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The Regulation of International Coercion

James P. Terry

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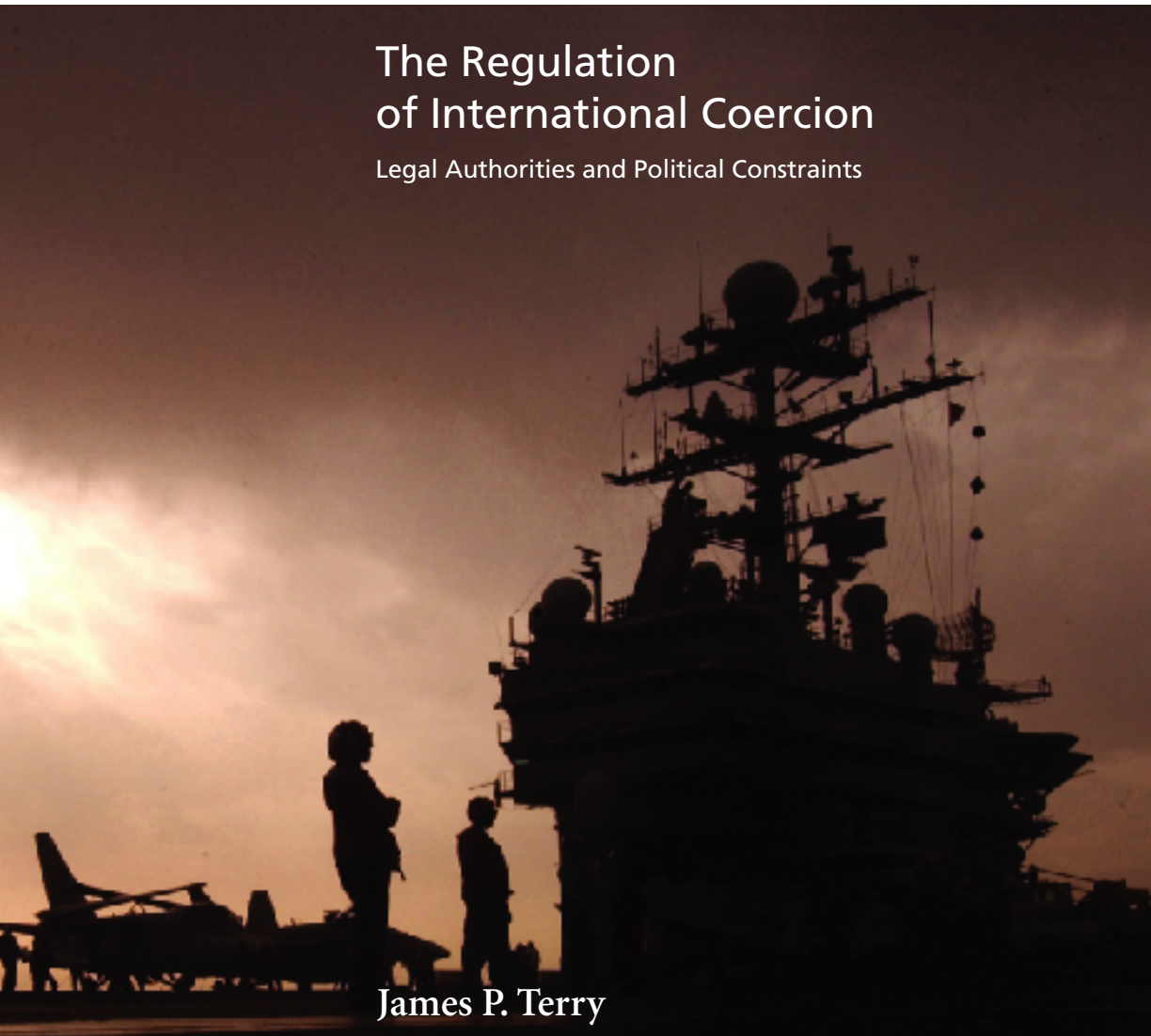
The Regulation of International Coercion

Legal Authorities and Political Constraints



James P. Terry

Cover

Preparations for evening flight operations on board the aircraft carrier USS Harry S. Truman *(CVN 75) in March 2005. U.S. Navy photo by Photographer's Mate Airman Ryan O'Connor.*

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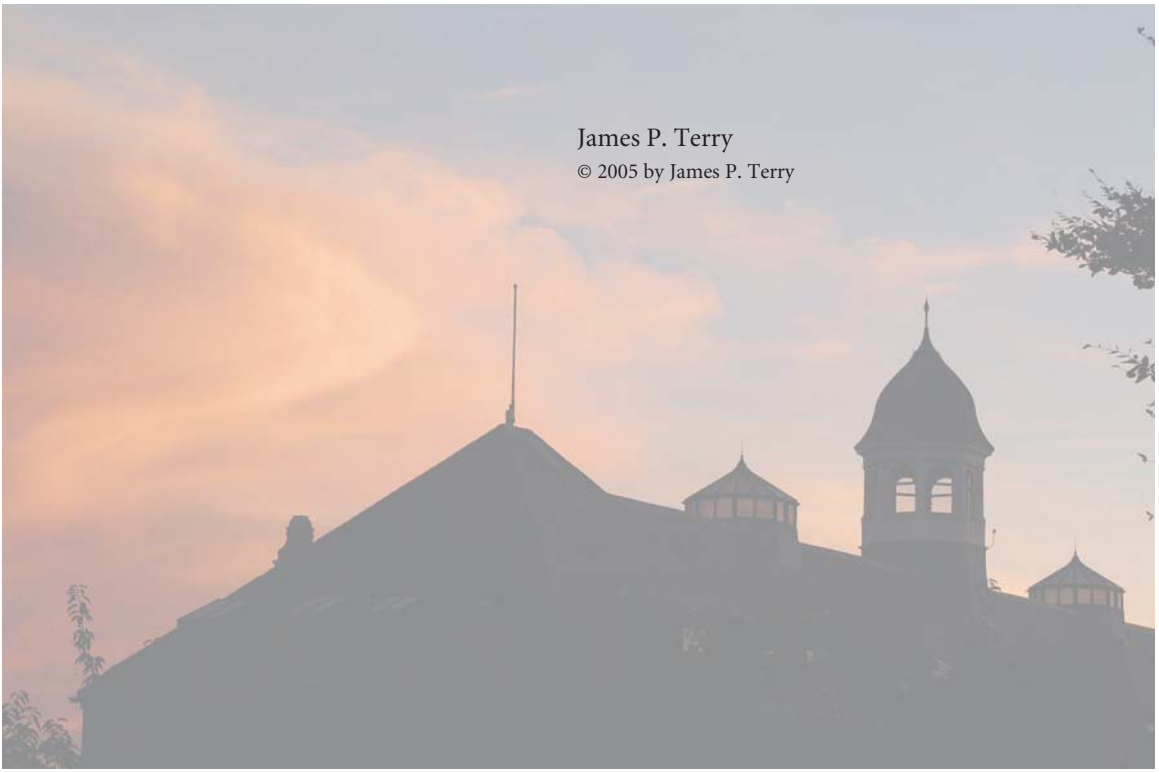

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Foreword

The study of international law has been an element of the curriculum of the Naval War College since the founding of the College, and it was to fill the need for textbooks focusing on practical, law-related naval issues that the College published its first book, in 1895. That work—a collection of edited and expanded lectures given in Newport by Freeman Snow, professor of international law at Harvard, published as *International Law: A Manual Based upon Lectures Delivered at the Naval War College*—was seminal in two ways. First, it was for its compiler, Commander Charles Stockton of the Naval War College's faculty, that the College's prestigious chair in international law is named. Second, the book itself, which was soon canonical, was the forerunner of the International Law Series, of which seventy-nine volumes by, or collecting the work of, major scholars have appeared, with more in preparation.

The *Naval War College Review* in its time took up the challenge. In the May 1949 issue (*Information Service for Officers,* as it was first known, having been founded only in October 1948), its editors published "Legal Foundations of International Relations," by Manley O. Hudson. At this writing, the index of the journal contains seventy-one entries under the heading "International Law," and the continual flow of manuscripts from international lawyers testifies that the *Review* is well established in that field. It is no surprise, then, that when the Naval War College Press established the Newport Papers monograph series in the early 1990s, international law quickly found a place there. The third Newport Paper, published in October 1992, was Horace B. Robertson, Jr.'s, *The "New" Law of the Sea and the Law of Armed Conflict at Sea;* the eleventh, by Frank Gibson Goldman, was *The International Legal Ramifications of United States Counter-Proliferation Strategy: Problems and Prospects* (April 1997), and number fifteen was *International Law and Naval War: The Effect of Marine Safety and Pollution Conventions during International Armed Conflict,* by Dr. Sonja Ann Jozef Boelaert-Suominen (December 2000).

So it is with particular satisfaction that we sustain that commitment with this Newport Paper, the twenty-fifth in the series, and the first of our 2006 program. James P. Terry—a former Principal Deputy Assistant Secretary and Deputy Assistant Secretary of State; former legal counsel to the chairman of the Joint Chiefs of Staff, then General Colin Powell; a retired colonel, U.S. Marine Corps; and today chairman of the Board of Veterans' Appeals, in the Department of Veterans Affairs—is familiar to Press subscribers as the author of four articles (going back to 1986) in the *Review.* In *The*

Regulation of International Coercion Colonel Terry has undertaken a major task, an assessment—from a U.S. policy perspective and in an international-law framework—of "representative instances where force has recently been used in international relations, the circumstances under which it was used, the instructive international policy and legal constructs that can be applied, and the relationship of these policies to the minimum world order system established in . . . the United Nations Charter." He is eminently fitted to meet the challenge, and the value of his argument befits the century-long tradition of publishing in international law at the Naval War College.

CARNES LORD
Editor, Naval War College Press
Newport, Rhode Island

Introduction

The most significant discourse about serious threats to U.S. national security in the twenty-first century will likely concern the military capabilities and intentions of nonstate actors, acting either for themselves, for religious elites, or as surrogates for state sponsors. This preoccupation results not from any inordinate fear of "terrorism" but from a recognition of objective military and political realities. While prior to 1991 only the Soviet Union possessed the capacity to inflict catastrophic military destruction on the United States, today that threat is vested in terrorist cells and religious sects that seek to destroy the fabric of the United States through unconventional military and paramilitary means. The terrorist attacks of 11 September 2001 bear this out.

During the Cold War, the major threat to the United States was clearly the fear of miscalculation by the Soviets. Today, that threat has been recharacterized in terms of deliberate aggression against the United States by nontraditional actors willing to take suicidal risks to inflict premeditated, brutal savagery on innocent civilians in a manner designed to force not so much regime change directly as policy changes that affect regime change.

Commitment to national security is only as valid as the policies and plans, military, economic, and political, that shape the areas and people from which these threats originate. The problem always has been to determine which policies, and how applied, make the greatest contribution to countering the threat—a threat now represented by social and religious systems that foster or at least condone aggressive response to differing religious and social values. This has never been more true than in Afghanistan and in Iraq. Security, then, means more than simply protecting the land on which we live; it embraces a comprehensive understanding of the appropriate response to human aspirations for improved conditions of life, for equality of opportunity, and for justice and freedom. Where these interests are thwarted for peoples or groups within a particular state or region by armed protagonists representing narrow, restrictive interests, our response must be one measured by the effective institutionalization of order.

This monograph first examines the relationship between law and the use of force, to include a review of the principles of legal justification, the legal criteria for self-defense, and the policy of deterrence followed by the United States. It then examines the characteristic differences between the interpretive approaches taken by national and nonnational entities in their respective claims and counterclaims during international crises.

Chapter 2, which concludes Part I, is focused on the historical aspects of the minimum world order system, which today comprises the prohibition against the use of force by one state against another embodied in Article 2, paragraph 4, of the United Nations Charter, with the exception inherent in customary international law and in Article 51 of the Charter that every state is authorized to use force in self-defense. A review of the pre-Charter system focuses on the development of the nation-state and the threads of international law development leading to multilateral agreements vice solely bilateral accords. The period following World War I, with the emergence of the League of Nations, is examined for its significance as an important source of the Charter of the United Nations. The structuring of the Charter is then addressed in terms of the concept of aggression and lawful response to aggression. Chapter 2 concludes with a review of the law of self-defense as defined first under customary international law and then under the UN Charter.

Part II addresses lesser conflicts. Chapter 3 addresses instances where intervention is authorized in defense of humanitarian values defined in the UN Charter. The recent humanitarian interventions in the Congo and in Kosovo provide examples of authorized humanitarian initiatives. Chapter 4 examines the American intervention in Panama in 1989 as we intervened both to protect our interests under the Panama Canal Treaty and to ensure the safety of U.S. nationals present in Panama pursuant to that agreement. Chapter 5 reviews those conflicts in which terrorist violence by individuals, groups of individuals, and state-supported terrorist elements create a right to respond through military force by the target state. The attacks by Iranian militants in 1979 and by al-Qa'ida in 2001 spearhead the discussion of lawful response to terrorist violence.

Chapter 5 argues that an effective counterterrorism strategy must ensure that enforcement measures are not legally constrained and that people responsible for terrorist acts are consistently held accountable by regional and international organizations. This expanding body of international law, when coupled with increasingly effective national legislation, appears to be arming the victims of terrorism with some of the legal instruments necessary to combat the threat. This chapter concludes that governmental response to state-supported terror violence, where the elements of necessity and proportionality are met, is clearly supported by customary international law and the UN Charter.

