 4–5 (statement of U.K. Ambassador Sir Jeremy Greenstock). Wedgwood, otherwise a staunch defender of the Iraq action, apparently agrees: "The debate over Resolution 1441 was thus a draw, and did not purport to revoke or amend the prior authority of Resolutions 678 and 687." Wedgwood, *supra* note 8, at 580.

28. Taft & Buchwald, *supra* note 13, at 562–63.

29. *But see* Taft & Buchwald, *supra* note 13, at 563 n.23. As Bob Woodward presents it, it was the British prime minister Tony Blair who insisted on trying to win a second resolution, against the will of both Vice President Cheney and Secretary of state Powell. PLAN OF ATTACK, *supra* note 8, at 297–98. President Bush apparently objected.

forcement at the sole discretion of one or more of the Council's members.<sup>30</sup>

Thus, any justification of the U.S.-U.K. action needs to look beyond resolution 1441 and the Charter provisions on the prohibition of the use of force. Indeed, the preamble of the resolution itself contains, if not a trigger, at least a hint to a more complex legal justification. Its preambular paragraphs refer to Resolution 678 of Nov. 29, 1990, which had, famously, authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) [demanding that Iraq evacuate Kuwaiti territory] . . . and to restore international peace and security in the area."<sup>31</sup>

The preamble of Resolution 1441 construes a connection between the cease-fire and the authorization to use force by "[r]ecalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein."<sup>32</sup> There is unquestionably some ingenuity in this wording, seemingly removing the ceasefire in case of Iraqi non-observance. However, the cease-fire was conditioned on Iraqi *acceptance*—which was forthcoming rather quickly—and not on Iraqi *compliance*. In addition, according to resolution 687, the Security Council reserved for itself the task "to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area."<sup>33</sup>

Accordingly, the Council was supposed to be the relevant decision-making body, not the Kuwaiti allies. Besides, by invading Iraq twelve years after the liberation of Kuwait, the United States and the United Kingdom pursued aims quite remote from those addressed in Resolution 678 (1990).<sup>34</sup>

However, the connection of the cease-fire with the authorization of the use of force, one may argue, goes deeper. Is not any armistice subject to the fulfillment of its conditions by the defeated party? According to Article 60 of the Vienna Convention on the Law of Treaties, a "material breach of a bilateral treaty by one of the parties entitles the other to

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30. Franck, *supra* note 4, at 614.

31. S.C. Res. 678, U.N. SCOR, 45th Sess., 2951st mtg., at 1, U.N. Doc. S/RES/0678 (1990) (emphasis added).

32. S.C. Res. 1441, *supra* note 20, at 2 (emphasis added).

33. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., at 10, U.N. Doc. S/RES/0687 (1991).

34. According to Yoo, Resolution 678 continued to authorize the use of force. Yoo, *supra* note 10, at 567. This understanding would transform Resolution 678 in an extraordinary semi-permanent authorization to use force against Iraq. All odds of the Charter system are against such an interpretation.

invoke the breach as a ground for terminating the treaty.”<sup>35</sup> Since the Security Council had confirmed recurring material breaches and warned of serious consequences in case of recurrence, and since Iraq had not fulfilled its reporting requirements contained in Resolution 1441—were the United States and the United Kingdom not in a position to declare the cease-fire terminated? However, the resolution is an enforcement measure by the Security Council under Chapter VII, not a treaty between individual Council members and Iraq. The only party to such a treaty with Iraq, e.g. the ensuing cease-fire agreement resulting from the acceptance of Resolution 687, is the United Nations. Accordingly, it would be for the Security Council to terminate the cease-fire, not for the United States and Britain.<sup>36</sup>

The laws of war do not help much more.<sup>37</sup> According to Article 40 of the Hague Regulations, “[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”<sup>38</sup> But the Hague Regulations presuppose the very existence of an armistice agreement by the parties, which does not exist between the coalition and Iraq, but only, if at all, between the United Nations and Iraq.

In the end, the lack of any language authorizing the unilateral use of force by member states leads to the conclusion that the Security Council had neither explicitly nor implicitly authorized the use of force. The remaining room for unilateral action, however, depends on the question of whether one regards the Charter system of collective security as complete or as leaving room for unilateral action. Two lines of argument are possible to challenge this assumption. According to one opinion, the law on the use of force has ceased to exist.<sup>39</sup> However, no state has yet em-

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35. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 60, 1155 U.N.T.S. 331, 346.

36. See Franck, *supra* note 4, at 612 (“[T]his proviso [of a cease-fire agreement between the U.N. and Iraq] manifests that it is the Security Council and the United Nations, and not individual members, who are the parties, with Iraq, to the cease-fire agreement. It is they who are entitled in law to determine whether Iraq is complying with its commitments to the Council, how long these are to remain in effect, and what is to be done in the event of their violation.”)

37. But see Yoo, *supra* note 10, at 568.

38. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 40, 36 Stat. 2277, 2305–06, 3 Martens Nouveau Recueil (ser. 3) 461, 499.

39. This is maintained primarily by Michael Glennon. Michael Glennon, *Why the Security Council Failed*, FOREIGN AFF., May–June 2003, at 16, 16 (2003) [hereinafter *Why the Security Council Failed*]; Michael Glennon, *The Fog of Law. Self-Defence, Inherence, and Incoherence in Article 51 of the UN Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 *passim* (2002); LIMITS OF LAW, *supra* note 11, at 1–2 *passim*. For a succinct rebuttal of his arguments in light of recent events and literature, see Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT’L L. 544, 545 (1971); Mary Ellen O’Connell, *Review Essay: Re-leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 447–48 (2003); Jane E.

braced such a sweeping proposition, not even a member of the coalition against Saddam's Iraq. Rather, the United States and the United Kingdom appear to be of the opinion that the system needs to accord wide latitude to states in order to fill the lacuna left by the ineffectiveness of the U.N. security system. Accordingly, states are deemed authorized to act in case the Security Council does not properly implement its decisions.<sup>40</sup> There is little doubt that such a perspective does not conform to a view of the U.N. as an effective collective security system. But for those who do not share this assumption, the U.S.-U.K. argument is much more compelling. Ultimately, the dispute unveils conceptual differences on the nature of the collective security system of the Charter and the effectiveness of the prohibition on the unilateral use of force except in self-defense.

## 2. Pre-Emptive Self-Defense Against the Combined Threats of Weapons of Mass Destruction and Terrorism

A similar logic applies to the other argument advanced by the United States, namely that the threat of weapons of mass destruction and their proliferation into the hands of terrorists or "rogue states" requires modifications to the international legal framework on the use of force. The 2002 National Security Strategy of the United States puts the argument strongly as one of necessity, an adaptation of the right to self-defense to new circumstances:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.<sup>41</sup>

Indeed, the maximum degree of flexibility for anticipatory self-defense was traditionally defined by the conditions first enunciated in the *Caroline* negotiations between Britain and the United States in 1842 by

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Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 632 (2003). See also *Oil Platforms (Iran v. U.S.)*, I.C.J. No. 90 (Nov. 6) (separate opinion of Judge Simma, ¶¶ 5–8), 42 I.L.M. 1334, 1428, 1430–31 (2003) (stating a need for the court to reaffirm the law of the use of force).

40. See DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188–93 (1958).

41. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited July 12, 2004) [hereinafter NATIONAL SECURITY STRATEGY]. For a spirited defense of its approach, see Abraham Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT'L L. 209 (2003); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 534–35 (2003).

U.S. Secretary of State Daniel Webster, according to which any kind of anticipatory self-defense required that the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”<sup>42</sup> For some, even such limited, “preemptive” self-defense goes too far, because it seems to run counter to the wording of Article 51 requiring a previous armed attack.<sup>43</sup> The stakes in this debate can hardly be overestimated. In the words of Thomas Franck, who generally argues for a middle position,<sup>44</sup> but has strongly denounced the use of force against Iraq:<sup>45</sup>

[A] general relaxation of Article 51’s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a State feels potentially threatened could lead to another *reductio ad absurdum*. The law cannot have intended to leave every State free to resort to military force whenever it perceived itself grievously endangered by action of another, for that would negate any role for law.<sup>46</sup>

Even the National Security Strategy does not consider “preemption” as part of international law in force. Instead, it argues for an adaptation of international law to new international threats:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists . . . rely on acts of terror and, potentially, the use of

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42. Letter from Daniel Webster to Lord Ashburton, Aug. 6, 1842, *reprinted* in 2 INT’L L. DIGEST 412 (John Bassett Moore ed., 1906); *see also* Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938). The Nuremberg judgment regarded the *Caroline* case as the ultimate limit of the anticipatory use of self-defense. *See* International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, 41 AM. J. INT’L L. 172, 205 (1947).

43. *See* Albrecht Randelzhofer, *Article 51*, in CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 803 (Bruno Simma et al. eds., 2d ed. 2002); Michael Byers, *Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 180 (2003). For an account of the drafting history confirming these views, *see* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACK* 50 (2002). *But see id.* at 67 n.82, 97–108 (discussing the development of the argument of anticipatory self-defense); Michael Bothe, *Terrorism and the Legality of Preemptive Force*, 14 EUR. J. INT’L L. 227, 231 (2003). *Cf.* Randelzhofer, *supra*, at 188 (arguing for “mitigation” in cases of pre-emption); OPPENHEIM’S INT’L LAW 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (“[T]he basic elements of the right of self-defence were aptly set out in connection with the *Caroline* incident in 1837 by . . . Daniel Webster”). For further discussion, *see id.* at 420–422.

44. FRANCK, *supra* note 43, at 107–08 (2002).

45. Franck, *supra* note 4.

46. FRANCK, *supra* note 43, at 98 (citing IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275 (1963)).

weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . .

. . . .

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>47</sup>

The relationship of this statement to the Iraq crisis is evident. On many occasions, the administration has emphasized that it considers unacceptable the mere possibility that rogue regimes could acquire weapons of mass destruction, because they may distribute them to terrorists. In this context, the terrorist attacks of Al Qaeda on September 11, 2001, have played a prominent role in the argument of the administration. In the deliberations of the National Security Council, Iraq was the focus of the Pentagon early on.<sup>48</sup> Although there is no evidence that Iraq participated in any way in the attacks of September 11,<sup>49</sup> it has also taken a prominent place in the public justifications for the Iraq action. In his speech to the U.N. General Assembly on September 12, 2002, President

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47. NATIONAL SECURITY STRATEGY, *supra* note 41, at 15.