Part III, consisting of chapters 6 and 7, addresses examples of major conflict. These are conflicts that have involved aggression by one or more nation-states against another nation-state, as opposed to the intervention by nations or coalitions of nations in response to either humanitarian crises or terrorist violence. In these major conflicts, the sovereignty of a nation is normally in dispute. While not necessarily exhibiting greater destructiveness than "lesser" conflicts, the more traditional international conflicts addressed in Part III invoke the law-of-war principles reflected in the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949.

Chapter 6 examines the coalition response to Iraqi aggression in 1990–91 during Operation DESERT STORM. It contrasts the illegality of the actions of the Iraqi regime of Saddam Hussein with the responses of the coalition led by the United States, which succeeded in liberating Kuwait and returning its borders to the status quo ante. The chapter begins with a discussion of Iraq's invasion of Kuwait and the response of the United Nations, leading up to the decision to use force. It then examines the conduct of armed hostilities by both sides during the war. The chapter concludes with observations on the role of law in the successes and failures of the postwar enforcement regime in Iraq.

Chapter 7, Operation IRAQI FREEDOM, examines the Bush administration's decision to invade Iraq in March 2003 and enforce a long series of UN Security Council resolutions addressing Iraqi threats to international peace and security. This chapter examines these Iraqi violations in the context of international law principles justifying intervention. More significantly, it examines the right of states to enforce mandates issued by the Security Council and to redress violations of its edicts when the Council, as a body, refuses to do so.

Part IV addresses U.S. policy for peace operations. The United States has voted to support the United Nations and NATO in providing multilateral forces to restore international peace and security. The United Nations was involved in both Chapter VI (peacekeeping) and Chapter VII (peace enforcement) operations in the 1990s, with limited success. Chapter 8, "Development of Criteria for Peace Operations," looks at the limitations inherent in UN leadership of such operations, citing the UN failures in Somalia and Bosnia. The success of NATO as the leadership element in Kosovo in 1998 was significant and may foreshadow a new era for the role of regional organizations (discussed in chapter 9) under Chapter VIII of the UN Charter.

Part V concerns itself with special areas of legal concern that warrant consideration with regard to legal justification for military response to international coercion. This part, "Challenges for the Twenty-first Century," addresses the right of states to respond to threats to, and attacks on, critical infrastructure. Chapter 10 examines what rights, if

any, in self-defense are triggered by attacks on infrastructure systems critical to our national political and economic integrity. Chapter 11, concerning computer network attack, takes this one step farther and examines the authority that international law provides to nations wishing to protect these systems aggressively, through preemptive defense. Chapter 11 carefully analyzes the right to target computer networks of nations that have expressed "clear indicators of attack." Finally, recommendations are offered to enhance the ability of the international legal system to support and embrace, strongly and legally, computer-generated data-warfare responses to such aggression.

This Newport Paper examines representative instances where force has recently been used in international relations, the circumstances under which it was used, the instructive international policy and legal constructs that can be applied, and the relationship of these policies to the minimum world order system established in Articles 2(4) and 51 of the United Nations Charter. That system, defined more fully in the pages that follow, provides a complementary structure that prohibits and counters the unlawful, aggressive use of force, on the one hand, and permits national and collective self-defense, on the other, in a manner designed to meet both the traditional threats represented during the Cold War and the nontraditional threats we have seen recently and can expect in the future.

PART ONE

The Changing Nature of the Threat to National Security

CHAPTER ONE

Customary Law
The Relationship between Law and the Use of Force

In consideration of the breadth of the process of coercion and of the related military and economic imbalances on which coercion tends to thrive, a number of legal and policy considerations need to be reexamined. Among these principles are necessity and proportionality, principles of legal justification, the legal criteria for self-defense, and the world-order commitments undertaken by all nations under the United Nations Charter for the deterrence of aggression. In examining these principles, it must be understood that every nation has determined which exclusive or national interests it must protect at all costs if it is to retain elements of its own sovereignty free from the destructive effects of armed attack, conventional or nonconventional. Where these national or exclusive interests intrude upon the collective claims of the greater community of states, as represented by the United Nations, they are rejected by that body. Within that community of nations, however, there are subcommunities with separate agendas. One such includes the lesser developed, or Third World, states, from which most recent destructive violence has been observed to arise.

Because coercion involves such a multivariance of concerns, it is necessary in any analysis of specific factual situations to consider the objectives, motivations, and "needs" of the states involved. Certain of the principles, because they dominate our consideration of the legality of specific instances of coercion, must first be addressed in greater detail.[1]

The Use of Force: Principles of Legal Justification

The principles that confine the legitimate use of force are embodied in two competing but complementary components. The first is the claim of participants to their right to use force until the threat posed by an adversary has been overcome.[2] A related but separate requirement is that the level and type of force used be proportionate to the objective to be obtained. Referred to as the "principle of proportionality," this concept denies a participant the right to interpose excessive force, regardless of the level of the conflict. It has often been stated that the principle of proportionality is but a

moderating element of necessity and that the operation of one without the other would make efforts to regulate international coercion futile. The Department of the Navy observes:

> In allowing only that use of force necessary for the purpose of war, the principle of necessity implies the principle of humanity that disallows any kind or degree of force not essential for the realization of this purpose: that is, force that needlessly or unnecessarily causes or aggravates both human suffering and physical destruction. Thus the two principles may properly be described, not as opposing, but as complementing each other: the real difficulty arises, not from the meaning of the principles, but from their application in practice.[3]

These principles have value only if respected in the practices of states, and specifically in those of the United States and the nations of Western Europe, which shape policy expectations for the larger community. Multilateral agreements like the Hague Conventions of 1907 and the Geneva Conventions of 1949, which codify these principles in specific rules, all depend for their vitality upon the restraint exercised in the actual practice of states. The late Professor Myres McDougal, referring to these state practices in terms of customary international law, declared, "What is important in the development of international law by custom is, we may emphasize, the crystallization of perspectives among peoples, and especially among their effective decision-makers, that certain past uniformities in decision will, and should, be observed in the future."[4]

When the mutual tolerance and mutual restraint required to give effect to these principles are violated by one state in its relations with another, the delicate balance between them of equal security under the law is lost. It is with this predicate in mind that these legal precepts are applied to post–World War II intervention in the chapters that follow.

The Legal Criteria for Self-Defense

The "necessity" for the use of force by states and the "proportionality" with which that force must be applied to an existing threat are simply elements of the right of states to defend themselves and to maintain an international status quo.[5] Thus, an understanding of permissible coercion is as important as an understanding of the unlawful use of force by states and nonstate actors. Professor McDougal stated most succinctly the need to understand both parameters of coercion:

> Complete disorder, failure to forbid even the most intense and comprehensive destruction of values is not only possible but has in fact long characterized the perspectives of traditional international law. If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted. The conceptions both of impermissible and permissible coercion are thus necessary in the theoretical formulation of authoritative policy as well as the practical application of that policy to interacting human groups.[6]

Unfortunately, that coercion which is legally permissible and that which is illegal often differ only in the perception of the state claimant. To the extent that states have a right

of self-defense under Article 51 of the United Nations Charter, that right has been shaped by their own ideologies. In that regard, the issue of whether preparation for armed conflict is actually for a state's national security and self-defense or for purposes of aggression becomes a major political question in the legal dimension of coercion.

An equally relevant and related issue concerns self-serving and reinforcing doctrines argued by states following a use of force that is condemned by the community of nations. One such reinforcing doctrine was the "Brezhnev Doctrine," issued by the Soviet Union at the height of the 1968 crisis in Czechoslovakia. It attempted to establish a special international right to intervention in order to protect and promote the "Socialist Commonwealth of States."[7] Such claims, largely discounted by the international community, point up the obstacles to uniform acceptance of reasonable interpretations of international law principles, as well as the asymmetries between "open" and "closed" societies.[8]

The Policy of Deterrence

The policy of deterrence is a third aspect in the process of balancing vital interests of states so as to preclude the initiation and escalation of conflict. The great value of this perspective is that, unlike the traditional perspectives—political, military, cultural, ideological, and economic—which view international conflicts primarily in terms of original causes, "deterrence" offers a focus on avoidance. Each of these perspectives, however, is necessary in the dynamic approach required for the resolution of international disputes. Such an integrated approach cannot avoid examining the role of law. Existing international legal institutions and processes for establishing world order are addressed in later chapters; however, consideration must also be given to the extent to which countries are willing and able to adopt legal standards in their international relations.

The Contextual Relationship

Within this broad context, the monograph's case studies in the use of force and conflict resolution examine the characteristic differences between the interpretive approaches taken by national and nonnational entities in their respective claims and counterclaims during international crises. The importance of the facts and rationales of post–World War II coercion lies in the significance that nations place in the role of law as a necessary element in gaining political support, both national and international. In their statements of international legality, nation-states, including the United States, and nonstate entities as well adopt and espouse customary and conventional international principles that serve policy aims. The international legal mechanisms, led by the various organs of the United Nations, provide means by which the flexibility of these varying interpretations of law is bounded.

This review of the events and issues surrounding examples of international coercion since the 1945 Yalta Conference attempts to examine the various national and subnational claims in terms of the common, inclusive interests of all sovereign states (and nonstates aspiring to such status) in adhering to an international legal regime that is protective of the interests of the greatest number. Exclusive claims asserted irrespective of these interests must be rejected.

Notes

1. This study will not equate illegal coercion under Article 2(4) of the UN Charter with the definition of aggression adopted by the General Assembly without vote on 14 December 1974. ("Definition of Aggression," 29 UNGA Res. 3314). The fundamental question of aggression has always revolved around "intent," which is approached tentatively in Article 2 of the 1974 definition. Article 2 declares that the use of armed force by a state "in contravention of the Charter" shall constitute prima facie evidence of aggression, in the absence of justifying circumstances. The ambiguity of this provision is such that even acts "in contravention of the Charter" could be legally justified. When "illegal coercion" and "aggression" are addressed in this study, the definition provided by the late Professor Phillip Jessup and widely accepted by international legal scholars will be used. That definition provides "a resort to armed force by a State when such resort has been duly determined, by a means that that state is bound to accept, to constitute a violation of an obligation." Phillip Jessup, "Harvard Research in International Law: Rights and Duties of States in Acts of Aggression," *American Journal of International Law Supplement* 33 (1939), p. 827.
2. See Steven Downey, "The Law of War and Military Necessity," *American Journal of International Law* 47 (1953), p. 251.
3. U.S. Navy Dept., *Law of Naval Warfare,* NWP 10-2 (Washington, D.C.: 1955); see also U.S. Army Dept., *The Law of Land Warfare,* FM 27-10 (Washington, D.C.: 1976). Para. 41 of FM 27-10 declares: "Unnecessary Killing and Devastation. . . . [L]oss of life and damage to property must not be out of proportion to the military advantage to be gained. Once a fort or defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, such as the removal of fortifications, demolition of military buildings, and destruction of stores."
4. Myres McDougal, Harold Laswell, and Ian Vlassic, *Law and Public Order in Space* (New Haven, Conn.: Yale Univ. Press, 1963), p. 243.
5. Article 51 of the United Nations Charter provides in part that the use of force in self-defense can be invoked only "if an armed attack occurs against a member of the United Nations." The Security Council is then required by the same article to take action to "restore international peace and security." Clearly, the restoration of the *status quo* is the primary justification for permitting coercion in self-defense under the Charter.
6. Myres McDougal and Florentine Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn.: Yale Univ. Press, 1961), pp. 128–29.
7. See "Legality of Czechoslovak Invasion," in *Department of State Bulletin,* UN Special Committee on Principles of International Law (Washington, D.C.: 14 October 1968), pp. 396–401, for a discussion of this "doctrine." Article 1 of the Soviet-Czechoslovak Treaty on Stationing of Soviet Troops, in force 18 October 1968, justified Soviet troops in Czechoslovakia "for the purposes of ensuring the security of the countries of the socialist commonwealth against the increasing revanchist aspirations of the West German militarist forces." Article 2 declared that their "temporary presence" did not violate the sovereignty of Czechoslovakia.
8. "Open" societies such as the United States draw in greater participation from the citizenry in decisions with respect to their armed forces. See, e.g., S. Res. 2956, 92d Cong. 2d. sess. (1972), passed over President Nixon's veto.

CHAPTER TWO

The Minimum World Order System

The inception of conflict management on an international scale can be traced to the evolution of the modern state system. The benchmarks of this historical process, marked by the breakup of medieval Christendom in Europe, were the Peace of Westphalia in 1648 and the Treaty of Utrecht in 1713. It was the nineteenth century, however, that saw the emergence of factors that permitted the organizational means to regulate international conflict. These factors included the development of improved management structures within the developing national states and of improved means of communication, both of which led to an awareness of the need for a method to regulate interstate relations.

The Pre-Charter System

In 1815, in the wake of the ruinous Napoleonic Wars in Europe, the Congress of Vienna provided the first international forum for the major nations, as an alternative to the traditional bilateral diplomacy of the past. Although the congress proved largely ineffective, it established a precedent for future multinational conferences. The tragically destructive Crimean War and the equally devastating U.S. Civil War were major factors in gaining support for the 1899 and 1907 Hague Conferences addressing means and methods of warfare. These conferences gave equal status to all participant nations, forty-four of them in the case of the 1907 conference. The great value of these conferences was the template they established for future multilateral conferences to formulate and codify international law principles and to institute procedures for the settlement of disputes.

The Hague approach to international dispute resolution was premised upon rationality and the belief in the merit of a systems approach. The priority placed upon the peaceful settlement of disputes was a signal that conference participants viewed war as a result of misunderstandings that could be eliminated by clarification of issues and the evocation of reason. Unfortunately, the Hague ideal of self-restraint and rational consideration of opposing concerns has never been realized. The Hague approach viewed peace in the abstract, postulating that if systems were created to which the major

nations committed themselves, war could be prevented. This presumption was reflected in some 120 general arbitration treaties negotiated from 1900 to 1914 between pairs of states.[1]

The Hague construct reached its zenith in a 1913 plan proposed by Secretary of State William Jennings Bryan, calling for an investigatory function and a permanent international commission. This proposal, which envisioned bilateral agreements between the United States and any country willing to accede to the Bryan plan, called for submission of all disputes to investigation before any resort to force.[2] Unfortunately, this intellectual approach tied to mechanisms and procedures had little impact on the national passions swirling on the eve of World War I, nor could it preclude the horrendous violence unleashed in 1914 at Sarajevo.[3]

The Period of the League of Nations

The League of Nations, established after World War I, was a further attempt by world leaders to define the lawfulness of resort to war in procedural terms. Believing, albeit incorrectly, that World War I had been a war by accident, they sought to establish a regime in which the lawfulness of war did not depend solely on the rightness of one's cause but rather on whether procedural standards had been complied with. Thus, under Articles 12, 13, and 15 of the Covenant of the League, resort to war was prohibited only if the dispute leading thereto had not been submitted to arbitration, judicial settlement, or the League.[4] This created an obvious "gap" in the Covenant's jurisdiction. The League failed, however, not as a result of any technical language concern with the Covenant or the failure of the United States to join (despite President Woodrow Wilson's pivotal role in its creation) but as a result of the utter failure by nations to take seriously the Covenant's clear mandate against aggression—an indifference evident in the actions of Japan, Italy, and Germany within their spheres of influence.[5]

During this same interwar period, Secretary of State Frank B. Kellogg was instrumental in negotiating with representatives of Germany, Belgium, France, Great Britain, Italy, India, Japan, Poland, and the Czechoslovak Republic the 1928 Treaty of Paris (or Kellogg-Briand Treaty), which renounced war as an instrument of national policy, an attempt to fill the gap in the Covenant of the League.[6] This international commitment was not deemed violated by certain of its signers who later used military force against their neighbors, as described above. These uses of force were justified in each case as legitimate exercises of the national right of self-defense.[7] Despite this not-insignificant imperfection in practice, the Covenant of the League of Nations, with its commitment to procedural safeguards, and the Kellogg-Briand Treaty, which forbade war except in self-defense, provided the seminal concepts for the postwar conference that developed the Charter of the United Nations.

The Era of the United Nations Charter

When the Allies met in San Francisco following World War II, they structured their work around an effective procedural framework and the prohibition of war, except for self-defense, but also the principle of collective security, from Article 16 of the Covenant of the League of Nations.[8] The UN Charter made three important contributions to the institutional development of law that had begun during the League period. First, by prohibiting the "the threat or use of force," it effectively expanded the scope of the Kellogg-Briand formulation. Second, it provided for a strong Security Council, which meant that in the future collective security could *meaningfully* be substituted for unilateral action.[9] Finally, it established an International Court of Justice to which disputes between states could be referred.[10] Notwithstanding the inadequacies in Charter operation reflected in the case studies in subsequent chapters, the advance in conflict management represented in the first point above merits discussion.

The basic provision restricting the threat or use of force in international relations is Article 2, paragraph 4, of the UN Charter, which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."[11] The underlying purpose, to regulate aggressive behavior between states, is identical to that of Article 12 in the Covenant of the League of Nations, which declared that League members were obligated not to "resort to war."[12] This terminology, however, left out hostilities that, although violent and destructive, could not be considered warfare. The drafters of the UN Charter wished to ensure that the legal aspects of a conflict's status did not preclude cognizance by the international body. Thus, in drafting Article 2, paragraph 4, they replaced the term "war" with the phrase "the threat or use of force." The wording was interpreted as prohibiting a broad range of hostile activities including not only "war" and equally destructive conflicts but also applications of force of a lesser intensity or magnitude.[13]

The United Nations General Assembly has clarified the scope of Article 2 in two important resolutions, both adopted unanimously.[14] Resolution 2625, the Declaration on Friendly Relations, describes behavior that constitutes the unlawful "threat or use of force" and enumerates standards of conduct by which states must abide.[15] Contravention of any of these standards of conduct is declared to be in violation of Article 2, paragraph 4.[16]

Resolution 3314, the Definition of Aggression, is a detailed statement on the meaning of "aggression," defining it as "the use of armed force by a state against the sovereignty, territorial integrity or political integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations."[17] This resolution

contains a list of acts that, regardless of a declaration of war, qualify as acts of aggression.[18] The resolution provides that a state that commits an act of aggression violates international law as embodied in the UN Charter.[19]

The actions of states supporting terrorist activities, as previously observed in Afghanistan, plainly fall, in light of these resolutions, within the scope of Article 2, paragraph 4. The illegality of aid to terrorist groups has been clearly established by the UN General Assembly. Both resolutions specifically prohibit the "organizing," "assisting," or "financing" of "armed bands" or "terrorists" for the purpose of aggression against another state.[20]

The Development of the Law of Self-Defense under the UN Charter

When the UN Charter was drafted in 1945, the right of self-defense was the only exception included to the prohibition of the use of force. Customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses as well. Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury that it has caused. Retribution is a criminal-law concept, implying vengeance, that is sometimes used loosely in the international law context as a synonym for retaliation. While debate continues as to the current status of these responses, the U.S. position has always been that actions protective of American interests are not punitive in nature but offer the greatest hope of securing a lasting, peaceful resolution of international conflict.[21]

The right of self-defense was codified in Article 51 of the Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[22] The word "inherent" suggests that self-defense is broader than the immediate Charter parameters. During the drafting of the Kellogg-Briand Treaty, for example, the United States expressed its views as follows:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.[23]

Because self-defense is an inherent right, its contours have been shaped by custom and are subject to customary interpretation. Although the drafters of Article 51 may not have anticipated its use in protecting states from the effects of terrorist violence, such as the United States experienced in September 2001, international law has always recognized the need for flexible application. George Shultz, when secretary of state, emphasized this point: "The UN Charter is not a suicide pact. The law is a weapon on our

side and it is up to us to use it to its maximum extent. . . . There should be no confusion about the status of nations that sponsor terrorism against Americans and American property."[24]

The final clause of Article 2, paragraph 4, of the Charter supports this interpretation, forbidding the threat or use of force "in any manner inconsistent with the Purposes of the United Nations."[25] The late Professor Myres McDougal of Yale University placed the relationship between Article 2, paragraph 4, and Article 51 in clearer perspective:

> Article 2(4) refers to both *the threat* and the use of force and commits the Members to refrain from the "threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations"; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion.[26]

Significant in Professor McDougal's interpretation is the recognition of the right to counter the imminent threat of unlawful coercion as well as actual attack. This comprehensive conception of permissible or defensive coercion, honoring appropriate response to threats of an imminent nature, is merely reflective of the customary international law. It is precisely this anticipatory element of lawful self-defense that is critical to an effective policy countering terrorist violence under the UN Charter.

Customary international law has long recognized that no requirement exists for states to "absorb the first hit."[27] The doctrine of anticipatory or preemptive self-defense, as developed historically, is applicable only where there is a clear and imminent danger of attack. The means used for preemptive response must be strictly limited to that required for the elimination of the danger and must be reasonably proportional to that objective.

Four historical incidents, cited with approval by international lawyers, are critical to an understanding of existing authorities available to U.S. leaders in the twenty-first century, when terrorist violence has already proven more deadly than a major conflict. In 1818, the United States established the right to enter the territory of another state to prevent terrorist attacks if the host is unable or unwilling to quell a continuing threat. The Seminole Indians, in Spanish Florida, had demanded "arms, ammunition and provisions or the possession of the garrison at Fort Marks."[28] President James Monroe directed General Andrew Jackson to proceed against the Seminoles, declaring that the Spanish were bound by treaty to keep their Indians at peace but were incompetent to do so.[29]

During the Canadian insurrections of 1837–38, the standard for justifiable anticipatory self-defense was more clearly established.[30] Anti-British sympathizers gathered near Buffalo, New York. A large number of Americans and Canadians were similarly encamped on the Canadian side of the border, with the apparent intention of aiding these

rebels. The *Caroline,* an American vessel that the rebels used for supplies and communications, was boarded in an American port at midnight by an armed group acting under orders of a British officer; the boarders set the vessel on fire and cast it loose to drift over Niagara Falls. The United States protested the incident, which had claimed the lives of at least two American citizens. The British government replied that the threat posed by the *Caroline* had been established, that American laws were not being enforced along the border, and that the destruction had been an act of necessary self-defense.

In the controversy that followed, the United States did not deny that circumstances were conceivable that would justify this action, and Great Britain admitted the necessity of demonstrating the extreme urgency. The two countries differed only on the question of whether the facts brought the case within the exceptional principle. Charles Cheney Hyde summed up that "the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duties."[31] Secretary of State Daniel Webster, in formulating an oft-cited principle of self-defense, declared that there must be a demonstrated "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation."[32] It is clear, however, that the Webster formulation was not applied by the British in the decision to destroy the *Caroline,* at least not with respect to time for deliberation. This formulation may have been overly restrictive, even when stated in 1841.

In the present era, when terrorists and their sponsors possess weapons that can be employed rapidly, any requirement that a nation not respond until faced with a situation providing no moment of deliberation is unrealistic.[33] The U.S. Department of State has criticized Secretary Webster's formulation: "This definition is obviously drawn from consideration of the right of self-defense in domestic law: the cases are rare indeed in which it would fit an international situation."[34]

Another example of preventative defensive measures, this time drawn from World War II, has greater application to the element of necessity as it relates to states sponsoring terrorist violence. Following the capitulation of France to Germany in June 1940 and the establishment of the Vichy regime, many French naval vessels took refuge abroad, a number of them at Oran on the North African coast. British demands for disposition of the vessels were accepted by French commanders at Alexandria and Martinique (thus establishing the reasonableness of the demands), but they were rejected at Oran. Fearing the French vessels there would fall into Berlin's hands, Britain destroyed them. Professor Mallison, noting that acquisition of the French fleet could have provided the Germans means to invade Great Britain by sea, stated: "Nothing in international law required the British to defer action in self-defense until after the French warships were incorporated into the German Navy."[35]

A fourth, and more recent, example occurred on 15 April 1986, when the United States launched defensive strikes on military targets in Tripoli and Benghazi, Libya. The use of force was preceded by conclusive evidence of Libyan responsibility for prior acts of terrorism against the United States, with clear evidence that more were planned. The final provocation occurred in West Berlin, on 5 April, when two American citizens were killed and seventy-eight other people were injured by an explosive device detonated in a discotheque.[36]

Eleven days earlier, on 25 March, a cable from Tripoli had directed the Libyan People's Bureau in East Berlin to target U.S. personnel and interests. On 4 April, a return message was intercepted that informed Colonel Muammar Kaddafi's headquarters that a terrorist attack would take place the next day. On 5 April, the same People's Bureau reported to Colonel Kaddafi that the attack had been a success and "could not be traced to the Libyan people."[37] On the next day, Tripoli exhorted other People's Bureaus to follow East Berlin's example.[38] In a news conference on 15 April, White House press secretary Larry Speakes advised reporters that personnel from the East Berlin People's Bureau had been seen and identified in West Berlin, apparently on surveillance missions before the terrorist attack.[39]

In the week before the United States responded to the attack, American defense officials reported that Libya had been planning terrorist attacks against U.S. diplomatic missions in ten African countries, the Middle East, and Latin America. In one African country, for example, three Libyan agents were planning to bomb the U.S. embassy and kidnap the ambassador.[40] On 15 April 1986, Secretary of State Shultz stated that the United States had information that Libya was targeting thirty American embassies for possible attack.[41]

Nor were these isolated events. The Libyans had been known to have had a direct role in kidnappings of Westerners in Lebanon between 1982 and 1985. Immediately after the U.S. raid, three of those hostages (two British and one American) were murdered by their captors. Sir Geoffrey Howe, British foreign secretary, stated on behalf of his government, "We have good reason to believe the hostages were in Libyan hands."[42]

Italy also appeared to have had enough of Kaddafi's violence. After Libyan patrol craft fired two Scud missiles at the Italian island of Lampedusa immediately following the U.S. raid, Prime Minister Bettino Craxi stated that Italy would respond militarily if Libya again attacked Italian territory.[43]

Other terrorist incidents prior to the raid could also be traced indirectly to Colonel Kaddafi. The 1985 attacks on the ticket counters of Trans World Airlines and El Al Airlines at the Rome and Vienna airports had been masterminded by Abu Nidal, a Palestinian terrorist supported both by Kaddafi and the Syrians. In fact, Abu Nidal had

maintained a residence in Tripoli at the time, later moving to Baghdad, where he was harbored by Saddam Hussein until Abu Nidal's death in Iraq in 2002. President Reagan summed up the U.S. view of Kaddafi's complicity in international terrorism when he spoke to the nation immediately following the 15 April 1986 defensive response by U.S. warplanes: "Colonel Kaddafi is not only an enemy of the United States. His record of subversion and aggression against the neighboring states in Africa is well documented and well known. He has ordered the murder of fellow Libyans in countless countries. He has sanctioned acts of terror in Africa, Europe, and the Middle East as well as the Western Hemisphere."[44]

As in the prior examples, the United States directed its response to continuing Libyan violence at military targets only. The objective was to strike at the military "nerve center" of Kaddafi's terrorist operations and limit his ability to use his military power to shield terrorist activities, thus "raising the costs" of terrorism in the Libyan leader's eyes and "deterring" him from future terrorist acts.[45] Press Secretary Speakes asserted that the American raids on Libya "were justified on grounds of 'self-defense' to preempt further Libyan attacks."[46]

The 1986 response involved F-111 bombers from an American air base in Great Britain and A-6 fighter-bombers from two aircraft carriers in the Mediterranean Sea; the aircraft struck five Libyan bases. The United States responded only after determining that the Libyan leader was clearly responsible for the 5 April bombing, that he would continue such attacks, and, having assessed that the economic and political sanctions imposed after the Rome and Vienna airport bombings had been unsuccessful, that our Western European allies were unwilling to take stronger joint steps against Kaddafi.