48. See, e.g., BOB WOODWARD, BUSH AT WAR 49, 60–61, 83 (2002) [hereinafter BUSH AT WAR] (quoting Rumsfeld and Wolfowitz arguing that Iraq should be on the list of targets in the alleged war on terror on September 12 and 13, 2001, respectively); PLAN OF ATTACK, *supra* note 8, at 24–26. Woodward's presentation was recently corroborated by National Security Adviser Condoleezza Rice, who stated:

There was a discussion of Iraq. I think it was raised by Don Rumsfeld. It was pressed a bit by Paul Wolfowitz. Given that this was a global war on terror, should we look not just at Afghanistan but should we look at doing something against Iraq? . . . [W]hen [the President] went around the table and asked his advisers what he should do, not a single one of his principal advisers advised doing anything against Iraq.

Condoleezza Rice, National Security Advisor, Public Testimony before the National Commission on Terrorist Attacks Upon the United States, 9th Public Hearing, Apr. 8, 2004, transcript of CNN, available at <http://www.cnn.com/2004/ALLPOLITICS/04/08/rice.transcript/index.html> (last visited July 8, 2004). Woodward adds that the President himself told Rice that "eventually we'll have to return to that question." PLAN OF ATTACK, *supra* note 8, at 26. He also asserts that the President started war planning already on Nov. 21, 2001. *Id.* at 1–3.

49. See President's Remarks Following a Meeting with the Congressional Conference Committee on Energy Legislation and an Exchange with Reporters, 39 WEEKLY COMP. PRES. DOC. 1237, 1238 (Sept. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030917-7.html>.

Bush tried to convince U.N. members that action against Iraq was required because of the possible supply of WMD to terrorists:

[O]ur greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale. . . .

. . . .

The first time we may be completely certain [Saddam Hussein] has a—nuclear weapons is when, God forbids, he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming.<sup>50</sup>

In a domestic environment, the President has emphasized the link between his Iraq policies and the “war on terrorism” even more clearly. In a speech in Cincinnati, Ohio, Bush stressed the “grave threat to peace” emanating from Iraq, and added: “On September the 11th, 2001, America felt its vulnerability, even to threats that gather on the other side of the earth. We resolved then and we are resolved today to confront every threat, from any source, that could bring sudden terror and suffering to America.”<sup>51</sup>

The mere potentiality of the provision of WMD to terrorists is deemed to justify immediate action:

Iraq could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists. Alliance with terrorists could allow the Iraqi regime to attack America without leaving any fingerprints. . . .

. . . .

Facing clear evidence of peril, we cannot wait for the final proof—the smoking gun—that could come in the form of a mushroom cloud.<sup>52</sup>

When announcing the end of major combat operations, Bush made clear that “[t]he battle of Iraq is one victory in a war on terror that began on September the 11, 2001, and still goes on.”<sup>53</sup>

50. President’s Address to the United Nations General Assembly in New York City, 38 WEEKLY COMP. PRES. DOC. 1529, 1530–32 (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

51. President’s Address to the Nation on Iraq from Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716, 1716 (Oct. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html>.

52. *Id.* at 1717–18.

53. President’s Address to the Nation on Iraq from the USS Abraham Lincoln, 39 WEEKLY COMP. PRES. DOC. 516, 517 (May 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html>.

Thus, abstract risks of an uncertain nature upset the elaborate structure of the law of force. As the International Court of Justice has recently reminded us, the burden of proof for the existence of an armed attack lies with the state invoking self-defense.<sup>54</sup> The National Security Strategy, however, provides for unilateral action without or with only scant evidence. The size of the risk is deemed to outweigh traditional standards of proof for the immediacy of an armed attack.

And yet, it is in the nature of state governments—in particular of superpowers—to consider security as the one concern superseding all others. In a more limited fashion, the International Court of Justice has recognized that state survival is a legitimate consideration relating both to the *ius ad bellum* and to the *ius in bello*:

[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. . . . [T]he Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.<sup>55</sup>

Of course, the ICJ did not opine on the required concreteness of the risk to state survival and on the standard of proof. Nevertheless, its pronouncement points to the fact that, in state practice, security and survival are of a vital importance and may justify certain modifications of, or exceptions to, the prohibitions on the use of force and the restrictions on the means of warfare.<sup>56</sup> The very combination of an argument on the *ius ad bellum* with the prohibition of a weapon in the *ius in bello*—an otherwise cardinal sin in the law of war—exemplifies the exceptional nature the Court accords to the state right to survival.

Thus, the recent debate on the lack of evidence for the possession of weapons of mass destruction by Iraq<sup>57</sup> somewhat misses the point. In the eyes of the Bush administration, Saddam's intention to possess and develop WMD, combined with the use of such weapons in the past, did not call merely for further investigation, but for action—and the less

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54. See *Oil Platforms (Iran v. U.S.)*, I.C.J. No. 90 (Nov. 6) ¶¶ 57, 61, 71, 42 I.L.M. 1334, 1356–57, 1360 (2003).

55. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 263 (July 8).

56. Note the declaration of then President Bedjaoui, who weighs the *ius cogens* principle of international humanitarian law against that of state survival and thus endorses the *ius cogens* character of the latter. *Id.* at 268, 273. Note also Dean Acheson's observation that state survival is not a matter of law. Dean Acheson, *Remarks*, 57 AM. SOC'Y INT'L L. PROC. 13, 14 (1963); see also Schmitt, *supra* note 41, at 543–44.

57. See *supra* note 15.



advanced Saddam's weapons programs were, the better.<sup>58</sup> In addition, the U.S. determination is supposed to exert pressure on other states to forego weapons of mass destruction. Libya is a case in point, although its negotiations with the United States, Britain and France date from the time before the Iraq war.<sup>59</sup>

But this strong version of a "precautionary approach" carries great risk. Other countries possessing weapons of mass destruction, such as Russia or India, may draw on this precedent to justify highly problematic activities both on their own territory—*e.g.*, Chechnya—or against other states allegedly supporting terrorist groups, *e.g.*, Pakistan. The pressure on third states can hardly justify the attack on a state that did not constitute a threat by itself.

Thus, one of the central tenets of contemporary international law, the prohibition on the use of force, is under threat. The preemption of weapons of mass destruction and their proliferation is regarded as more important than the avoidance of war. Some already claim that the prohibition has ceased to be good law.<sup>60</sup> But such an argument throws the baby out with the bathwater. A broad notion of self-defense, whatever one thinks of its justification, does not cancel out the general prohibition on the use of force. What remains is a basic conflict between the prohibition and the interest of survival, which also entails a certain justification for preemptive action. What is in question, however, is who is to strike the balance.

### 3. The Coalition Acting in the Common Interest

Normally, the alternatives are presented by way of pitting the unilateralism of the current U.S. administration against traditional multilateralism<sup>61</sup>—the younger Bush against the older Bush, the champion of America acting alone against the proponent of a "new world

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58. Bob Woodward reports that President Bush was skeptical concerning the CIA evidence regarding Iraqi WMD but apparently relied on CIA Director George Tenet's assertion that it was "a slam dunk case." *PLAN OF ATTACK*, *supra* note 8, at 249. But others, notably in Congress, were more cautious. *Id.* at 295, 308–09. More importantly, however, Bush stressed to Woodward that he deems sufficient the evil nature of Saddam and the existence of weapon programs. *Id.* at 422–23.

59. See President's Address Before a Joint Session of the Congress on the state of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 96 (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (claiming credit for Libya's renunciation of WMD). "For diplomacy to be effective, words must be credible, and no one can now doubt the word of America." *Id.* But see Flynt Leverett, *Why Libya Gave Up on the Bomb*, N.Y. TIMES, Jan. 23, 2004, at A23 (arguing that Libya's re-engagement with international institutions predates the Iraq war).

60. See *supra* note 39.

61. See Symposium, *Unilateralism in International Law*, 11 EUR. J. INT'L L. 1 (2000).

order.”<sup>62</sup> The “(George W.) Bush doctrine” of the unilateral use of force in self-defense against terrorists constitutes a marked departure from the previous emphasis on the backing of allies and the United Nations, even at the cost of some modifications. The President’s 2002 speech before the U.N. General Assembly clearly contained a challenge to the organization: Either follow U.S. lead in the aggressive pursuit of “self-defense” against terrorists and rogue regimes, or become irrelevant and unable to influence U.S. policies any further. In a truly hegemonic attitude, the rest of the world represented in the U.N. is asked to follow the U.S. lead or fall into oblivion:

We created a United Nations Security Council so that, unlike the League of Nations, our deliberations would be more than talk, our resolutions would be more than wishes. . . .

. . . .

The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace. . . .

. . . .

My nation will work with the U.N. Security Council to meet our common challenge. . . . But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced, the just demands of peace and security will be met, or action will be unavoidable.<sup>63</sup>

In his State of the Union address in 2003, Bush repeated his vision of a United States which serves the interests of humankind:

America will not accept a serious and mounting threat to our country and our friends and our allies. . . .

We will consult. But let there be no misunderstanding: If Saddam Hussein does not fully disarm, for the safety of our

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62. See President’s Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit, 1990 PUB. PAPERS 1218, 1219, 1222 (Sept. 11, 1990); President’s Address before a Joint Session of the Congress on the state of the Union, 1991 PUB. PAPERS 74, 79 (Jan. 29, 1990); President’s Remarks at Maxwell Air Force Base War College in Montgomery, Alabama, 1991 PUB. PAPERS 364, 366 (Apr. 13, 1991); President’s Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict 1991 PUB. PAPERS 218, 221 (Mar. 6, 1991).