A clear linkage existed between the threat perceived and the response directed against Libyan military targets. Despite the fact that Kaddafi had purposefully targeted civilians, every effort was made to minimize collateral damage to the civilian communities contiguous to the two target areas. Civilian sectors were inadvertently hit, but evidence supports the conclusion that this resulted from an errant release of a bomb from an F-111 aircraft that had been hit by Libyan antiaircraft fire.[47]

The role of the allies was clearly considered as well. Prior to authorizing the response, President Reagan sent Ambassador Vernon Walters to consult with each of our NATO partners to ensure that each understood our position and justification. Only Great Britain's prime minister, Margaret Thatcher, offered public support and overflight rights for U.S. F-111 bombers. President François Mitterand of France "favored stronger military action" than that actually proposed and executed against Libya but reportedly told Ambassador Walters, "We can't come out publicly for you."[48] It was reported that the French president, the most vocal critic of U.S. counterterrorist policy in his

public statements, had privately suggested an "all-out effort to change Libyan policy" and "real major action against Libya."[49]

In a 21 August meeting in Luxemburg, the actions of the foreign ministers of twelve European states reflected the profound effect the defensive raid had had in inspiring allied efforts to resist terrorism. The foreign ministers approved a package of diplomatic sanctions aimed at limiting Libya's ability to sponsor terrorist attacks, sanctions that had been rejected only a week earlier.[50] These sanctions had been endorsed and refined at a Tokyo economic summit in May 1986, when President Reagan met with the leaders of Britain, Canada, France, Italy, Japan, and West Germany, as well as other representatives of the European Community. It is worthy of note that the U.S. essentially had to act alone against Libya, even after Kaddafi's implication in the 1985 Vienna and Rome airport bombings. In April 1986, however, the U.S. use of force suddenly spurred more active support among the allies.

This support, though offered only after the fact, suggests that the allies viewed the 15 April 1986 U.S. actions as proportionate to the perceived threat. Proportionality in the Libyan case could be assessed from a dual perspective. First, this element of self-defense required that the U.S. claims, in the nature of counterterrorist goals, be reasonably related to the existing terrorist threat to national interests. Second, proportionality mandated that the United States and other offended states use only such means as were required to terminate the offending conduct. In the first sense of proportionality, the U.S. actions in 1986 sought only to neutralize the broad effort to overthrow through terrorist violence the power balance in the Mediterranean region; it did not seek to create a new alignment of that balance in North Africa. In the second sense, the defensive strikes, directed at targets in Tripoli and Benghazi, were restricted to military installations behind which Kaddafi's terrorist infrastructure was concealed.

The 1986 defensive response of the United States to Libyan state-sponsored terrorism met customary and conventional legal requirements to counter aggression and thus was valid under international law. The four basic elements of the law of armed conflict were clearly evident in the U.S. response. The force used was capable of being, and was in fact, regulated by the United States. Necessity for its use had been established by exhaustion of lesser means. Libya's complicity in supporting international terrorism had been clearly established. The force used was not otherwise prohibited. The raid of 15 April 1986 was proportional to the threat and no greater in effect than was required.

Response to terrorism, like response to other forms of armed conflict, has as its principal purpose termination of hostilities under favorable conditions. Having forcefully demonstrated that the United States would respond to weaken Libya's military support for terrorist violence, President Reagan's follow-on moves were clearly appropriate. The

president, through his support for coordinated diplomatic and economic sanctions at the 21 April 1986 European Community ministerial session and his plea for concerted action at the economic summit in Tokyo, emphasized that nonmilitary coercive measures against a pariah state are effective only if all major free nations participate. If the 15 April blow against Libya was to do more than reestablish the credibility of U.S. forces, an integration of strategies involving nations trading with Libya was imperative.

The four examples cited do not suggest the lack of international law restraints upon the determination of necessity for preemptive action. Rather, they suggest that self-defense claims must be appraised in the total context in which they occur. One aspect of this contextual appraisal of necessity, especially as it relates to response after the fact to terrorist violence, concerns the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. To require a state to tolerate terrorist violence without resistance on the grounds that peaceful means have not been exhausted is absurd. Once a terrorist attack has occurred, the failure to consider a military response would play into the hands of aggressors who deny the relevance of law to their actions. The legal criteria for the proportionate use of force is established once a state-supported terrorist act has taken place. No state is obliged to ignore an attack as irrelevant, and the imminent threat to the lives of nationals requires consideration of a response.

Notes

1. See Shabtai Rosenne, *The World Court: What It Is and How It Works,* 3d rev. ed. (Dobbs Ferry, N.Y.: Oceana, 1973), p. 17; see also James Brown Scott, introduction, in *Treaties for the Advancement of Peace between the United States and Other Powers Negotiated by the Honorable William J. Bryan* (New York: Oxford Univ. Press, 1920), pp. xxxiii–xxxv.
2. The following national states ultimately signed treaties with the United States agreeing to this formulation: El Salvador, Guatemala, Panama, Honduras, Nicaragua, Netherlands, Brazil, Argentina, Chile, France, Great Britain, Spain, China, and Russia.
3. Despite these agreements, a disenchanted Serb killed Archduke Ferdinand in Sarajevo in 1914, starting World War I. There was no apparent interest in seeking a complete investigation of this incident, despite the fact that Austria-Hungary, Belgium, and Germany endorsed the Bryan plan in 1914, although not signing treaties embodying it.
4. See Covenant of the League of Nations:

   Article 12: (1) The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report of the Council.

   (2) In any case under this Article the award of the arbitrators or judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

   Article 13: . . . (4) The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall

propose what steps should be taken to give effect thereto. . . . .

Article 15: (1) If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. . . . .

(6) If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

5. During this period, Japan committed aggression against China, Italy invaded Ethiopia, and Germany seized the Sudetenland. This aggression was followed by Germany's open aggression against Austria, Czechoslovakia, and Poland; the Soviet Union's invasion, under cover of the Molotov-Ribbentrop Pact with Germany, of the Baltic states and Finland; and Japan's continued aggression against China, followed by attacks on the Philippines and the United States.

6. Treaty of Paris (Kellogg-Briand Pact), signed 27 August 1928, 46 Stat. 2343, TIAS 796, 94 LNTS 57 (entered into force 24 July 1929).

7. See Q. Wright, "The Meaning of the Pact of Paris," *American Journal of International Law* 27 (1933), p. 39. See also statements from UN Doc. A/221, 23 June 1928 showing that the right of self-defense is retained under the pact.

8. Article 16 of the covenant states, in part: "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, and 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League."

9. UN Charter, Arts. 23–32. These articles address the composition, functions and powers, voting, and procedures of the Security Council.

10. UN Charter, Arts. 92–96. These articles address membership and the jurisdiction of the International Court of Justice.

11. UN Charter, Art. 2, para. 4.

12. See Covenant of the League of Nations, Art. 12.

13. See discussion in Myres McDougal and Florentine Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn.: Yale Univ. Press, 1961), pp. 142–43.

14. Definition of Aggression, GA Res. 3314, 29 UN GAOR Supp. (no. 31) at 142, UN Doc. A/9631 (1974); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625, 25 UN GAOR Supp. (no. 28) at 121, UN Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

15. The Declaration on Friendly Relations includes the following provisions (quoted separately from pp. 122–23):

- A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.
- Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes.
- Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
- Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.
- No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.
- No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State.

16. "By accepting the respective texts [of the Declaration on Friendly Relations], States have acknowledged that the principles represent their interpretations of the obligations of the Charter." Resinstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey," *American Journal of International Law* 65 (1971), p. 715.

17. Definition of Aggression, p. 142.

18. Included in the list of acts of aggression are (p. 143):

(a) The invasion or attack by the armed forces of a State or Territory of another State, or any military occupation, however temporary, resulting from such invasion

or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State, for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or Mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

19. A fundamental purpose of the UN Charter is to "maintain international peace and security" (Art. 1, para. 1). Article 1, paragraph 2 of the Definition of Aggression provides: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." Definition of Aggression, p. 144.

20. See notes 22, 26.

21. See statement of Acting Secretary of State Dean Rusk in Arthur W. Rovine, "Contemporary Practice of the United States Relating to International Law," *American Journal of International Law* 68 (1974), p. 736.

22. UN Charter, Art. 51.

23. Marjorie M. Whiteman, *Digest of International Law* (Washington, D.C.: U.S. Government Printing Office, 1965), sec. 25, pp. 971–72.

24. George Shultz, *Low Intensity Warfare: The Challenge of Ambiguity*, Current Policy 783 (Washington, D.C.: U.S. State Dept., January 1986), p. 1.

25. See UN Charter, Art. 2, para. 4.

26. Myres McDougal, "The Soviet-Cuban Quarantine and Self-Defense," *American Journal of International Law* 57 (1963), p. 600.

27. See George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review* 39, no. 3 (May–June 1986), p. 69.

28. J. Moore, *A Digest of International Law* (Washington, D.C.: U.S. Government Printing Office, 1906), p. 404.

29. Ibid.

30. Ibid., pp. 409–14. The *Caroline* incident, often called the *Caroline* "case," was not resolved through the judicial process but rather through diplomatic correspondence.

31. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States,* 2d ed. (Boston: Little, Brown, 1945), p. 240.

32. Moore, *A Digest of International Law,* p. 412.

33. For a more complete discussion of this issue, see W. Thomas Mallison, "Limited Naval Blockade or Quarantine Interdiction: National and Collective Self-Defense Claims Valid under International Law," *George Washington Law Review* 31 (1962), p. 335.

34. *Participation in the North Atlantic Treaty of States Not Members of the United Nations,* Hearings before the Senate Committee on Foreign Relations on the North Atlantic Treaty, 81st Cong., 1st sess., 1949, pp. 101–102.

35. Mallison, "Limited Naval Blockade," p. 349.

36. See discussion in James Terry, "Countering State-Sponsored Terrorism," *Naval Law Review* (Winter 1986), p. 180.

37. See B. Kempster, "Cables Cited as Proof of Libyan Terror Role," *Los Angeles Times,* 15 April 1986, p. 5.

38. "Targeting a Mad Dog," *Newsweek,* 21 April 1986, p. 25.

39. "Attack on Libya: The First Word," *New York Times,* 15 April 1986, p. 1; "Libyans Accused of Worldwide Plots," *New York Times,* 15 April 1986, p. A11.

40. Kempster, "Cables Cited as Proof of Libyan Terror Role," p. 5.

41. Ibid.

42. Brian Lelyveld, "Britain Cites 'Evidence' of Libyan Role," *New York Times,* 19 April 1986, p. 4.

43. Fortunately, these missiles missed their target. Kempster, "Cables Cited as Proof of

Libyan Terror Role"; E. Dionne, "Italian Promises to Answer Terror," *New York Times,* 20 April 1986, p. 12.

44. "Transcript of Address by Reagan on Libya," *New York Times,* 15 April 1986, p. A10.
45. "Libyans Accused of Worldwide Plots," p. A11.
46. Ibid.
47. See Terry, "Countering State-Sponsored Terrorism," p. 182.
48. See W. Weinraub, "U.S. Says Allies Asked for More in Libya Attack," *New York Times,* 22 April 1986, p. A1.
49. Ibid.
50. See R. Bernstein, "European Community Agrees on Libya Curbs," *New York Times,* 22 April 1986, p. A8.

PART TWO

Lesser Conflict

CHAPTER THREE

Humanitarian Intervention

Respect for national sovereignty and the commitment to nonintervention have long been at the heart of the international legal order. The norm of state sovereignty, however, has never been absolute. It has always been subject to certain constraints, whether embodied in other norms of international relations or formalized in international law. A challenge to the traditional concept of sovereignty arises when a sovereign state fails to perform such basic functions as providing political stability, distributing resources equitably, or ensuring social welfare. When such failure is reflected in the direct violation of the civil liberties and human rights of a major segment of a state's own population, compromising its health and well-being and generating a humanitarian crisis, it is generally the responsibility of the state's body politic to hold the state accountable.

The Framework

Where the ethnic majority has joined with the government in promoting humanitarian crisis within a community represented by the ethnic minority, as in Kosovo in 1998, however, the international community has, arguably, if the 1947 Genocide Convention has any meaning, a corresponding responsibility to help the victims and prevent their genocide.[1] Professor Louis Henkin has clarified most succinctly the responsibility of states to address international human rights abuses: "The international system, having identified contemporary human values, has adopted and declared them to be fundamental law. But in a radical derogation from the axiom of 'sovereignty,' that law is not based on consent; at least it does not honor or accept dissent, and it binds particular states regardless of their objection."[2]

The debate on the concept of sovereignty has its most practical implication for the principle of nonintervention. Nonintervention, the duty to refrain from uninvited involvement in a state's internal affairs, has been a standard corollary of the traditional norm of sovereignty. As stated in the United Nations Charter, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[3] Once a government fails to fulfill

the basic purposes for its independence—that is, providing safety and fundamental human rights to all its population—the principles that guarantee that state's immunity from intervention are undermined.[4]

This chapter first examines the legal framework related to humanitarian intervention as it has developed under customary and Charter precedents. It then reviews the potential or actual legal impact of the NATO intervention in Kosovo on that body of law, suggesting that the principles of the UN Charter were fulfilled in this NATO action and that they would have been frustrated had Soviet and Chinese opposition been allowed, for political purposes, to preclude actions necessary to restore peace and security in Kosovo. Finally, it suggests that criticism of the NATO actions in Kosovo may be misguided in that they fail to understand that the Charter regime was designed to be effective and that interpretations of its provisions tending to make it so are supportive rather than destructive of its moral authority.

Legal Concepts for Humanitarian Intervention

Traditionally, humanitarian intervention has referred to a forcible intervention designed to stem a large-scale human rights crisis.[5] The late Professor Richard Lillich of the University of Virginia observed that humanitarian intervention is normally exercised by a group of states and not by a single state, as has traditionally been the case in the protection of nationals. He further stated that pre-Charter humanitarian intervention was to be justified on the ground that although it obviously was an interference with the sovereignty of the state concerned, it was a permissible one. "Sovereignty was not absolute and when a state did reach this threshold of shocking the conscience of mankind, intervention was legal."[6]

Component elements of humanitarian intervention include the fact that it is executed without the consent of the target government.[7] In fact, this form of intervention is usually directed against the incumbent regime, although nonstate actors might be the target where the state is weak or unstable.[8] It is important that only humanitarian abuses be targeted; addressing other political objectives and interests takes an intervention out of the humanitarian category.[9] Therefore, if intervention is approved, the objective for the use of force must be to address a human rights crisis and, more specifically, the abuses that made intervention necessary.[10] Finally, the rule of proportionality applies to humanitarian intervention, as it would in every use of force.[11] Thus, the level of force exerted must be consistent with the magnitude of the specific crisis and must rise only to that required to curtail the abuse.[12] Professor Ved Nanda explains that demanding adherence to the proportionality of force in such operations eliminates the "pretext problem" that arises when overwhelming force is used to address a situation that quite obviously does not warrant it.[13]

Many legal experts, however, have opined that the entry into force of the United Nations Charter in 1945 supplanted the lawfulness of humanitarian intervention, which had been approved by customary international law.[14] The reason that humanitarian intervention would no longer apply, they claim, is that the Charter provides, in Chapter VII, the exclusive authority for the use of force in such circumstances.[15]

The contrary view, supported by Professors John Norton Moore and Lillich of the University of Virginia, Professors Michael Reisman and McDougal of Yale University, Professor Nanda of the University of Denver, and Professor Christopher Greenwood of Great Britain, to name a few, argue that humanitarian intervention is permissible in response to threats of genocide or other widespread arbitrary deprivation of human life in violation of international law, but only if diplomatic and other peaceful techniques are unavailable and the United Nations Security Council is unable to take effective action.[16]

Legal scholars advocating the post-Charter vitality of the doctrine of humanitarian intervention have urged that a significant credibility gap exists between a strict noninterventionist policy and fulfillment of the principles of the UN Charter. Considered as a whole, they claim, the Charter's two main purposes are the maintenance of peace and security, and the protection of human rights.[17] Article 2(4), the Charter provision relevant to both these purposes, prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Since humanitarian intervention by a collective of states or a regional organization, far from being inconsistent with Charter purposes, actually might further one of the world organization's major objectives if authorized, they urge that such interventions would not run afoul of Article 2(4) if they do not affect the "territorial integrity" or "political independence" of the state against which they are directed. In situations where the UN Security Council is unable to act because of a potential veto, effectuation of this doctrine by a group of concerned states, as in Kosovo, thus becomes critical to upholding Charter principles.

This argument becomes even more attractive legally when one studies the actual substance of the Charter. While the UN Charter is admittedly best known for the articles that create a minimum world order system—as represented by Article 2(4) (prohibition on the use of force), Article 51 (exception for self-defense), and Chapter VII (Articles 39–51, addressing Security Council responsibilities)—there is certainly an equal emphasis in the Charter on protection of human rights. The Preamble, in fact, focuses on the rights of individuals vice the rights of nations, in stating that the purpose of the Charter is

> to save succeeding generations from the scourge of war, which twice in our lifetime have brought unto sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

Article 1(3) reinforces this preambular language by stating that a principal purpose of the organization is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Articles 55–60 of the Charter directly address international economic and social cooperation. Article 55, for example, emphasizes the need to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The fifty-four-member Economic and Social Council, established in Article 61 and addressed in Articles 61–72, provides the means by which the humanitarian objectives set forth in Articles 55–60 are to be addressed and then reported to the General Assembly or Security Council for action.

The Security Council, which alone under the Charter framework enjoys authority to authorize measures involving the use of force, can be frustrated therein when the support for such a decision of all permanent members, required in Article 27(3), is not forthcoming. This describes the situation in March 1999 when the Chinese and Russian delegates, despite the support of twelve of the fifteen council members, refused to support a draft Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis.

It was precisely this concern that led legal experts to debate, long prior to the Kosovo crisis, criteria that would both satisfy the need to address satisfactorily future instances of widespread human rights abuses but at the same time preserve UN Charter principles. In 1974, Professor Lillich, anguished over the inability of the Security Council to function in Chapter VII "all necessary means" matters, requiring the unanimous approval of the permanent members, argued that "the most important task confronting international lawyers is to clarify the various criteria by which the legitimacy of a State's use of forcible self-help in human rights situations can be judged."[18] Lillich suggested that consideration of the following five criteria by a state, collective of states, or regional organization prior to taking humanitarian action in a foreign state would ensure that Charter principles of the United Nations were upheld even if Security Council approval was lacking: the immediacy of the violation of human rights, the extent of the violation of human rights, the existence of an invitation by appropriate authority, the degree of coercive measures employed, and the relative disinterestedness of the state or states invoking the coercive measures.[19]

Professor Nanda has offered similar criteria in arguing for the continued vitality of the doctrine: a specific limited purpose, invasion by the recognized government, limited duration of the mission, limited use of coercive measures, and lack of any other recourse.[20]

By far the most definitive and principled approach has been offered by Professor Moore, a former legal advisor to the Department of State. He suggested in 1974 that intervention for the protection of human rights is permissible if it meets the following standards: an immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law; an exhaustion of diplomatic and other peaceful techniques for protecting the threatened rights to the extent possible and consistent with protection of the threatened rights; the unavailability of effective action by an international agency or the United Nations; a proportional use of force that does not threaten greater destruction of values than the human rights at stake and that does not exceed the minimum force necessary to protect the threatened rights; minimal effect on authority structures necessary to protect the threatened rights; minimal interference with self-determination necessary to protect the threatened rights; a prompt disengagement, consistent with the purpose of the action; and immediate full reporting to the Security Council and compliance with applicable regional directives of the Council.[21] Moore urged that intervention for the protection of fundamental human rights should be permitted if carefully circumscribed:

> Although it is recognized that legitimizing such intervention entails substantial risks, not permitting necessary action for the prevention of genocide or other major abuse of human rights seems to present a greater risk. Opponents of any such standard should at least endeavor to weigh the risks of permitting such intervention as carefully delimited by the suggested standard against the risk of insulating genocidal acts and other fundamental abuse of human rights from effective response.[22]

The critical most point with respect to the three proposed sets of criteria is that each would permit a humanitarian response involving the use of force by a regional organization such as NATO in response to threats of genocide or other widespread arbitrary deprivation of human life in violation of international law only if diplomatic and other peaceful means are not available and the United Nations is unable to take effective action. Another critical point is that under each of the three proposals, the territorial integrity and political independence of the target state is only temporarily affected, and then to protect other equally significant Charter values.

These criteria, designed to ensure that territorial integrity and political independence are preserved when humanitarian intervention to save lives is authorized, must nevertheless be balanced with the right of states regarding domestic jurisdiction, as set forth in Article 2(7) of the Charter. Article 2(7) provides, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State . . ., but this principle shall not prejudice

the application of enforcement measures under Chapter VII." This provision to protect the domestic jurisdiction of states does not mesh comfortably with the requirements in Articles 55 and 56 to cooperate with the UN in promoting respect for human rights (nor does it with the explicit duties of states set forth in human rights treaties).

The fall of the Soviet Union, however, marked a watershed in how many states viewed the proper exercise of domestic jurisdiction. For example, Poland insisted in 1983, when its own declaration of martial law was under severe international criticism, that UN organs could not even consider human rights questions in a particular state unless there existed a violation of human rights and fundamental freedoms that was gross, massive, and flagrant, that established a consistent pattern, and that endangered international peace and security.[23] By 1991, however, Poland had endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE):

> The participating states emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the State concerned.[24]

Today, the issue of domestic jurisdiction is rarely raised in UN fora or other international discourse in other than a perfunctory manner.[25]

Humanitarian Intervention in Context

The most significant post-Charter example of humanitarian intervention absent Security Council approval, other than Kosovo, occurred in the Congo in 1964. The Stanleyville intervention was unlike the 1965 interventions in the Dominican Republic by U.S. Marines or the December 1989 intervention in Panama, ordered to protect American lives. The intervention in the Congo was directed by the leaders of three states to protect not only their own nationals but also the nationals of third states and of the country in which the intervention occurred. As Professor Lillich explains, "the Congo airdrop was a classic occasion of humanitarian intervention, and the Dominican Republic, at least initially, was a classic case of forcible self-help."[26]

The Congo crisis presented legal issues nearly parallel to those faced by NATO in 1999. In 1964 several thousand Congolese and foreigners had been captured by the faction led by Antoine Gizenga in Stanleyville. The captured civilians were being held as hostages, and Gizenga was threatening to kill them if his demands were not met. There is no doubt that this constituted a violation not only of the UN Charter but also of the Geneva Conventions; no one disputed that, but the Security Council was unable to agree upon a course of action. Instead, the Council ceded authority to the Organization

of African Unity to deal with the situation. It failed miserably. The United States, seeing no alternative, much as it would in the later Kosovo crisis, cooperated with other concerned states (Britain and Belgium) in mounting an airdrop of paratroopers without UN Security Council authority. These forces landed at Stanleyville and rescued the hostages.[27]

Interestingly, while there was much political criticism, led by the Russian ambassador to the UN, of the allied intervention, there has been little scholarly legal criticism alleging violation of Article 2(4) of the Charter in the Stanleyville operation. Not one legal commentator has found that the use of limited force represented in the collective effort of Britain, Belgium, and the United States impaired the long-term territorial integrity or political independence of the Congolese state. In fact, it can be argued that the stability of the government was enhanced once the hostage crisis was resolved.[28]

A similar judgment can be reached in the case of Kosovo. When fighting broke out in early 1998 between Federal Republic of Yugoslavia (FRY) authorities and Kosovo Albanian paramilitary units, commonly known as the Kosovo Liberation Army (KLA), it became clear the Serb offensive was designed to eliminate Kosovar resistance. The United Nations responded to the extreme violence with Security Council Resolutions 1160, 1199, and 1203.[29] When fighting continued, NATO leadership threatened air strikes; this in turn led to negotiations between U.S. envoy Richard Holbrooke and the FRY leadership, which produced a 12 October 1998 accord between Holbrooke and President Milosevic. Agreements were signed on 15 October 1998 between NATO and the FRY, and on 16 October 1998 between the Organization for Security and Cooperation in Europe (OSCE) and the FRY.[30] When the follow-on peace negotiations in March 1999 at Rambouillet, France, failed to produce a peace settlement the FRY was willing to sign and the Serbs once again escalated the violence against ethnic Albanians in Kosovo, NATO forces entered Yugoslavia as part of a humanitarian intervention to force Serb forces from Kosovo and to bring an end to the violence against the ethnic Albanians of this province.[31]