63. President’s Address to the United Nations General Assembly, *supra* note 50, at 1529, 1532.

people and for the peace of the world, we will lead a coalition to disarm him.<sup>64</sup>

Thus, the United States may act alone when it considers its actions as indispensable for the well-being of the world, purporting to serve “the permanent rights and the hopes of mankind.”<sup>65</sup> As a sympathetic observer has remarked, “[t]he U.S. government has relegated to itself not only the ability to act in its own interest, but also to redefine the criteria for appropriate uses of force in the common interest.”<sup>66</sup>

As superpower, the United States claims to be responsible for the world, and to lead where the United Nations is incapacitated. In fact, a similar rationale was invoked for the Kosovo intervention, with the support of all NATO allies.<sup>67</sup> In the end, the argument goes, results count, not process. In the words of the U.S. President:

Well, we're never going to get people all in agreement about force and use of force. But action—confident action that will yield positive results provides kind of a slipstream into which reluctant nations and leaders can get behind and show themselves that . . . something positive has happened toward peace.<sup>68</sup>

Undoubtedly, the U.N. sanctions had cost many people's lives, had gruesome effects on the Iraqi population, and had not succeeded in eliciting full Iraqi cooperation.<sup>69</sup> But the Iraqi response to Security Council Resolution 1441 was not all negative. For many Security Council members, the U.N. inspections were doing the job and Iraqi co-operation was not excellent, but sufficient.<sup>70</sup> For the Bush administration, the burden of proof was on Saddam Hussein, and it had not been met. Thus, it is difficult to maintain that the U.N. system was not working and the U.S.-led coalition needed to substitute for collective non-action.

64. President's Address before a Joint Session of the Congress on the state of the Union, 39 WEEKLY COMP. PRES. DOC. 109, 116 (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

65. President's Address to the United Nations General Assembly, *supra* note 50, at 1533.

66. *A Letter to the President from Fredrick S. Tipson*, NEWSL. (Am. Soc'y Int'l Law, Washington, D.C.), Mar.-Apr. 2003, at 1, 4.

67. See Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

68. BUSH AT WAR, *supra* note 48, at 341 (quoting Bush).

69. For a legal analysis see, for example, Symposium, *The Impact on International Law of a Decade of Measures Against Iraq*, 13 EUR. J. INT'L L. 1 (2002) (containing various contributions on the matter); August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851 (2001).

70. See U.N. SCOR, 58th Sess, 4707th mtg., *supra* note 7. See also BLIX, *supra* note 8, at 237.

On the other hand, some kind of emergency powers in case of international inertia should not be completely excluded, if genocide and massive and imminent threats are to be avoided. Such is the logic behind Article 51 of the Charter, which allows for self-defense absent sufficient international action; and one may indeed ask why it should not be extended to similar situations of direct and imminent danger.<sup>71</sup> However, it is questionable whether this was indeed the situation in Iraq before the invasion. It seems every day more likely that the threat of weapons of mass destruction or even of weapons-related programs was virtually non-existent.<sup>72</sup> The president himself now speaks merely of “weapons-of-mass-destruction-related program activities.”<sup>73</sup>

The question remains whether these intelligence failures can be avoided, and who bears the risk of a faulty assessment. The premise of a collective decision-making process is that a collective determination (as the one by the Security Council under Article 39 of the Charter) is more reliable and therefore more legitimate than a unilateral assessment not subject to the same international scrutiny. In light of the evidence—or rather the lack of it—it appears difficult to argue that the Iraq case demonstrates that this assumption is patently false.

#### 4. Regime Change for Democracy

The less likely the discovery of weapons of mass destruction in Iraq becomes, the more the argument shifts to political and humanitarian grounds. The most challenging of the U.S. reasons for invading Iraq is

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71. For an argument not excluding the unilateral use of force when all multilateral avenues are exhausted, see Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan.–Feb. 2004, at 136, 148–49. The authors of this piece avoid taking a stand on whether the Iraq intervention meets their criteria for unilateral action. *But see* Anne-Marie Slaughter, *Reflecting on the War in Iraq One Year Later*, NEWSL. (Am. Soc’y Int’l Law, Washington, D.C.), Mar.–Apr. 2004, at 1, 2 (“A year later, I conclude that the invasion was both illegal and illegitimate.”). One must be permitted to ask, however, what relevance international law would have if it allowed only for a determination one year after political action. Thus, Slaughter’s late answer as to the legitimacy of the Iraq war demonstrates the importance of a strictly legal, ex-ante determination of legality as opposed to open-ended legitimacy. On the value of law in politics, see Andreas Paulus, *Realism and International Law: Two Optics in Need of Each Other*, 96 AM. SOC. INT’L L. PROC. 269 (2002).

72. On the testimony of Dr. David Kay, former chief weapons inspector regarding the lack of WMD in Iraq before the U.S. Senate Committee on Armed Services, on January 28, 2004, see Richard W. Stevenson & Thom Shanker, *Ex-Arms Monitor Urges an Inquiry on Iraq Threat*, N.Y. TIMES, Jan. 29, 2004, at A1. *See also* James Risen, *C.I.A. Lacked Iraq Arms Data, Ex-Inspector Says*, N.Y. TIMES, Jan. 26, 2004, at A1; Barton Gellman, *Iraq’s Arsenal Was Only on Paper*, WASH. POST, Jan. 7, 2004, at A01; JOSEPH CIRINCIONE ET AL., WMD IN IRAQ: EVIDENCE AND IMPLICATIONS (2004), available at <http://www.ceip.org/files/pdf/Iraq3FullText.pdf>.

73. *See* President’s Address Before a Joint Session of the Congress on the State of the Union, *supra* note 59, at 97.

the request for regime change. The U.S. government has argued all along that the nature of the Iraqi regime itself constituted a threat to its neighbors and the world at large. In fact, the policy originated in Congress during the Clinton presidency. In the Iraq Liberation Act of 1998, Congress declared its sense that “[i]t should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.”<sup>74</sup> The law included authorization for assistance to Iraqi opposition groups, but did not provide for military action by the United States. After September 11, Vice-President Richard Cheney argued that regime change in Iraq would have positive repercussions for the whole Middle East:

Regime change in Iraq would bring about a number of benefits to the region. When the gravest of threats are eliminated, the freedom-loving peoples of the region will have a chance to promote the values that can bring lasting peace. . . . With our help, a liberated Iraq can be a great nation once again. . . . Our goal would be an Iraq that has territorial integrity, a government that is democratic and pluralistic, a nation where the human rights of every ethnic and religious group are recognized and protected.<sup>75</sup>

As President Bush emphasized in his speech to the U.N. General Assembly, “[I]berty for the Iraqi people is a great moral cause, and a great strategic goal. . . . Free societies do not intimidate through cruelty and conquest, and open societies do not threaten the world with mass murder.”<sup>76</sup> By that logic, only a democratic Iraq will be able to meet its disarmament commitments.

In his above-mentioned Article, Richard Perle adds an indictment of the United Nations for being accessible to both democracies and dictatorships alike. He favors instead a “willing coalition of liberal democracies.”<sup>77</sup> According to Perle, the idea of a U.N. monopoly on the use of force is fundamentally flawed: “This . . . idea . . . leads inexorably to handing great moral—and even existential politico-military decisions—to the likes of Syria, Cameroon, Angola, Russia, China and France.”<sup>78</sup> Let us abstain to comment on the inclusion of France into this

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74. Iraq Liberation Act of 1998, Pub. L. No. 105-338, § 3, 112 Stat. 3178, 3179 (1998).

75. Vice President Richard Cheney, Remarks to the Veterans of Foreign Wars 103d National Convention (Aug. 26, 2002), available at <http://www.whitehouse.gov/news/releases/2002/08/20020826.html>.

76. President’s Address to the United Nations General Assembly, *supra* note 50, at 1532; see Feinstein & Slaughter, *supra* note 71, at 136.

77. Perle, *supra* note 1; see also LIMITS OF LAW, *supra* note 11, at 4–5.

78. Perle, *supra* note 1, at 22.

list. The question is nevertheless valid: why not substitute for the U.N. a community of democratic nations, which would benefit from a much greater moral authority?<sup>79</sup> In a recent speech, President Bush has cited U.S. power and the spread of democracy as two sides of the same coin.<sup>80</sup>

The classic counter-argument rejects the use of issues of democratic legitimacy for the justification of the use of force. It points to the pluralism in an international society that is, alas, not composed of democratic states only. For the opponents of the Iraq invasion, democracy may be important—but peace is more so. The authority of the prohibition on the use of force ultimately depends on the question whether one is ready to sacrifice peace for the spread of democracy. So far, international lawyers have debated the existence of a right to democratic governance,<sup>81</sup> but no one has argued so far that democracy justifies military action.<sup>82</sup> Neither, explicitly, has the United States.<sup>83</sup> This is however what some in the Bush administration seem to have adopted as their strategy for a lasting peace in the Middle East. If accepted, this argument would indeed lead to a profound transformation of international law from a pluralist to a liberal-democratic order backed by force.

### 5. Humanitarian Intervention

In the absence of weapons of mass destruction, the justification of the Iraq intervention more and more shifts to the egregious human rights violations of the Saddam regime. President Bush spoke of the suffering of the Iraqi people early on: “Clearly there will be a strategic implication

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79. Wedgwood seems to suggest as much. See Wedgwood, *supra* note 8, at 578.

80. President’s Remarks on the 20th Anniversary of the National Endowment for Democracy, 39 WEEKLY COMP. PRES. DOC. 1542, 1542–43 (Nov. 6, 2003), available at <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html> (“It is no accident that the rise of so many democracies took place in a time when the world’s most influential nation was itself a democracy.”).

81. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992). For a collection of the most important contributions to the debate, see DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

82. The closest the international debate has approached the question of the relationship between democracy and peace deals with domestic law, see Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 81, p. 389. But see also the vigorous responses by Martti Koskeniemi, *Whose Intolerance, Which Democracy?*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 81, at 436, and Brad R. Roth, *Democratic Intolerance: Observations on Fox and Nolte*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 81, at 441.