The NATO determination to intervene in Kosovo under other than UN Security Council authority came after the Russian and Chinese permanent representatives to the Security Council advised in early March 1999 that their governments would not support a draft resolution that would authorize the use of force to stop the Serb attacks in Kosovo. Neither Russia nor China had impeded passage of Resolutions 1160, 1199, or 1203. These resolutions, under Chapter VII of the UN Charter, called upon both Serb and KLA forces to end the fighting, required Serb forces to withdraw, called upon Serb forces to cooperate with investigators and prosecutors from the War Crimes Tribunal at the Hague, and endorsed the 15 and 16 October 1998 monitoring agreements brokered by Richard Holbrooke, the architect of the Dayton Peace Accords in Bosnia.[32]

As noted above, the Serbs violated these obligations through renewed violence, refused to sign the Rambouillet agreement in mid-March 1999 (calling for a cease-fire, Kosovo autonomy, and a NATO peacekeeping force), and commenced an offensive designed to drive all Albanian resistance from Kosovo. On 24 March 1999, NATO directed execution of Operation ALLIED FORCE against Serbian aggression and human rights violations. The operation continued until 9 June 1999.[33]

In the first eight days of the operation, the UN High Commissioner for Refugees (UNHCR) reported that some 220,000 persons were forcibly expelled from Kosovo to neighboring states, principally Albania, by Serbian forces. The OSCE Verification Mission in Kosovo was to estimate that over 90 percent of the Kosovo Albanian population—some 1.45 million people—had been displaced by the conflict by the time it ended.[34]

Although the Security Council had never authorized the intensive bombing campaign, it endorsed the political settlement that was reached and agreed to deploy an extensive "international security presence" in parallel with an "international civil presence." The considerable responsibilities of each of these missions were spelled out in detail in UN Security Council Resolution 1244 of 10 June 1999.[35]

Legal Rationale for the Intervention in Kosovo

Immediately following the start of bombing on 24 March 1999, NATO representatives of the five member states on the Security Council claimed that "NATO's actions were necessary to avoid a 'humanitarian catastrophe.'"[36] The German foreign minister, Klaus Kinkel, had earlier argued that "under these unusual circumstances of the current crisis situation in Kosovo, as it is described in Resolution 1199 of the UN Security Council, the threat of and if need be the use of force by NATO is justified."[37]

The British position on the use of force in Kosovo was stated by Foreign Minister Anthony Lloyd in January 1999 before the House of Commons Select Committee on Foreign Affairs. In response to a question concerning whether there was a legal right for NATO to intervene in the humanitarian crisis in Kosovo to save lives, absent Security Council authorization, Minister Lloyd stated, "Within those terms yes. International law certainly gives the legal basis in the way that I have described. . . . We believe . . . that the humanitarian crisis was such as to warrant that intervention."[38]

Professor Christopher Greenwood, who represented Great Britain before the International Court of Justice defending NATO's action in the Case Concerning the Legality of the Use of Force in Kosovo, explained Britain's legal position when he stated that

> there is a right of humanitarian intervention when a government—or the factions in a civil war—create a human tragedy of such magnitude that it creates a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so. It is from this state practice that the right of humanitarian intervention on which NATO now relies has

> emerged. Those who contest that right are forced to conclude that even though international law outlaws what the Yugoslav Government is doing[,] . . . if the Security Council cannot act, the rest of the world has to stand aside. That is not what international law requires at the end of the century.[39]

Professor Antonio Cassesse, defending the Kosovo humanitarian intervention from an ethical, not legal, perspective, has nevertheless stated that under certain strict conditions "resort to armed force may gradually become [legally] justified even absent any authorization by the Security Council."[40] The criteria Cassesse would require for legal justification are the following:

> (i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;
>
> (ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that these authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;
>
> (iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power . . . ;
>
> (iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted . . . ;
>
> (v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the nonopposition of the majority of the Member states of the UN;
>
> (vi) armed force is exclusively used for limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed force.[41]

It is significant that the facts of the Kosovo crisis precisely satisfy each of the factors required by Cassesse to provide legal justification for humanitarian intervention outside Charter parameters. It is also striking how similar and parallel in content Cassesse's six criteria for humanitarian intervention are to the eight proposed by Professor Moore twenty-five years earlier.

If the British justification for resort to force under the doctrine of humanitarian intervention per Professor Greenwood was the clearest and most compelling, the U.S. legal rationale was the least centered and most confusing. In fact, the official government statements of legal justification for American participation never mentioned

the doctrine of humanitarian intervention but ignored it completely. The United States addressed instead a number of factors—some legal, some policy driven—that justified its actions.

On 29 March 1999, after five days of NATO bombing, President Clinton offered the following rationale for U.S. participation: "Make no mistake, if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors, . . . hesitation is a license to kill. But action and resolve can stop armies and save lives."[42] Before the UN General Assembly, President Clinton stated, "By acting as we did, we helped to vindicate the principles and purposes of the U.N. Charter, to give the U.N. the opportunity it now has to play the central role in shaping Kosovo's future. In the real world, principles often collide, and tough choices must be made. The outcome in Kosovo is helpful."[43]

As international legal scholar and writer Gary Sharp has accurately summarized, the former president's justifications "focused . . . on "moral imperative[s]" and the political interests of America and NATO, and his War Powers Report did not refer to any international legal authority for the air strikes against Serbia-Montenegro. The White House argued, however, that the NATO bombing campaign was backed internationally by Security Council Resolutions 1199 and 1203, in that they affirmed "that the deterioration of the situation in Kosovo constitutes a threat to the peace and security of the region."

Specifically, the United States contended that Resolution 1199 authorized the use of force by United Nations members' to compel compliance with its terms because it was a Chapter VII resolution, though the resolution does not explicitly authorize the use of force. The United States also contended that Resolution 1203 was to protect personnel monitoring the cease-fire, though the monitors had been withdrawn before the NATO air strikes began.[44]

The justifications of a number of the contributor states, including the United States, reflect an uneasy recognition that the Charter system is inadequate to address certain of the humanitarian crises that may come before the UN, if unanimity among the five permanent members of the Security Council continues to be a requirement. Only the United Kingdom, Belgium, and Germany, among the NATO participants, have directly addressed the matter and found that the authorization of the Security Council was not necessary in Kosovo since the action was supportive of, rather than contrary to, the values represented in Article 2(4), thus obviating a need for that body to consider the matter.

The United States, unfortunately, fashioned a rather contrived and disingenuous approach to justification for intervention by claiming the Security Council had provided the necessary authorization by implication in its earlier resolutions on Kosovo, despite the lack of any specific reference thereto.

Kosovo's Implications for Future Charter Application

Kosovo thus requires we once again examine the law of humanitarian intervention as it relates to Charter values, on the one hand, and required Charter procedures, on the other. Kosovo is especially appropriate for consideration since it met all the requirements for humanitarian intervention under pre-Charter law. Specifically, the horrendous crimes against humanity, mass expulsions, and war crimes involved were widely recognized and little disputed. The intervention had as designed only to redress the threat to international peace and security and to end the abuses resulting from the mass violations by Serb forces, not to disturb the territorial integrity or political independence of the FRY. Equally important, the intervention was collective in nature, pursuant to the decision of NATO, a responsible body acting to carry out the will of the world community—a community unable to act through a United Nations Security Council resolution under Chapter VII of the Charter.

Professor Louis Henkin suggests that the likely result of the Kosovo intervention, unless the unanimity requirement can be separated from Security Council decisions on humanitarian intervention, will be the establishment of a precedent whereby states, or collectives, confident that the Security Council will acquiesce in their decision to intervene, shift the burden of the veto. Instead of seeking authorization in advance by resolution subject to veto, states or collectives will act and challenge the Council to terminate the action. A permanent member favoring the intervention could frustrate the adoption of such a resolution.[45]

Henkin argues that Kosovo may in fact have already achieved this. He suggests that "for Kosovo, Council ratification after the fact in Resolution 1244—formal ratification by an affirmative vote of the Council—effectively ratified what earlier might have constituted unilateral action questionable as a matter of law."[46]

This writer must agree. The actions of the North Atlantic Council and the subsequent action of the Security Council in adopting UNSC Resolution 1244 clearly reflect a step toward a change in the law. While it is unlikely there will be a formal change in the Charter, the NATO actions in Kosovo support an interpretation of law such that humanitarian intervention can be authorized by regional organizations absent Security Council authorization when consistent with the purposes of the United Nations, and when the careful strictures suggested by Professor Moore are applied to ensure that neither the territorial integrity nor the political independence of the target state are impacted in a way that would implicate Article 2(4) of the Charter.

In Kosovo, NATO's use of military force to prevent the continuation of massive human rights abuses was supportive of state practice that has established the lawfulness of humanitarian intervention, as carefully circumscribed by Moore, Lillich, Nanda, Reismann,

McDougal and Greenwood. International law requires that the community of nations first consider all means short of force to address threats to international peace and security. Where diplomacy fails and egregious human rights violations are observed, the international community must not be allowed to excuse its failure to act by references to pre-Charter principles of nonintervention and sovereign immunity or to the Charter requirement for Security Council approval, when the lack of approval is contrary to the values for which the Charter stands.

Notes

1. See James Terry, "Response to Ethnic Violence: The Kosovo Model," *Brown Journal of World Affairs* (Winter/Spring 1999), pp. 235–38.
2. Louis Henkin, "Human Rights and State 'Sovereignty,'" *Georgia Journal of International Law* (1995/1996), p. 37.
3. UN Charter, Art. 2(4).
4. See UN Charter, Art. 2(1), which states: "The Organization is based on the principle of the sovereign equality of all of its Members."
5. Richard Lillich, "Forcible Self-Help under International Law," in Richard Lillich and John N. Moore, eds., *Readings in International Law from the* Naval War College Review, International Law Studies 61 (Newport, R.I.: Naval War College, 1980), p. 134; see also Ruth Gordon, "Humanitarian Intervention by the United Nations," *Texas International Law Journal* (Winter 1996), p. 44.
6. Lillich and Moore, eds., *Readings in International Law from the* Naval War College Review.
7. Anthony Arend and Robert Beck, *International Law and the Use of Force* (New York: Little Brown, 1993), p. 113. Arend and Beck note that governments are usually more capable than other parties of violating human rights on the scale necessary to justify humanitarian intervention.
8. Ibid.
9. Ved Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti: Revisiting the Validity of Humanitarian Intervention under International Law—Part I," *Denver Journal of International Law and Policy* 20 (1992), p. 331.
10. Ibid.
11. Ibid., p. 311.
12. Ibid., p. 332.
13. Ibid., p. 311.
14. See, for example, Ian Brownlee, "Humanitarian Intervention," in *Law and Civil War in the Modern World,* ed. John N. Moore (Baltimore, Md.: Johns Hopkins Press, 1974), p. 218, in *National Security Law,* ed. John N. Moore and Robert F. Turner (Durham, N.C.: Carolina Academic, 1990), pp. 151–52.
15. Ibid.
16. Lillich, "Forcible Self-Help under International Law," p. 136.
17. See discussion in Moore and Turner, eds., *National Security Law,* pp. 148–49.
18. See Richard Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlee and a Plan for Constructive Alternatives," in Moore and Turner, eds., *National Security Law,* pp. 152–53.
19. Ibid., p. 153.
20. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti," p. 311.
21. John N. Moore, "Toward an Applied Theory for the Regulation of Intervention," in *National Security Law,* pp. 141–42.
22. Ibid., p. 142.
23. UN Doc. E/CN.4/1983/SR.40/Add.1.
24. 30 INT. LEG. MAT. 1670, 1672 (1991).
25. See Louis Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," *American University Law Review* 32 (1982), p. 1.
26. Lillich, "Forcible Self-Help under International Law," p. 137.
27. Ibid., p. 136.

28. See ibid.

29. United Nations Security Council Resolution (UNSC Res.) 1160, 31 March 1998, determined that the situation in Kosovo constituted a threat to international peace and security and condemned the excessive use of force by Serbian authorities. UNSC Res. 1199, 23 September 1998, demanded that "all parties, groups and individuals immediately cease hostilities and maintain a cease-fire in Kosovo." UNSC Res. 1203, 24 October 1998, endorsed the October 1998 cease-fire agreement and further condemned all acts of violence and terrorism. See Terry, "Response to Ethnic Violence," for a full discussion of these measures.

30. The 15 October 1998 agreement between the FRY and NATO established an air verification mission for NATO forces to enforce the requirements of UNSC Res. 1160 and 1199. The 16 October 1998 agreement between the OSCE and FRY established a verification mission for the OSCE on the ground in Kosovo, again to ensure compliance with UNSC Res. 1160 and 1199. The OSCE is a fifty-five-member body that serves as an instrument for early warning, conflict prevention, and crisis management in Europe. Both the United States and Russia are members. It has no military arm.

31. Operation Allied Force was executed on 24 March 1999. See UNSC press release SC/6657, 24 March 1999.

32. See James Terry, "The Importance of Kosovo to NATO," *ABA National Security Law Report* (July 1999), pp. 1, 2, 4.

33. See W. Gary Sharp, Sr., "A Short History of the Kosovo Crisis," ABA *National Security Law Report* (July 1999), pp. 3, 6.

34. OSCE, *Kosovo/Kosova: As* Seen, *As Told, December 1999*, available at www.osce.org/kosovo/report/hr.

35. UNSC Res. 1244, 10 June 1999, also sets forth President Milosevic's 9 June 1999 agreement to comply with NATO's schedule for a Serb withdrawal from Kosovo.

36. See UNSC press release SC/6657, p. 9.

37. *Deutcher Bundestag: Plenarprotokoll* 13/248 vom 16.10.1998, 21329.

38. House of Commons Minute of Evidence taken before Foreign Affairs Committee, 26 January 1999, p. 35.

39. Christopher Greenwood, "Yes, But Is It Legal?" *Observer,* 28 March 1999, p. 2.

40. Antonio Cassese, "*Ex Iniuria Ius Oritur:* Is International Legitimization of Forcible Humanitarian Countermeasures Taking Shape in the World Community?" *European Journal of International Law* 10 (1999), p. 25.

41. Ibid., pp. 25–26.

42. "The President's News Conference," *Weekly Compilation of Presidential Documents,* 29 March 1999, pp. 25–26.

43. Statement of President Clinton before UNGA, 21 September 1999, quoted in Henry J. Steiner and Philip Alston, *International Human Rights in Context,* 2d ed. (Oxford, U.K.: Oxford Univ. Press, 2000), pp. 661–62.

44. W. Gary Sharp, Sr., Jus Paciarii: *Emergent Legal Paradigms for UN Peace Operations* (Stafford, Va.: Paciarii International LLC, 1999), pp. 313–14.

45. Louis Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention," *American Journal of International Law* 93 (1999), p. 827.

46. Ibid.

CHAPTER FOUR

Defense of U.S. Nationals
Intervention in Panama

Since the conclusion of World War II, one of the predominant forms of international violence has been mixed civil-international conflict. Within that category, intervention to protect nationals has been the most frequent activity for the United States. In the seminal article on this subject, Professor Richard Lillich wrote in 1980:

> If you go back to the first instances in which the United States sought to protect nationals by the use of contingents ashore, you will find about 188 cases in which these forces allegedly protected the lives and the property of American citizens, mostly in Latin America but in the East and Near East as well. It was deemed to be permissible under international law, there was nothing wrong with this as states could legally use forces to protect the lives and property of their citizens abroad. It was forcible self-help, but it was a permissible sanction to protect the human rights of your citizens, including their property rights. There was no doubt that it was not deemed to be intervention under customary international law. Even those people who said it was intervention would then go on to say it was permissible intervention because it was for a permissible purpose.[1]

Protection of nationals may be thought of either in the context of defense or actions below the threshold of Article 2(4) of the UN Charter. If necessary and proportional, there is substantial support for the lawfulness of such actions.[2] Such was the case when the United States intervened in Panama in 1989 to protect U.S. citizens lawfully present pursuant to our obligations under the Panama Canal Treaty.

The 1989 Intervention in Panama

Operation JUST CAUSE, the U.S. December 1989 military intervention in Panama, was ordered, according to President George H. W. Bush, to protect U.S. lives, restore order, and protect the integrity of the Panama Canal Treaty.[3] It was the fifth such incursion into that nation in a century.[4] From the perspective of international law, this use of force was justified then, and can be today, as a legitimate use of American military power in defense of U.S. and Panamanian national interests.

The use of the military instrument, under the best of circumstances, will engender international criticism. JUST CAUSE was no exception. The Soviet Union used traditional

Cold War rhetoric to denounce the action; leaders of neighboring Latin American countries universally condemned the incursion within the Organization of American States (OAS) and within the United Nations.[5] (Strangely, this criticism was far more vocal than it had been when the Panamanian strongman nullified the victory of opponents to his puppet regime the preceding May.) Britain and other Western European nations were supportive.

What this use of military power in Panama emphasized was that criticism is short-lived when both the people in the state in which the intervention occurs and the opposition party of the intervenor nation support the action as within their respective national interests. For the people of Panama, the intervention represented fulfillment of a then-ongoing civic movement for democratization, their vital economic interest in political change (they recognized that U.S. economic sanctions would be lifted only if the dictator General Manuel Noriega were deposed or surrendered to face American drug and conspiracy charges), and an appeasement of the newly critical attitude of the international community toward conditions in Panama.

The Threat to U.S. National Interests

For more than two years prior to the 20 December 1989 intervention by U.S. Southern Command (USSouthCom) forces, Washington had attempted to resolve the crisis in Panama through negotiation. That effort was directed toward protecting the thirty-five thousand Americans in Panama, combating the drug transshipment trade from Colombia (which was being coordinated in Panama City), and ensuring that the operation of the Panama Canal remained secure.

U.S. concern grew when in May 1989 opposition candidates on a slate headed by Guillermo Endara appeared to have soundly beaten the Noriega slate in the national elections. Noriega quickly nullified the election. Memories remain fresh of the brutal beating the day after the election of Second Vice President–Elect Guillermo Ford by thugs from Noriega's "Dignity Battalions."

Harassment of U.S. military personnel and their dependents increased significantly after the election. On 15 December 1989, General Noriega declared his military dictatorship to be in a "state of war" with the United States. This statement followed a declaration by his puppet regime that he was now "Maximum Leader of the Panamanian People." Noriega's declaration of war was coupled by thinly veiled threats against U.S. citizens, including statements to the effect that he looked forward to seeing American corpses floating in the Panama Canal.

On 16 December, forces under Noriega's command shot and killed First Lieutenant Robert Paz, an unarmed Marine, and wounded another. Both were assigned to U.S.

forces stationed in Panama pursuant to the Panama Canal Treaty. Shortly after that incident, a U.S. naval officer, similarly assigned and traveling with his wife in Panama City, was arrested without cause and brutally beaten. His wife was interrogated and then threatened with sexual abuse. Believing that this pattern of violence would continue, President Bush acted to protect U.S. lives and interests and to restore democracy in Panama on behalf of the legitimately elected Endara government.

Application of International Law

The law supporting U.S. intervention in defense of nationals can be found in both international agreement and custom. The cornerstone of the law regulating coercion between states is the minimum world-order system represented by Articles 2(4), 2(7), and 51 of the United Nations Charter, as described in chapter 2 of this monograph.[6] The provisions of Article 2 preclude the use of armed force by one state against another. Article 51 authorizes one exception, the inherent sovereign right to use military force in self-defense. The UN Charter system requires strict accountability, however, before the projection of force into the territory of another state can be justified.

The 1989 intervention in Panama must be tested against each of the several conditions required to justify the use of military force in self-defense under Article 51. The first condition, in the case of defense of nationals or otherwise, is the existence of an armed attack or the imminent threat of armed attack upon one's territory or citizens. In December 1989, U.S. citizens lawfully residing in Panama pursuant to Panama Canal Treaty provisions, their property, and an international waterway vital to U.S. national power were all imminently threatened with armed attack. Not only had threatening rhetoric (to include a declaration of war) placed the Canal Treaty provisions in imminent risk, but attacks on U.S. citizens, coupled with allusions by Noriega to further "corpses," made more attacks likely. Further, there was every indication that this threat would continue as long as General Noriega remained in power.

A further condition relates to the possibility of an alternative to military force that might have returned the U.S.-Panamanian relationship to an acceptable status quo. The UN Charter contemplates a hierarchy of responses, envisioning armed force only when other responses have been attempted and have failed or are obviously without application. In the case of Panama, all other reasonable measures had been addressed. Every form of diplomatic (including recalling the U.S. ambassador), economic (such as sanctions), and legal initiative (even the indictment of Noriega) had been attempted, yet conditions had only worsened.

The use of force was seriously questioned by some international legal scholars and certain Latin American nations.[7] Nonetheless, a detailed scholarly analysis supports the

action taken by President Bush. Sir Gerald Fitzmaurice, former jurist on the International Court of Justice (ICJ), notes that international law "by no means permits [self-defense] in every case of illegality, but on the contrary, confines it to a very narrow class of illegalities.[8] Professor Ian Brownlee of Oxford University sets the parameters clearly: "Provided there is control by the principal, the aggressor state, and an actual use of force by its agents, there is 'an armed attack.'"[9] This view was further expanded by the ICJ in its 1979 ruling "Concerning United States Diplomatic and Consular Staff in Tehran" *(United States v. Iran)*. The court found Iranian actions in seizing American diplomats to be an armed attack on the United States.[10]

John Norton Moore was to categorize the actions carried out by Noriega's forces against U.S. citizens and interests as being within the scope of an "armed attack," concluding that "a state is entitled to respond against aggressive attack, whether that is a direct attack using armies on the march, or whether it is low intensity conflict or guerrillas or terrorist attack."[11]

The more significant legal issue in this case of protection of nationals may not be whether the United States was permitted to respond to attacks on its personnel but whether it could take those actions necessary to preempt reasonably anticipated *future* acts of violence against its citizens in Panama through removal of Noriega. The United States has always maintained that Article 51 of the United Nations Charter does not create a new principle but rather reiterates the inherent right of self-defense recognized by customary international law.[12] In that light, the right of self-defense is not limited to responding to an actual armed attack but includes preemptive or anticipatory self-defense, as described in Chapter III. Secretary of State Shultz affirmed this view during the Libyan crisis in 1986, when he stated the United States "is permitted to use force to pre-empt future attacks, to seize terrorists, or to rescue its citizens when no other means are available."[13]

Four basic arguments in favor of anticipatory self-defense have been advanced, and each has application with respect to the intervention in Panama.[14] First, Article 51 embraces the inherent right of self-defense (which includes anticipatory self-defense). Second, it is very difficult to distinguish acts that constitute preparation for aggression (but might not justify responding coercion under a restrictive view) from others that constitute elements of an attack. Third, the destructive power of modern weaponry makes it unreasonable to expect a state to absorb a first strike before responding.[15] Finally, a more restrictive position would only benefit an aggressor.[16]

Under the "minimum world order system" addressed in Chapter III and represented principally by Articles 2, 2(7), and 51 of the UN Charter, the U.S. intervention in Panama must also be measured against the customary international-law principle of

proportionality. Although the corresponding requirement of "necessity" is directly embraced, at least implicitly, within Article 51, the same arguably cannot be said for "proportionality of response."[17] Professor McDougal and Dr. Feliciano of Yale University Law School have defined the rule as follows:

> Proportionality in coercion constitutes a requirement that responding be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates the responding coercion.[18]

This definition, as noted previously, requires merely a rational relationship between the intensity of the attack and the intensity of the response. Although the relationship need not approach precision, a nation subject to a number of state-sponsored attacks on its citizens is not entitled, for example, to destroy in its entirety the capital city of the offender state.

Other canons of military practice, such as conservation of resources, support this principle of restraint in defense. The United Nations has condemned defensive actions that greatly exceed the provocation as illegal reprisals.[19] Where a continuation of hostile acts beyond the triggering event or events is reasonably to be expected, however, as was the case in Panama, a response that anticipates requirements of a continuing nature beyond the scope of the initial attack would be legally appropriate. The addition, on 20 December 1989, of some 9,500 troops from Fort Bragg and Fort Ord (among others) to augment the thirteen thousand SouthCom soldiers already in Panama can hardly be viewed as exceeding the parameters established by this rule, given the size of the forces under Noriega's control.

Application of Regional Arrangements

In addition to the regime established by the United Nations Charter, the United States and Panama are bound by the Charter of the OAS, the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and the Panama Canal Treaty.[20] At the time of the Panama intervention in 1989, Latin American nations were particularly sensitive to the provisions of the Rio and OAS agreements, because of their view that the United States had violated their tenets between 1981 and 1984, when it had been laying mines in Nicaraguan ports and planning and directing attacks by Nicaraguan resistance forces, the Contras, on ports, oil installations, and naval bases.

The ICJ had ruled in the case of *Nicaragua v. United States* that the assistance given by the United States to the military and paramilitary activities of the Contras through financial, training, weapons, intelligence, and logistics support constituted a clear breach of the principles of nonintervention under provisions of the OAS and Rio accords.[21]

The ICJ further found in that case that the actions of Nicaragua against its neighbors had not, as the United States maintained, amounted to an armed attack that could have authorized the collective countermeasures taken by the United States. In making these findings, the ICJ ruled that the U.S. actions in Nicaragua had resulted in an infringement of territorial sovereignty under both agreements, as well as the UN Charter.[22] It is small wonder, then, that the Latin American nations expressed concern over the U.S. intervention in Panama.

OAS Charter

The prohibitions against the use of force in the OAS Charter are phrased in language that is even more categorical than that of Article 2(4) of the UN Charter—a reflection of the long and painful history of the Latin American states. Article 13, for example, establishes: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and social elements." Article 20 is equally clear with respect to territorial integrity: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation, or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever."

The one exception to these comprehensive prohibitions, and the one relied upon by the United States in taking action to protect American citizens and interests in Panama, is Article 22, which provides: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20." The measures addressed in Article 22 include the right of self-defense under Article 51 of the UN Charter, as well as diplomatic and economic actions, to the extent that they are not considered regional enforcement initiatives pursuant to Article 53 of the Charter. Because the U.S. measures in Panama satisfy the self-defense criteria of the UN Charter, they likewise trigger the exception specified in Article 22 of the OAS Charter.