83. See *United States Letter*, *supra* note 18 (concentrating on previous Security Council resolutions and mentioning self-defense in passing). For an analysis of earlier practice involving the promotion of democracy as a justification for military intervention, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 43–44 (2000). See also BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999).

to a regime change in Iraq, if we go forward. But there's something beneath that, as far as I'm concerned, and that is, there is immense suffering."<sup>84</sup>

According to this argument, the imposition of democracy by force may not be frequent. However, when the repression of and violence against one's own people goes beyond a certain threshold, then the use of force from the outside against the regime will be justified. In his U.N. speech, Bush referred to the assessment of the Commission on Human Rights:

Last year, the U.N. Commission on Human Rights found that Iraq continues to commit extremely grave violations of human rights and that the regime's repression is all pervasive. Tens of thousands of political opponents and ordinary citizens have been subjected to arbitrary arrest and imprisonment, summary execution, and torture . . . . Wives are tortured in front of their husbands, children in the presence of their parents, and all of these horrors concealed from the world by the apparatus of a totalitarian state.<sup>85</sup>

The prevention of crimes against the civil population was one of the reasons for the Kosovo intervention. Since the 19th century, it constitutes a rather traditional topos of Western policies.<sup>86</sup> The gruesome details of the Saddam regime that have now clearly emerged (although they were not really new) add credibility to the argument that there had indeed been grounds for humanitarian intervention along the Kosovo precedent. These revelations raise all the old questions on the legality and morality of intervention in the absence of Security Council authorization.<sup>87</sup> But, as Human Rights Watch has recently pointed out, the extreme urgency to stop ongoing bloodshed, which was so pressing in the Kosovo case,

84. BUSH AT WAR, *supra* note 48, at 339; *see also id.* at 340 ("There is a human condition that we must worry about . . . . As we think through Iraq, we may or may not attack. I have no idea yet. But it will be for the objective of making the world more peaceful.").

85. President's Address to the United Nations General Assembly, *supra* note 50, at 1530.

86. See, in particular, John Stuart Mill, *A Few Words on Non-Intervention*, in JOHN STUART MILL, *ESSAYS ON EQUALITY, LAW, AND EDUCATION* 110 (John M. Robson ed., Univ. of Toronto Press 1984) (1859); MICHAEL WALZER, *JUST AND UNJUST WARS* 86-108 (3d ed. 2000).

87. From the enormously rich literature, see INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* (2000); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 *EUR. J. INT'L L.* 23 (1999); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001); FRANCK, *supra* note 43, at 135-91; Simma, *supra* note 67.

seems to be largely absent with respect to Iraq, because the most egregious violations dated back to the early 1990s, and the Shiites were to a certain extent protected by no-fly-zones, whereas most of the Kurds enjoyed a state of quasi-independence.<sup>88</sup> Nevertheless, a ruler such as Saddam Hussein is a continual threat to the most basic human rights of his people, and prone not only to maintain a repressive regime, but also to repeat his egregious behavior whenever it suits his lust for power.<sup>89</sup>

However, the justification of the Iraq invasion as humanitarian intervention raises some suspicion because it was clearly raised only after the fact, when it became likely that the other reasons would not hold up to scrutiny. Although Paul Wolfowitz lists the “criminal treatment of the Iraqi people” among the reasons for the intervention, he also adds that to help the Iraqis was “not a reason to put American kids’ lives at risk, certainly not on the scale we did it.”<sup>90</sup> Besides, human rights are not mentioned in any of the official documents justifying the intervention in legal terms, neither in Resolution 1441 (2003), nor in the U.S. and U.K. letters to the Security Council.<sup>91</sup>

Thus, humanitarian intervention seems not to be used as an independent argument for armed intervention as such, at least not when there is no acute, urgent situation where parts of a population fight for their survival against genocide or crimes against humanity. Nevertheless, the clash between the values of an inter-state system and human rights is clearly visible.

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88. See Gardner, *supra* note 13, at 589–90; Farer, *supra* note 8, at 624–25; Ken Roth, *War in Iraq: Not a Humanitarian Intervention*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 13 (2004), available at <http://hrw.org/wr2k4/download/wr2k4.pdf>. According to this view, only “ongoing or imminent genocide, or comparable mass slaughter or loss of life” justifies armed intervention. *Id.* at 17. Of course, the result depends on whether one agrees to such a narrow standard. See also Jutta Brunnée & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT. & COMP. L.Q. (forthcoming 2004).

89. I am grateful to Professor Robert Howse for urging me to clarify this point. For a further discussion on changes of the Charter system to allow for interventions in case of gross violations of human rights and international criminal law, see INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 32–37, 55 (2001), available at <http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf>; Brunnée & Toope, *supra* note 88; Jutta Brunnée & Stephen J. Toope, *Slouching Towards New ‘Just’ Wars: The Hegemon After September 11th* (forthcoming 2004) (manuscript Apr. 15, 2004, on file with the author) [hereinafter *Just Wars*]; David Luban, *Preventive War*, 32 PHIL. & PUB. AFF. 207 (2004). Luban argues, however, that humanitarian intervention against Iraq would at least have been justified in the late 1980s at a time when the U.S. was aligned with Iraq rather than the Kurds. *Id.* at 231 n.43 (manuscript).

90. Wolfowitz Interview, *supra* note 15. This passage reminds one of Bismarck’s (in)famous phrase that the Balkans were not worth the bones of a single Pomeranian Grenadier.

91. See *supra* notes 18–20.



### III. COMPETING CONCEPTIONS OF THE INTERNATIONAL LEGAL ORDER

The reconsideration of the arguments on the use of force against Iraq has shown that the debate not only involved the specifics of the situation, but fundamentals of the international order after September 11 and the fall of the Berlin wall: the impact of the U.N. on world politics, the legalization and moralization of international relations, the role of the single superpower as guarantor or violator of international law, the role of other states as subcontractors of or counter-weight to the United States, the impact of liberal values on a legal order between states. Both sides have a fundamentally different view of the current international system and the role of international law. In the following, we will look more closely at these background assumptions of international law in the post-September 11 international (dis)order. We will try to engage the contradictions which have been used in the public debate—might versus right, unilateralism versus multilateralism, prevention versus repression, hegemony versus sovereign equality, democratic imperialism versus pluralism. How can international law meet these apparently contradictory considerations? A closer look shows that these contradictions to a certain extent already exist in contemporary international law, which maintains a delicate balance between the coexistence of different value-systems and the promotion of some communal values.<sup>92</sup>

#### 1. Might v. Right

According to the understanding of Habermas and others,<sup>93</sup> the Iraq war constitutes a severe setback for all attempts to legalize international relations<sup>94</sup> with respect to the use of force as embodied in the U.N. Charter. However, this account of the situation is problematic both in the law and in the facts. The drafters of the Charter did not have in mind the enforcement of international law as such. On the contrary, the goal was to maintain and, if necessary, restore international peace and security.<sup>95</sup>

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92. For broader analysis, see ANDREAS L. PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT* 439–46 (2001).

93. See *supra* note 2 and accompanying text; Rule of Power or Rule of Law? (Nicole Deller et al. eds., 2003)

94. See Debate, *The Legalization of International Relations*, 96 AM. SOC. INT'L L. PROC. 291 (2002); see also Special Issue, *Legalization and World Politics*, 54 INT'L ORG. 385 (2000) (discussing unilateral military intervention as an exception to the general trend of increasing legalization of international relations).

95. See INIS CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 71–76 (4th ed. 1984); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 139–40 (1995); MORTON KAPLAN & NICOLAS DE BARON KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 216–17 (1961); PAULUS, *supra*

The Charter is not based on the primacy of law, but on collective security provided by superpower involvement and broad Security Council discretion. The Council is not bound by international law itself, but only by the “Purposes and Principles of the United Nations.”<sup>96</sup> Thus, the Charter is a very incomplete expression of a legalist international order. Secondly, the coalition did not shun international law. Even if one broadly shares the estimate of American Society of International Law President Anne-Marie Slaughter that about eighty percent of international lawyers—at least outside the United States—deemed the war on Iraq illegal,<sup>97</sup> it is simply untrue that the United States and its coalition partners regarded legality as irrelevant. Instead, all of them argued that international law supported their conclusions.<sup>98</sup> Thus, the question was not so much “might versus right,” but which concept of “right” to adopt: 1) a legalist position based on the U.N. Charter, which held that every use of force needed to be either an exercise of self-defense or mandated by the Security Council; 2) a broader interpretation that allowed for the unilateral implementation of Security Council resolutions in case of inaction of the Council and for a broad interpretation of the “inherent right to self-defense” under Article 51 of the Charter; or 3) at the other extreme, a position according to which the prohibition on the use of force had expired or, to use the famous phrase coined by Thomas Franck, had been killed.<sup>99</sup>

Some supporters of the invasion of Iraq have apparently adopted the latter position,<sup>100</sup> but it does not constitute the official view of the administration. Otherwise, the U.S. letter to the Security Council, in which it justified its actions as conforming to international law,<sup>101</sup> would be a

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note 92, at 287–92; see also Ian Hurd, *Too Legit to Quit*, FOREIGN AFF., July–Aug. 2003, at 204; Anne-Marie Slaughter, *Misreading the Record*, FOREIGN AFF., July–Aug. 2003, at 202.

96. U.N. CHARTER art. 24, para. 2; see Jochen Abr. Frowein & Nico Krisch, *Introduction to Chapter VII*, in CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 43, at 701, 710–12 (citing additional sources).

97. International Law Expert Says U.S. Should Delay an Iraq Attack Until It Gains Security Council Backing, Interview by Bernard Gewertzman, Council of Foreign Relations, with Anne-Marie Slaughter, at <http://www.cfr.org/publication.php?id=5646> (Mar. 3, 2003) (“I think it is certainly true that eight out of 10 international lawyers would say that would be a violation of international law. That view would also be supported by the legal advisers of most other countries in the United Nations.”).

98. *Supra* notes 18, 19.

99. In this vein, see, in particular, *Why the Security Council Failed*, *supra* note 39. For sharp criticism, see in particular Franck, *supra* note 4. Cf. Thomas M. Franck, *Who Killed Article 2(4), or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809 (1970). Franck now asks: “Who killed Article 2(4) again?” Franck, *supra* note 4, at 607.

100. See Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 751–53 (2002); Glennon, *supra* note 39; Perle, *supra* note 1.

101. *United States Letter*, *supra* note 18.

sheer exercise in hypocrisy. What the administration has done, both in its National Security Strategy and in its public justifications of its actions, is to advance a position of how the law should change or at the very least be reinterpreted.<sup>102</sup> The United States did not argue that it may use force whenever it pleases—thus, Michael Glennon is wrong when he claims that the United States “felt free to announce in its national security document that it would no longer be bound by the charter’s rules governing the use of force.”<sup>103</sup>

Yet, if the law concerning the international use of force is not to become irrelevant, it must enjoy a minimum degree of effectiveness. As long as states perceive a need to justify their actions in the terms of international law, it maintains a certain “compliance pull.”<sup>104</sup> As the International Court of Justice has pointed out in the *Nicaragua* case, every justification of the violation of a rule by a reliance on a different interpretation confirms rather than weakens the rule.<sup>105</sup> Thus, the coalition justifications for the invasion of Iraq, both formal and informal, demonstrate the lasting viability rather than the demise of the international regulation of the use of force. Without recognizing that he thereby admits as much, Michael Glennon describes the need for states to justify their behavior according to international law: “In most situations, little is to be gained through a frontal challenge to existing law. To do so could lead to broader disorder, which few States see as in their interest, as well as to condemnation and possible reprisals.”<sup>106</sup> But international law had also immediate practical effects. The difficulties the United States now

102. See *supra* note 18; NATIONAL SECURITY STRATEGY, *supra* note 41 and accompanying text. The timid presentation by the State Department’s legal advisers, Taft & Buchwald, *supra* note 13, at 563 (stating that preemptive use of force is justified only in the context of a broader conflict and/or when consistent with SC resolutions), demonstrates the reluctance even within the administration to declare the unilateral preemptive use of force lawful. See also Reisman, *supra* note 10, at 89–90 (regarding the claim to the preemptive use of force as *lex ferenda*, not *lex lata*).

103. *Why the Security Council Failed*, *supra* note 39, at 24.

104. For the term, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1989).

105. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27) (“If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state’s conduct is in fact justifiable on that basis, the significance of the attitude is to confirm rather than to weaken the rule.”). On the role of state justifications in affirming the viability of the rule, see also GRAY, *supra* note 83, at 18–23.

106. *LIMITS OF LAW*, *supra* note 11, at 43. In his rejection of the ICJ argument, Glennon confuses the continual approval of the *substance* of a rule with assertions of its *validity*, that is, their character as part of existing international law. *Id.* at 44–46. Glennon’s examples defeat his arguments. When he asserts that the 1958 Geneva Conventions on the Law of the Sea ceased to be law because they were repudiated by “[w]idespread and consistent state declarations,” he forgets to mention that in case of the prohibition on the use of force, all state declarations are to the contrary. *Id.* at 47.

faces in Iraq are a case in point: the perceived lack of legal justification of the war has undercut U.S. efforts to receive sufficient international assistance. Claiming “might” as “right” would further deprive the United States from the cooperation of other actors.

Glennon also disregards the indirect effects of the international regulation of the use of force. When he asserts that “[t]he received rules of international law neither describe accurately what nations do, nor predict reliably what they will do, no prescribe intelligently what they should do when considering intervention,”<sup>107</sup> he fundamentally misreads the function of international law. Law is not a description of actual behavior, nor a prediction of future behavior, nor a system of moral or ethical norms. On the contrary, law is composed of the norms that are accepted by a society as prescriptions for behavior. Thus, law describes what states *shall* do according to the normative system accepted as binding by them. At times, legal norms may conflict with real behavior, future behavior, and even moral behavior,<sup>108</sup> but that does not change their character as *legal* norms.<sup>109</sup> Glennon’s appeal to “geopolitics”<sup>110</sup> sounds remarkably similar to Morgenthau’s repudiation of international law in favor of Realist political science in 1940.<sup>111</sup> But replacing law with a description of state practice does not lead to law, but to political science, and leaves the world without a commonly accepted standard for the evaluation of state behavior.

The United States relies on Charter law in a lot of different contexts, too: as much as the United States opposed any limits imposed by international law on its invasion of Iraq, it insists on the implementation of Security Council resolutions, in particular regarding the defense against terrorism. In the very period in which the United States attacked Iraq, it was also litigating before the International Court of Justice with another

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107. *Id.* at 2, 204.

108. An arguable example is the case of Kosovo. *See supra* note 87. Compare FRANCK, *supra* note 44 at 135–91 (arguing that we should integrate moral considerations into the law) with INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *supra* note 87, and Simma, *supra* note 67 (asserting that states may sometimes follow a moral rather than a legal imperative without thereby changing the law).

109. For a defense of such a positivist attitude, see Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302 (1999).

110. LIMITS OF LAW, *supra* note 11, at 13 (“Before law came geopolitics”); *see also id.* at 177–205. Glennon is fully aware of the problematic character of this term. But his appeal to the informal Concert of Europe disregards not only the reactionary character of this order, but also its legal underpinnings. *See id.* at 278; *see also* Fritz Münch, *Vienna Congress (1815)*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1286 (2000); WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 429–36 (2000).

111. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260 (1940). Glennon’s arguments are quite similar to Morgenthau’s. *See* LIMITS OF LAW, *supra* note 11, at 64–65.

member of the so-called axis of evil, namely Iran, involving questions of self-defense.<sup>112</sup> The security situation in Iraq after the proclaimed end of “major combat operations”<sup>113</sup> has compelled the United States to negotiate a further U.N. resolution, which authorizes “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>114</sup> Recently, the United States enlisted the United Nations to convince a recalcitrant Shiite leader of the impossibility of organizing elections before the handover of power to an Iraqi government.<sup>115</sup> Even within Iraq, the United Nations seems to afford a legitimacy that the United States as occupying power alone cannot provide.

Thus, there is no escape from some kind of law. The only question is what kind of law—whether international law translates hegemonic power into legal obligations, or whether those obligations can effectively constrain the superpower, too. Recent pronouncements of the Security Council may indeed be interpreted in both ways—as a constraint, however weak, on the exercise of superpower prerogatives, or as rubber-stamp for U.S. policies. In the end, they probably are somewhere in the middle. Thus, Resolution 1511 and the preceding Resolutions 1483<sup>116</sup> and 1500<sup>117</sup> put some constraints on the U.S.-led coalition, such as reporting and transparency requirements, but extend also considerable authority to the Coalition Provisional Authority<sup>118</sup> beyond the rights of an

112. See *Oil Platforms (Iran v. U.S.)*, I.C.J. No. 90 (Nov. 6), 42 I.L.M. 1334 (2003); *Letter Dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations*, U.N. SCOR, 42d Sess., U.N. Doc. S/19219 (1987); *Letter Dated 18 April 1988 from the Permanent Representative of the United States of America to the United Nations*, U.N. SCOR, 42d Sess., U.N. Doc. S/19791 (1988). In its Counter-Memorial and in the oral proceedings, the United States has justified its action again according to the international law on the use of force. For the oral and written pleadings, see the ICJ’s Oil Platforms Website, at <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>. See also *Oil Platforms*, *supra*, ¶¶ 48–51, 67.

113. President’s Address to the Nation on Iraq from the USS Abraham Lincoln, *supra* note 53, at 516.

114. S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., at 3, U.N. Doc. SC/RES/1511 (2003); see also Peter Slevin & Bradley Graham, *U.S. Renews Bid To Involve More Nations in Iraq*, WASH. POST, Aug. 21, 2003, at A1.

115. See Press Release, U.N., *Secretary-General Will Send Election Team to Iraq, Once Satisfied with Coalition Security Arrangements* (Jan. 27, 2004), U.N. Doc. SG/SM/9129, IK/419 (2004), available at <http://www.un.org/News/Press/docs/2004/SGSM9129.doc.htm>; see also Edward Wong, *New Pressures Over U.S. Plan For Iraqi Rule*, N.Y. TIMES, Jan. 24, 2004, at A1.

116. S.C. Res. 1483, U.N. GAOR, 58th Sess., U.N. Doc. S/RES/1483 (2003).

117. S.C. Res. 1500, U.N. GAOR, 58th Sess., U.N. Doc. S/RES/1500 (2003).

118. Resolution 1483 recognizes the exercise of the occupying powers by the Authority, allows the use of funds of the Development Fund for Iraq, among them U.N. funds. S.C. Res. 1483, *supra* note 116, at 4, 6. Furthermore, the resolution introduces an independent audit of the finances of the Development Fund for Iraq. *Id.* at 4.

occupying power under the Fourth Geneva Convention and the Hague Regulations.<sup>119</sup>

Even a “coalition of the willing” needs to translate its *ad hoc* aims into enforceable rules. If such coalitions shall not be based on force, this requires in turn a voluntary acceptance of U.S. prerogatives by other participants; even a superpower cannot forever forego legal commitments to others. Law not only is a translation of power politics into fine print, but also stabilizes delicate compromises between power and legitimacy.

## 2. Unilateralism v. Multilateralism

Iraq is thus not so much a question of “might versus right,” but of which mechanism determines what the law is and how it is to be applied<sup>120</sup>—the unilateral pronouncements of a hegemonic superpower or a quasi-constitutional system of checks and balances. This leads us to the second pair of opposites that may shape the future of international law in the age of U.S. hegemony: how far are states obliged—or, should be obliged—to work through multilateral institutions to pursue their interests? There is little doubt that the alternative between unilateralism and multilateralism does not exist in such an unambiguous manner. The Iraq example shows that even the United States favored, at first, the exploration of multilateral avenues. On the other hand, in extreme situations, the failure of multilateral institutions may sometimes not be the last word. To secure some base values in the international system, from state survival to the prevention of genocide, unilateral action cannot always be avoided. Still, there seems to be no agreement as to when such action is justifiable.

The balance struck by the U.N. Charter is well known. Article 39 gives the Security Council great latitude in determining when a threat to international peace and security, or even a breach of the peace or a war of aggression, has occurred. The Council also enjoys broad powers to adopt sanctions that are binding on all U.N. member states (by Article 41). The only real check on the exercise of its power consists in the veto of the permanent members, combined with the requirement of nine positive votes (out of 15) for the adoption of a resolution. On the other hand, the use of force without Security Council authorization is limited by Article 51 to instances of self-defense—an interpretation that conforms to

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119. Resolution 1483 explicitly recognizes the applicability of these instruments but seems to interpret them in a most expansive way, basically allowing it to determine Iraq's pace towards self-determination. *Id.* at 2

120. Cf. Franck, *supra* note 4, at 616 (“In essence, the Iraq crisis was not primarily about what to do but, rather, who decides.”)

the requirement of Security Council authorization for enforcement action of regional arrangements contained in Article 53 of the Charter.<sup>121</sup>

The change in international law proposed by the United States in the 2002 National Security Strategy would give states such a broad latitude for unilateral action as to risk undermining the prohibition on the use of force and the authority of the Security Council altogether.<sup>122</sup> If the mere possibility of the proliferation of weapons of mass destruction to terrorists would suffice to justify the unilateral use of force, any state suspected of possessing or developing weapons of mass destruction would become a target for the unilateral use of force. If applied to all states, such a reinterpretation of the law might have disastrous consequences for whole regions such as the Indian subcontinent or the Middle East.

Next to unilateral action, the Bush administration has advanced a counter-image to permanent institutions such as the United Nations or NATO: the “coalition of the willing.” Others speak of “multilateralism à la carte”<sup>123</sup> or regional coalitions of democracies.<sup>124</sup> Accordingly, the superpower builds coalitions *ad hoc* to complete certain tasks. Sometimes, an organization as a whole may be enlisted. Usually, however, coalitions of the willing will be composed of states *ut singuli*. The American argument for inter-state cooperation is presented as an endorsement of national sovereignty.<sup>125</sup> In reality, however, it amounts to an assertion of U.S. dominance, because such coalitions will be dominated by the strongest state that will take the initiative and provide the military and often also financial means. On the contrary, institutional decision-

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121. Franck has argued that regional arrangements enjoy broader rights of forceful intervention in U.N. Charter practice amounting to a reinterpretation of Charter Article 53. See FRANCK, *supra* note 43, at 162. *Contra* Georg Ress & Jürgen Bröhmer, *Article 53*, in *CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 43, at 864.

122. Even supporters of exceptions to multilateralism voice such concerns. Reisman, *supra* note 10, at 89–90 (proposing that the U.S. claim be regarded as a short-term, superpower-only “doctrine”). Feinstein & Slaughter express a clear preference for multilateralism and argue for stricter terms for non-democratic states. Feinstein & Slaughter, *supra* note 72, at 145, 148–49. Both of these arguments lead to unequal terms for certain states and can thus not easily be squared with the principle of sovereign equality. U.N. CHARTER art. 2, para. 1; *see infra* note 138 and accompanying text.

123. The term is generally attributed to Richard Haas, former director of policy planning at the state Department and now President of the Council on Foreign Relations.

124. A solution preferred both by Glennon, *supra* note 39, at 198–201, and Anne-Marie Slaughter, *Präzisionswaffe Völkerrecht, Die Demokratien müssen sich verbünden—zu einer neuen Kraft innerhalb der UN*, *DIE ZEIT*, Jul. 3, 2003, at 11. *See also* Press Release, Freedom House, Creation of UN Democracy Group Urged (Aug. 12, 2003), at <http://www.freedomhouse.org/media/pressrel/081203.htm>.

125. *See, e.g.*, Donald H. Rumsfeld, The Marshall Center 10th Anniversary, Remarks delivered at Garmisch, Germany (Jun. 11, 2003), available at <http://www.defenselink.mil/speeches/2003/sp20030611-secdef0285.html>.

making, whether in the United Nations or NATO, requires a larger consensus or unanimity so that each partner can exert influence on collective decisions.

Violence unleashed by states is of a special character, and brings with it more dangers and risks than foresight can predict. Long-term consequences of military action are almost impossible to ascertain in advance—Iraq is an example in point. International legitimacy provided by international institutions may thus constitute quite real support towards receiving broad assistance in taming the long-term consequences of the use of force. Institutional responses to new threats may thus prove more effective than the unilateral use of force of doubtful legitimacy.

Nevertheless, international law must find a way to renegotiate the relationship between multilateral and unilateral action, in particular when dealing with large crimes against international law and new threats emanating from non-state sources. Whereas multilateral legitimation is always preferable, in case of institutional apathy or inertia, unilateral emergency action should not be excluded. Only when international institutions work effectively in countering real threats to states, such as terrorism and weapons of mass destruction, may they effectively prevent unilateral action. In the words of U.N. Secretary-General Kofi Annan in his 2003 address to the General Assembly:

[I]t is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, and thus drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action.<sup>126</sup>

Thus, the future of multilateralism may well depend on the realization by the U.S. government that truly multilateral decision-making will be more successful in the long run than the *ad hoc* remedy of ‘coalitions of the willing’ that do not last longer than the willingness of the contributors. On the other hand, the international community should improve the effectiveness of international institutions and address questions regarding their democratic legitimacy.<sup>127</sup>

### 3. Prevention v. Repression

The argument in favor of prevention seems compelling. Even before the invention of weapons of mass destruction, would it not have been

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126. Press Release, Kofi Annan, Adoption of Policy of Pre-emption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly (Sept. 23, 2003), U.N. Doc. SG/SM/8891, GA/10157, available at <http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>.

127. Cf. Feinstein & Slaughter, *supra* note 71, at 137.



preferable to attack Hitler in 1936 before he was able to build the German Wehrmacht to its war strength, or to beat Al Qaeda before it could execute the attacks of September 11th, 2001? And do not weapons of mass destruction render the problem more urgent in light of the potential consequences of their use? However, the real problem has little to do with these arguments. The true difficulties lie elsewhere: 1) how is one to ascertain the facts?; and 2) who decides? Unilateral decisions lead to a jungle in which self-serving explanations of the use of force will abound.<sup>128</sup> Thus, one should rather ask whether prevention by multilateral means works—or can, at least, be made to work.

As it turns out, the inspections in Iraq in the 1990s had been far more effective than the inspectors themselves had believed.<sup>129</sup> The inspection route taken by Resolution 1441 (2002) was not exhausted. Other cases of proliferation, such as North Korea and Iran, also involved inspections. However, they only worked because of state cooperation. States are more ready to accept inspections when they come from a multilateral institution rather than from another state. In Iraq, only the combination of intelligence received from U.S. and other services and international inspectors on the ground ensured reliable evidence. In Iran, the British-Franco-German agreement opened the way for inspections by the International Atomic Energy Agency.<sup>130</sup>

The U.S. attitude towards the strengthening of international institutions in the field of prevention has recently changed to the negative, however. It is the United States that has, at the eleventh hour, prevented the adoption of a protocol on biological weapons, which would have introduced a control and inspection regime similar to that of the Nuclear Non-proliferation Treaty and the Chemical Weapons Convention.<sup>131</sup> Concerning the latter, U.S. cooperation seems to be wanting, in spite of the reluctant

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128. For an in-depth treatment, see Mary Ellen O'Connell, *Ad Hoc War, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* (Horst Fischer et al. eds., forthcoming 2004) (manuscript at 399).

129. See *supra* note 72; BLIX, *supra* note 8, at 20–28 (remarking on the dubious role of David Kay).

130. Leverett, *supra* note 59.

131. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (entered into force Mar. 26, 1975). The U.S.'s proposed alternative relies on traditional international criminal law concepts and on the after-the-fact investigation of suspicious outbreaks or allegations of biological weapons use. See President's Statement on Strengthening the International Regime Against Biological Weapons, 2001 PUB. PAPERS 1332 (Nov. 1, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011101.html>. On the negotiations, see Onno Kervers, *Strengthening Compliance with the Biological Weapons Convention: The Protocol Negotiations*, 7 J. CONFLICT & SECURITY L. 275 (2002); Onno Kervers, *Strengthening Compliance with the Biological Weapons Convention: The Draft Protocol*, 8 J. CONFLICT & SECURITY L. 161 (2003).

ratification during the Clinton administration. The U.S. Senate has blocked the Comprehensive Nuclear Test-Ban Treaty, and the Landmines Convention will not be ratified by the United States any time soon. Thus, the lack of an effective non-proliferation regime is not only due to the existence of “rogue states,” but just as much to the U.S. reluctance to build on the existing institutions to control the further spread of WMD. As to the repressive side, the Rome conference on the International Criminal Court was unable to agree on an effective system of criminal prosecution of the proliferation of WMD.<sup>132</sup> As long as the United States and other states obstruct an effective multilateralism, arguments as to the ineffectiveness of international institutions sound hollow.

However, this does not give an answer to the question of when it is appropriate unilaterally to preempt a regime from using WMD or supporting terrorist acts. Substantive criteria seem difficult to develop. The *Caroline* formula<sup>133</sup> draws a relatively narrow line, only accepting imminent threats that are relatively easy to assess.<sup>134</sup> While the *Caroline* doctrine may be satisfactory for situations of an imminent land war, it might indeed, as the National Security Strategy asserts, be less appropriate for effectively preventing the potential harm from weapons of mass destruction in time.<sup>135</sup> The differences between the approaches of the United States and Europe, old or new, seem to lie not so much in substance as in form. In the European view, the “first line of defense” is to be determined multilaterally, through international organizations and in multilateral partnership with the United States, rather than unilaterally.<sup>136</sup> In any case, the Iraq conflict hardly qualifies, because it turns out that the coalition was well aware of the fact that any potential threat from the

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132. Article 8(2)(b) of the Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 8, 2187 U.N.T.S. 90, 94–97 (entered into force Jul. 1, 2002), only penalizes the use of weapons already prohibited by the Hague Regulations and the 1925 Geneva Protocol (in subparagraphs xvii and xviii), *id.* at 96. In addition, in subparagraph (xx), it refers to an annex to be agreed upon in future negotiations among the state parties. *Id.*

133. See *supra* note 42 and accompanying text.

134. Although in one of the post-Charter instances frequently mentioned, the so-called Six-Days-War, the threat seems to have been, in hindsight, less imminent than apparent at the time, see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 173 (3d ed. 2001).

135. On this point, see Sofaer, *supra* note 41, at 214.

136. EUROPEAN UNION INST. FOR SEC. STUDIES, *A SECURE EUROPE IN A BETTER WORLD: EUROPEAN SECURITY STRATEGY* 20 *passim* (2003), available at <http://www.iss-eu.org/solana/solanae.pdf>; see also *EU Strategy Against Proliferation of Weapons of Mass Destruction*, in 66 CHAILLOT PAPERS: FIGHTING PROLIFERATION—EUROPEAN PERSPECTIVES 93, 96, ¶ 14 (2003), available at <http://www.iss-eu.org/chaillot/chai66e.pdf>. Both strategies were adopted by the European Council on Dec. 12, 2003. Presidency Conclusions, Brussels European Council 12 and 13 December 2003, ¶¶ 84, 87 (2004), available at [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/78364.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/78364.pdf). The argument for a multilateral decision-making process is forcefully made by Bothe, *supra* note 43, at 239–40; see also Feinstein & Slaughter, *supra* note 71, at 148.

Iraqi weapons program was not about to materialize. To counter dangers emanating from terrorism and weapons of mass destruction, international cooperation is key. In the long run, the success of coalition-building within multilateral institutions may well turn out to be superior to unilateral preventive action. Thus, there is nothing wrong about preemption as such. However, difficulties of risk-assessment and the danger of using preemption as pretext for the use of force point, at least in the absence of an imminent threat, to multilateral rather than unilateral processes to achieve effective preemption.<sup>137</sup>

#### 4. Hegemony v. Sovereign Equality

Others criticize the Charter principle of sovereign equality as a chimera<sup>138</sup> that prevents international law from addressing the real problems of hegemony. Both the problem and its novelty seem to be overstated, though. Sovereign equality as a legal principle depends not only on the underlying power rationale, but also on perceptions of legitimacy. If we do not wish to give up the distinctness of international law from political power altogether, international law must not simply reflect or describe political power, but try to influence and constrain the unilateral use of force.<sup>139</sup> On the other hand, under international law, sovereignty has never been absolute. The Charter itself contains the most important legal limit to the equality of states, namely the binding force of Security Council resolutions and the decisive role of the permanent veto-carrying members in their adoption.

Can sovereign equality be maintained for long when it not only fails to reflect the distribution of power capabilities—which it has never done—but when the most powerful member no longer recognizes the authority of the common institutions?<sup>140</sup> When U.S. President Bush, in

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137. For a more elaborate argument to this effect, see Luban, *supra* note 89, at 223–28. Among other things, he points to the fact that the U.S. justification of pre-emptive wars against risks of the proliferation of WMD would also have permitted attacks against Pakistan and even Russia. *Id.* at 233.

138. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, 135, 173–75 (Michael Byers & Georg Nolte eds., 2003).

139. See Michel Cosnard, *Sovereign Equality—“The Wimbledon Sails On”*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 138, at 117, 119 (“The analysis of sovereignty does not aim to describe the extent of one state’s power, but to explain why a subject of international law is legally empowered. . . . Sovereignty is a legal quality of power, recognized by international law as belonging to every state . . .”).

140. Cf. Gregory H. Fox, *Comment on Chapters 4 and 5*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 138, at 187, 189–90. For a more extensive treatment of the argument that a U.S. hegemon unbound by international law is in the general interest of global values, see Luban, *supra* note 89, at 236–48; *Just Wars*, *supra* note 89.

his State of the Union speech of 2003, emphasized that “the course of this nation does not depend on the decisions of others,”<sup>141</sup> he effectively denied the existence of multilateral checks on U.S. action, whether military or otherwise. He thus confirmed the earlier challenges to the United Nations contained in his address of September 12, 2002—either you do what we want, or we will do it alone anyway<sup>142</sup>—and to all other states dating from September 20, 2001—“[e]ither you are with us, or you are with the terrorists.”<sup>143</sup>

Nico Krisch has argued that the U.S. unwillingness to accept international legal constraints results in “a far-reaching hierarchical system which enables the United States to subordinate other States to law it has itself created—which enables the United States, in effect, to govern other States.”<sup>144</sup> Indeed, the United States practices a strategic and, at times, tactical use of international law—trying to impose obligations on others while remaining unrestricted itself. Thus, it insists on the fulfillment of the obligations of other states under Article 25 of the Charter, in particular regarding the anti-terrorism measures contained in SC Res. 1373 (2001). Being the single superpower, the United States can make the most out of the sovereign rights extended to it by the international legal system. The separation of law and power dictates that the United States may (ab)use international prerogatives to prevent the emergence of new law or to violate existing international law, but it cannot make international law by itself alone.<sup>145</sup> Thus, preemptive self-defense will only become legal if and to the extent the U.S. claim is accepted by other states. “Sovereign equality” does not constitute a utopian description of a world-to-be in which all states are equal in power and well-being, but a principle of how to create and enforce norms binding on other states. Sovereign equality always was a legal fiction, but it constitutes, as Pierre-Marie

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141. President’s Address before a Joint Session of the Congress on the state of the Union, *supra* note 64, at 114. The full passage reads:

America’s purpose is more than to follow a process—it is to achieve a result: the end of terrible threats to the civilized world. All free nations have a stake in preventing sudden and catastrophic attacks. And we’re asking them to join us, and many are doing so. Yet the course of this nation does not depend on the decisions of others. . . . Whatever action is required, whenever action is necessary, I will defend the freedom and security of the American people. . . .

*Id.*

142. President’s Address to the United Nations General Assembly, *supra* note 50, at 1532.

143. President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2001 PUB. PAPERS 1140, 1142 (Sept. 20, 2001).

144. Krisch, *supra* note 138, at 136.

145. *Cf.* Reisman, *supra* note 10, at 82, 90.

Dupuy has observed, nothing less than the constituent fiction of international law.<sup>146</sup>

At the very moment when the most powerful member, which has so far maintained the system in the first place, questions the binding character of international law, and thus the binding character of its own formal pronouncements (treaties) and actions accompanied by conviction of their normative character (customary law), international law becomes threatened as such.<sup>147</sup> This would not so much extend to the United States the characteristics of a world government,<sup>148</sup> but of an imperial power that intends to impose its commands and laws on others without being bound by them itself<sup>149</sup>—a Hobbesian sovereign indeed.<sup>150</sup> Just as much as Hobbes is not any more acceptable in a democratic society under the “rule of law,” neither could modern international law accept a world governed by the single superpower without legal checks and balances.

Of course, there still is the possibility of the acceptance of the U.S. views by the international community. Instead of a quasi-Hobbesian United States above the law, U.S. predominance would be assured within the law. Michael Byers understands the National Security Strategy as an attempt to achieve such dominance:

[T]he effort to change the rules concerning the use of force . . . is an effort to alter dramatically this important area of international law in favor of the United States. If the effort succeeds, the United States will be able to justify a substantial portion of its military action on the basis of a modified customary international law right of self-defense—one that is not subject to the constraints of the UN Charter. . . . The result would—at least with regard to the rules on the use of force—amount to an imperial system of international law.<sup>151</sup>

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146. Pierre-Marie Dupuy, *Comment on Chapters 4 and 5, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW*, *supra* note 138, at 176, 178–79.

147. *See id.* at 183.

148. *But see* Krisch, *supra* note 138, at 173 (“[D]espite the caveats above, the United States still operates in a fashion similar to a world government.”).

149. *Cf.* 4 JOHN ADAMS, *Novanglus*, in *WORKS OF JOHN ADAMS* 3, 106 (1851) (stating the famous adage of the rule of law as government of laws, not of men). For a transfer of this adage to the international sphere, see *Letter of the Honorable Elihu Root to Senator Henry Cabot Lodge regarding the Covenant of the League of Nations*, 13 AM. J. INT’L L. 596, 597 (1919). *See also* BRUNO SIMMA, *International Adjudication and U.S. Policy—Past, Present, and Future*, in *DEMOCRACY AND THE RULE OF LAW* 39, 56 (N. Dorsen & P. Gifford eds., 2001).

150. Krisch, *supra* note 138, at 170.

151. Byers, *supra* note 43, at 189.

Byers nevertheless regards this conduct as preferable to an open breach of the law. Unfortunately, the effort to change the law and a concomitant breach of the law do not exclude each other. The argument advanced by President Bush can be understood that way. If the law is not changed our way, we disregard it. Thus, international law in a hegemonic sense will either not contain any limits to U.S. power, or it will be disregarded by the hegemon. In either case, international law as such will be irrelevant as a factor in U.S. decision-making.

This need not remain so. The more the United States understands that it has a long-term interest in the existence of a strong international law to fight international terrorism and the spread of weapons of mass destruction, the more it will be ready to accept certain constraints on itself. In this vein, respect for international law may well turn out to be the best avenue to achieve global co-operation on these vital issues. To be convincing, this does also require the readiness to assume oneself the same obligations as other states.<sup>152</sup> Ultimately, U.S. hegemony is very strong regarding military means, but in other areas, such as trade or human rights, the effectiveness of U.S. leadership is based on the power of persuasion rather than the power of its guns. Thus, the relationship between military hegemony and international legitimacy, between power and law needs to be permanently negotiated and re-negotiated. International institutions, in particular the Security Council, still constitute the most appropriate *fora* for this process of negotiation and adjustment.

### 5. Democracy v. Peace

Closely related to, but nevertheless distinct from, the questions of the legitimate use of force is the cultural and ethical dimension. In the National Security Strategy, the argument in favor of "regime change" in Iraq is closely linked to the claim of the primacy of "western" values.<sup>153</sup> Pursuant to the thesis of the "democratic peace,"<sup>154</sup> the democratization of Iraq by force transforms into an act of securing

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152. *But see* Feinstein & Slaughter, *supra* note 71, at 145 (seeming to argue for a regime differentiating between democratic and other states). "The provisional agreement [between Iran and European states] . . . recognizes that regimes such as Iran's, because they sponsor terrorism, repress democracy, and have clear nuclear designs, are not entitled to the same rights as other NPT members." *Id.* I would rather suggest distinguishing between states with a clean record on WMD and those who have already violated the regime in question. Additional criteria would limit the participation in the system to democratic states and would render it thereby almost useless.

153. *See* NATIONAL SECURITY STRATEGY, *supra* note 41, at 1 *passim*.

154. *See* Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST COLD-WAR WORLD* (1993).

peace. Or, in the words of the U.S. president, "freedom is worth fighting for, dying for, and standing for, and the advance of freedom leads to peace."<sup>155</sup>

This value-optimism is not limited to the Bush administration. Since the end of the Cold War, (neo)liberal philosophers and international lawyers are increasingly looking for an international law that would not treat each state alike. No less than John Rawls has embraced a distinction between "liberal" and "non-liberal" societies, with "decent hierarchical" but not totalitarian societies in the middle.<sup>156</sup> Others view a "democratic caucus" within the U.N. as more apt in deciding on the use of force for humanitarian purposes than the Security Council.<sup>157</sup> However, if the use of force shall be based on the consent of the larger part of the community, and not only of states deemed democratic, it seems inapt to draw a line between democratic and non-democratic rather than between peaceful (or, in the language of Article 4 of the Charter, "peace-loving") and non-peaceful states.

The emphasis of the Charter on the primordial value of peace allows for an argument based on the more peaceful nature of democratic states. The step from the theory of "democratic peace" to the justification of intervention in authoritarian states is a small, but significant one. The thesis of the "democratic peace" originates in an analysis of state interests and behavior: Liberal and democratic states loathe war because it hurts their own populations and interests as much as those of the enemy. This description is turned into a prescription for unilateral intervention: only if the world becomes liberal and democratic in the western image will it live in peace. Wilson's "War to End All Wars" comes into mind.<sup>158</sup>

The democratic-peace approach, whether it is grounded in evidence or not,<sup>159</sup> can however not guarantee peace in a world which is still less dominated by liberal and democratic states than one might wish. Or, in order for it to do so, one would have to draw the category of democ-

155. President's Remarks on the 20th Anniversary of the National Endowment for Democracy, *supra* note 80, at 1543.

156. John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 41, 60–68 (Stephen Shute & Susan Hurley eds., 1993); *see also* JOHN RAWLS, *THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED* 62–78 (1999).

157. *See supra* note 124 and accompanying text.

158. *See* THOMAS J. KNOCK, *TO END ALL WARS. WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1992). *Cf.* Lawrence Kaplan, *Regime Change*, *THE NEW REPUBLIC*, Mar. 3, 2003, at 21 (discussing the new Wilsonianism displayed by parts of the Bush administration).

159. *See* John Norton Moore, *Solving the War Puzzle*, 97 *AM. J. INT'L L.* 282 (2003). For a sharp critique, *see* Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 *EUR. J. INT'L L.* 449, 463–67 (1997).

matic states so broadly that “democracy” becomes a meaningless term. When it is used to justify the use of force, it will easily lead to the opposite, namely a global war of the self-appointed forces of light with the forces of darkness.<sup>160</sup> International law has always been the space where conflicts of values (and interests) in a pluralist world have been negotiated. However, contemporary international law also contains a set of values which are deemed non-derogable—or *ius cogens*. Unlike the prohibition on the use of force,<sup>161</sup> “democratic governance” is not one of these values, because the precise definition and implications of “democracy” are still in dispute. In principle, this ambiguity forecloses a democratic imperialism that would use force to implement democracy. Nevertheless, the promotion of liberal and democratic values by itself is, of course, permissible. If used parsimoniously and with respect of local circumstances, liberal and democratic values can lead to the expression of pluralism rather than its suppression by force. The insistence on the primacy of one’s own values, however, followed, *in extremis*, by the use of force, does not entail persuasion of others, but resistance. The connection of use of force with the spread of democracy is not a recipe for democratic peace, but risks inter-cultural war.

#### IV. THE FUTURE OF INTERNATIONAL LAW IN A ONE-SUPERPOWER-WORLD

The Iraq conflict has divided the western alliance more than any other since the end of the Second World War. However, it also provides us with a set of conflicting views about international law and international relations, both in the argument for the invasion as in the argument against it. This Article has argued that it is wrong simply to regard this debate as one of a law-breaker against those upholding the law. Rather, both the security and the domestic legitimacy arguments need to be taken seriously. As we have seen, many supporters of the Bush administration regard legal constraints as either irrelevant or detrimental for decisions to use force. But this analysis has also shown that the Bush administration has combined its ambivalence towards existing international law with claims to revise it: to allow for preemptive and anticipatory use of force, to implement Security Council by

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160. Cf. REINHOLD NIEHBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (2nd ed. 1960).

161. See *Oil Platforms (Iran v. U.S.)*, I.C.J. No. 90 (Nov. 6) (separate opinion of Judge Simma, ¶ 6 and preface), 42 I.L.M. 1334, 1428–30 (2003) (stating a need for the court to reaffirm the law of the use of force).



unilateral “coalitions of the willing,” and actively to pursue the spread of democracy and human rights against dictatorship.

What does this tell us for the future of international law? Some claim that the regulation of the use of force by the Charter has failed.<sup>162</sup> But they do not provide any alternative mechanism to provide international legitimacy. Ultimately, a Charter conception of international law is compatible with liberal and democratic values, but attempts to realize these values by peaceful means. International law, with its insistence on consensus and persuasion, embodies the virtues of a “culture of formalism,” in Martti Koskenniemi’s felicitous phrase,<sup>163</sup> that does not attempt to impose one’s own values on others, combined with a slow development of common values that may allow for some minimum rules of behavior across different cultures and religions. Ultimately, for all its shortcomings and failures, no other system is in sight that could substitute for this function of the United Nations. The post-war situation in Iraq seems to demonstrate that the consequences of war cannot be assessed beforehand, however slight the war may appear on first sight. This might strengthen rather than weaken the insight of the drafters of the Charter that the use of force seldom solves problems, but, rather, constitutes one itself.<sup>164</sup> Democracy and the international rule of law are no opposites. The respect for the international rule of law also constitutes an important element of the external behavior of democratic states. The increasing importance and transformative potential of human rather than state rights for the international rule of law includes the respect for the right to life, which is the first victim of any war. An international rule of law without a workable prohibition on the use of force, or, in other words, a duty to respect the right to life of other people(s),<sup>165</sup> would remain incomplete, to say the least. Nevertheless, if we do not want to stand idle when faced with crimes against humanity and genocide committed by states against their own populations, the right to be protected from military

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162. For example, see Glennon’s arguments *supra* note 39.

163. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960*, 494–509 (2002).

164. Hardly anybody in Washington still asks “who’s next?” The state of affairs was quite different less than half a year ago. See IVO H. DAALDER & JAMES M. LINDSAY, *AMERICA UNBOUND: THE BUSH REVOLUTION IN FOREIGN POLICY* 172 (2003). For a similar point of view, see Brunnée & Toope, *supra* note 88.

165. The connection between the prohibition on the use of force and human rights has been recently clarified by Luban, *supra* note 89, at 218 (“The decision to ban the use of force except in self-defense represented a judgment, emerging from the smoldering ruins of Europe and Japan, that treating war as an instrument of policy poses an intolerable threat to ‘fundamental human rights’ and ‘the dignity and worth of the human person’” (quoting U.N. CHARTER pmbl.)). As Luban adds this does not exclude humanitarian intervention when certain conditions are met. *Id.* at 218–19n.21; see also *supra* note 89 and accompanying text.

interference may, in extreme cases, have to give way to the use of armed force as a last resort against massive violations of human rights.

The Iraq conflict was a momentous event, but not the first instance where the world superpower has allegedly disregarded the international rules on the use of force. International textbooks are replete with examples, from Grenada to Sudan.<sup>166</sup> International law could never be enforced against a superpower. Indeed, the effective implementation of international law largely depends on the support of the United States. But, arguably, the project of an international rule of law has lost, in the Iraq war, nothing of its usefulness, even for a superpower with a global reach that cannot, in spite of all imperialist temptations, manage the world alone.<sup>167</sup> In the words of Michael Walzer, “[the U.S. administration] will learn sooner or later that hegemony, unlike empire, rests on consent.”<sup>168</sup>

To conclude, let us revisit some of those uses of international law. First of all, international law continues to provide the framework and language for a dialogue regarding the pursuit of principled, long-term policies. It may not determine outcomes, but will influence them, if only because the actors know of the necessity of justifying their actions according to internationally recognized criteria for what is “right.”<sup>169</sup> Being both parsimonious by using consent- and custom-based methods to ground obligation, and value-laden through the development of cross-cultural principles and rules, international law is an important tool for dealing with the global concerns in today’s world—human rights, the environment, peace.

Second, the war against Iraq has changed nothing with respect to the much broader field covered by international law. There still exists a growing need for global regulation in a globalized world, from finance and trade to human rights. Indeed, as the post-war phase in Iraq has shown, if violence shall not last for ever, any use of force has to give way to non-violent means of conflict-solution, based on a minimum set of common values and institutions—the very values and institutions international law has helped to develop. Under these circumstances, the United Nations can, as representative of the whole international

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166. Compare the defense of international law-making based on consent and not on superpower imposition by Farer, *supra* note 8, at 607–08.

167. This point is also a cornerstone of the rising U.S. critique. See DAALDER & LINDSAY, *supra* note 164, at 195.

168. Michael Walzer, *Is There an American Empire?*, *DISSENT*, Fall 2003, at 27, 29, available at <http://www.dissentmagazine.org/menu/test/archives/2003/fa03/walzer.htm>.

169. See ABRAHAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 102 (1974); Friedrich Kratochwil, *How Do Norms Matter?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 53 (Michael Byers ed., 2000); Stromseth, *supra* note 8, at 632–33.

community, provide the legitimacy that is eluding the United States as occupying power.

Third, as can be observed in post-war Iraq, the use of force without the clear and unequivocal support of international law and institutions is costly in terms of so-called political capital, e.g. the costs of maintaining fragile “coalitions of the willing” and enlisting international support. Thus, the legitimacy bestowed on military action by international institutions is everything but negligible.<sup>170</sup> For example, a Security Council resolution would have allowed not only for a larger coalition including, among others, France, Turkey, and NATO as such, but also for a more inclusive and more acceptable post-war regulation. Every use of force has to give way to a regulation of peace involving binding commitments of the parties, which can only be done by using international law. In addition, the fight against terror requires broad international cooperation. A United States abandoning multilateralism will have a much harder time in winning support for the implementation of anti-terrorism measures.

Fourth, the rest of the world, and Europe in particular, depends on a United States that is willing to employ its huge military and economic capabilities for issues of global concern and the implementation of international law. In the absence of a world state with a world police force—whose presence would be a nightmare rather than a dream—international law needs powerful states to enforce international rules and principles. However, if power and legitimacy shall not remain apart, they need to negotiate with each other. To take up Robert Kagan’s image,<sup>171</sup> the relationship between Venus and Mars may be tempestuous, but neither can live without the other, even if they may not meet at the Four Seasons Hotel, but rather in a shabby place on the East River.

Power without international recognition and legitimacy will not be viable. Legality without power will remain a dead letter. The compromise between normativity and reality has to be negotiated and re-negotiated. The global institutions where this permanent negotiation takes place may be slow, bureaucratic, corrupt, and cynical. But if they did not exist, we would have to invent them. Certainly, there is much need for democratic reform. But renewed institutionalized settings can

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170. See Stromseth, *supra* note 8, at 631 (describing British and American efforts to receive the unequivocal backing of the Council); *id.* at 637–42 (arguing that the Council is more amenable to U.S. interests than any conceivable new organization); see also Wedgwood, *supra* note 10, at 581; Kagan, *supra* note 9.

171. See *supra* note 9.

only be found and implemented when based on the very consensus that is the precondition for the existence of an international community—and by the use of international law to provide the language and terms of its existence.