Another article within the OAS Charter is relevant to the U.S. military action. Article 3d provides: "The solidarity of the American States and the high aims which are sought through it require political organization of those states on the basis of the effective exercise of representative democracy." Not only had General Noriega violated this provision in May 1989, when he refused to allow the Endara government to assume power, but the abuses heaped upon his opponents had violated similar provisions of the 1953 American Declaration of the Rights and Duties of Man.[23]

The ICJ previously had opined that the commitment of states under Article 3d of the OAS Charter is a political, rather than legal, requirement;[24] however, the court had also asserted that nothing precludes a state from assuming a binding and enforceable international commitment of this kind.[25] When Panama committed itself to the multilateral 1953 declaration pledging to preserve these rights for its people, it had assumed a binding obligation that could be enforced by other states party to the declaration.[26]

The Rio Treaty

This multilateral agreement authorizes self-defense measures similar to those that can be taken under the OAS Charter and the UN Charter. Article 3 provides that the parties undertake "to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." This provision reinforces the U.S. right in the UN and OAS Charters to take measures in self-defense when the criteria established for an armed attack are met.

Panama Canal Treaty

The strongest tenet underlying U.S. actions was the bilateral Canal Treaty itself. Under Article 4, the United States had not only the right but the duty to protect the waterway. The basic U.S. responsibility was to operate and defend the Panama Canal until its transfer to Panama per the terms of the agreement. Even after the Noriega regime's illegal seizure of power, the United States continued to do what it had done since the entry into force of the treaty in 1979—provide for the safe and orderly transit of vessels through the canal while ensuring increased Panamanian participation in its management and operation.

During 1988 and 1989, however, the Noriega regime engaged in a systematic campaign to harass and intimidate American and Panamanian employees of the Panama Canal Commission and members of the U.S. forces. In 1989 alone, there were over three hundred violations of the U.S. military bases by Panamanian Defense Forces (PDF) personnel. Over four hundred U.S. personnel were detained, and 140 U.S. personnel were put in danger.[27] When this dangerous and provocative behavior reached an intolerable level in mid-December 1989, President Bush was compelled to act to end the threat to American and Panamanian lives as well as to canal operations.

Meeting the Weinberger Criteria for Intervention

From the perspective of the heavily Democrat U.S. Congress, the fact that the initiative met the carefully circumscribed criteria established by Secretary of Defense Caspar Weinberger for intervention in 1984 was critical. Senate Majority Leader George Mitchell stated immediately after the intervention, "I support the President's decision. It was made necessary by the actions of General Noriega."[28] House Speaker Thomas S. Foley echoed these sentiments:

"I support that decision. The President made a convincing argument. . . . The President asked for my support, and I gave him that assurance. The decision is justified."[29]

These statesmen had been two of the principal protagonists in the 1984 debates concerning the use of military force following the Beirut bombing of the Marine battalion headquarters and after the Grenada intervention. Those debates, precipitated by the military services over the appropriate circumstances in which military personnel could be put in harm's way, led to a clear articulation of six criteria for intervention by Secretary Weinberger before the National Press Club on 28 October 1984. These criteria, applauded then and since by the Congress, required that any use of force be predicated upon a matter deemed vital to our national interest, that the commitment be undertaken with the clear intention of winning, that political and military objectives be clearly defined, that the forces committed be sufficient to meet the objective, that the support of the American people be reasonably assured, and that the commitment of U.S. forces be a last resort.[30]

The intervention in Panama met each of these tests, and because it did, the support of the American people and Congress was overwhelming. If we have learned one lesson from Panama, it is that legal criteria and political criteria are related. Where use of military force can be defended as necessary and proportional under the canons of international law, the American people will support it as a proper exercise of national power. Fifteen years later, when the George W. Bush administration struggled to offer justification for Operation IRAQI FREEDOM, it would have been well served to place its arguments in terms of the Weinberger criteria.[31]

Notes

1. Richard Lillich, "Forcible Self-Help under International Law," in Richard Lillich and John N. Moore, eds., *Readings in International Law from the* Naval War College Review, International Law Studies 62 (Newport, R.I.: Naval War College, 1980), p. 134.
2. See Thomas Farer, "Intervention in Civil Wars: A Modest Proposal," *Columbia Law Review* 67 (1967), p. 266; S. Friedman, "Intervention, Civil War and the Role of International Law," *Proceedings of the American Society of International Law* (1965), p. 67; John N. Moore, "Legal Standards for Intervention in Internal Conflicts," *Georgia Journal of International and Comparative Law* 13 (1983), p. 191. The significant difference noted in each of these articles between protection of nationals and humanitarian intervention addressed in the last chapter is the fact that protection of sovereign interests is involved in the former but not the latter.
3. President Bush cited these as the objectives of the intervention in his speech to the nation at 7:40 AM (EST) on 20 December 1989.
4. In 1908, U.S. forces landed in Panama, which had gained independence from Colombia in 1903 with American support, in the first of four landings in that nation in the next decade. Although it had not been an intervention per se, in 1964 twenty-three persons were killed and three hundred injured during nationalist riots against the American presence. U.S. forces assigned in Panama were used to quell them.
5. "OAS Votes to Censure U.S. for Intervention," *Washington Post,* 23 December 1989, p. A7. Also see *Many Governments Condemn*

Use of Force in Panama, *Washington Post,* 21 December 1989, p. A34.

6. 59 Stat. 1031; UNTS 993; 3 Bevans 1153. Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945, reprinted in U.S. Department of State Pub. 2368, pp. 1–20.

7. Two weeks after the intervention, sixty-nine liberal politicians and activists, including 1972 presidential nominee George McGovern, took out a full-page ad in the *New York Times* decrying the Panama initiative. The open letter to the president stated: "Your invasion of Panama is illegal . . . a violation of the Constitution . . ., the UN Charter, [and] the OAS and Canal Treaties."

8. Sir Gerald Fitzmaurice, "The Problem of the Authority of International Law and the Problem of Enforcement," *Modern Law Review* 19 (1956), p. 1.

9. Ian Brownlee, *International Law and the Use of Force by States* (Oxford, U.K.: Oxford Univ. Press, 1963), p. 373.

10. See *Concerning United States Diplomatic and Consular Staff in Iran (U.S. v. Iran),* 1980 ICJ Merits, paras. 17, 24, 25, 57, and 91. See also James Terry, "The Iranian Hostage Crisis: International Law and U.S. Policy," *JAG Journal* 32 (1982), p. 94. The state-sponsored terrorist activity in Iran is further described in chapter 5, below.

11. John N. Moore, "International Law and Terrorism," *ROA National Security Report* 10 (October 1986), p. 4.

12. See Art. 1915, *U.S. Navy Regulations,* 1973.

13. *New York Times,* 16 April 1986, p. A8.

14. Richard Erickson, *Legitimate Use of Military Force against State-Sponsored International Terrorism* (Maxwell Air Force Base, Ala.: Air Univ. Press, 1989), pp. 138–39. Erickson presents a full discussion of each of these principles.

15. See George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" 39, no. 3 (May–June 1986), pp. 69–80.

16. See Marjorie M. Whiteman, *Digest of International Law* 12 (Washington, D.C.: U.S. Government Printing Office, 1965), pp. 49–50.

17. "Necessity" embodies the concept that the use of military force to protect or defend vital national interests, American citizens, or U.S. territory from armed attack or the imminent threat of armed attack shall be resorted to only after all other lesser means have been exhausted. See J. O'Brian, "The Meaning of Necessity in International Law," *World Polity* 1 (1966), p. 166, and W. Downey, "The Law of War and Military Necessity," *American Journal of International Law* 41 (1953), p. 251.

18. Myres McDougal and F. Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale Univ. Press, 1961), p. 242.

19. See the Security Council's discussion in 36 UN SCOR (2232–2285 mtgs.), UN Docs. S/PV 2285–2288 (1981).

20. Revised Charter of the Organization of American States, 2 UST 2394; TIAS 2361; 119 UNTS 3. Amendments, 21 UST 607; TIAS 6847. Entered into force for the United States on 13 December 1951. Amendments entered into force on 27 February 1967. Rio Treaty: 62 Stat. 1681, TIAS no. 1838; 21 UNTS 77. Panama Canal Treaty, with Annex, Agreed Minute, and related letter. TIAS 10031; signed in Washington, D.C., on 7 September 1977 and entered into force on 1 October 1979, subject to reservations and understandings.

21. Judgment, ICJ Rep. (1986), reprinted in *American Journal of International Law* 80 (1986), pp. 785–807.

22. Ibid.

23. Res. XXX of the Ninth International Conference of American States (1953), in *Human Rights: The Inter-American System,* ed. Thomas Buergenthal and R. Norris (Dobbs Ferry, N.Y.: Oceana, 1984), vol. 1, part 1, chap. 4, p. 1.

24. *U.S. v. Nicaragua*, ICJ Rep., para. 259, p. 131.

25. Ibid.

26. As a party to the declaration, the United States was entitled to make this claim.

27. U.S. State Dept., *Current Policy,* no. 1240 (Washington, D.C.: Bureau of Public Affairs, 22 December 1989).

28. *Washington Post,* 21 December 1989, p. A35.

29. Ibid.

30. Secretary Weinberger's speech was reprinted verbatim in the *New York Times,* 29 October 1984, pp. A1, A4.

31. See chapter 7, below.

CHAPTER FIVE

Response to International Terrorism

A third genre of lesser conflict is reflected in the devastation directed against the United States on 11 September 2001. The attacks by the al-Qa'ida terrorists on the World Trade Center in New York and on the Pentagon in Washington, D.C., do not represent a new kind of international conflict. They do, however, depart significantly from traditional warfare between states adhering to the law of armed conflict. These attacks reflect nontraditional violence against states and innocent civilians by individuals or groups supported by rogue states for political ends without regard to the civilized behavior on the battlefield that underpins the four 1949 Geneva Conventions.[1]

The Context

In light of this significant threat to democratic values, several U.S. presidents, most recently George W. Bush in late 2003, have articulated a right to respond "preemptively" when evidence exists of an imminent threat of terrorist violence.[2] Ronald Reagan's administration issued the seminal "preemption" doctrine in 1984. In the words of former Defense Department official Noel Koch, President Reagan's National Security Decision Directive (NSDD) 138, issued 3 April 1984 "represent[ed] a quantum leap in countering terrorism, from the reactive mode to recognition that proactive steps [were] needed."[3] NSDD 138 is classified, but Robert C. McFarlane suggested at a Defense Strategy Forum on 25 March 1985 that it included the following key elements: The practice of terrorism under all circumstances is a threat to the national security of the United States; the practice of international terrorism must be resisted by all legal means; the United States has the responsibility to take protective measures whenever there is evidence that terrorism is about to be committed; and the threat of terrorism constitutes a form of aggression and justifies acts in self-defense.[4]

While the moral justification for this U.S. policy may be obvious, the problem of defining state support or linkage that warrants a U.S. military response, a legal framework supportive of such a proactive policy, and reasonable force alternatives responsive to the threat, is more difficult. It is to these particular concerns that this chapter is addressed.

The linkage between the terrorist and the sponsoring state is crucial to providing the United States, or any nation, with justification for response against that state. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases and for providing effective warning of impending terrorist attacks. Unfortunately, as noted by Secretary of State George Shultz in 1984, "We may never have the kind of evidence that can stand up in an American court of law."[5]

The question, then, is how much information is enough, from several perspectives. Caspar Weinberger has underscored the very real and practical difficulties that exist for military planners in attempting to apply a relatively small quantum of force over great distance with uncertain intelligence. He has accurately noted the difficulty of ensuring success without accurate information, and he has echoed the relationship between public support and demonstrable evidence of culpability in any resort to force by the United States in defending against terrorist attack.[6]

No U.S. administration official, past or present, has been able to define adequately, "how much evidence is enough." As asserted by Secretary Shultz, the demand for probative, or court-sustainable, evidence affirming the complicity of a specific sponsoring state is an impractical standard, one that has contributed to the impression—prior to the articulation of NSDD 138 in 1984—that the United States was inhibited from responding meaningfully to terrorist outrages. This view was certainly reinforced when in 1979 the U.S. government allowed fifty-two American citizens to remain hostage to Iranian militants for more than four hundred days. Hugh Tovar has correctly noted, "There is a very real danger that the pursuit of more and better intelligence may become an excuse for nonaction, which in itself might do more harm than action based on plausible though incomplete intelligence."[7]

Legal Framework for Response

An examination of authorized responses to state-sponsored terrorism requires an understanding that terrorism is a strategy that does not follow traditional military patterns. In fact, a fundamental characteristic of terrorism is its violation of established norms. Whereas the conduct of warfare is governed by carefully defined norms that survive despite their frequent violation; the sole norm for terrorism is effectiveness. International law requires that belligerent forces identify themselves, carry arms openly, and observe the laws of war.[8] Prominent among the laws of war are the principles of discrimination (or noncombatant immunity) and proportion. Terrorists, however, do not distinguish between the innocent (noncombatants) and the armed forces of the country in which the attack is made.

Two rationales may explain this terrorist strategy. The very fact that the victims of terrorism are innocent third parties enhances the shock value of attacking them. Alternatively, the terrorist may decree that everyone living in a certain society is guilty of its perceived sins and deserving of punishment. In the contemporary language of defense economics, they wage countervalue rather than counterforce warfare.

Why is this important? It is important because it tells us that the only credible response to terrorism is deterrence. There must be an assured, effective reaction that imposes unacceptable costs on the terrorists and those who make possible their activities. However, this reaction must counter the terrorists' strategy within the parameters of international law, and more specifically, the law of armed conflict. Those who suggest otherwise understand neither the inherent flexibility of international law nor the cost of violating that law.[9]

International law has long recognized the need for flexible application. The underlying tenet of that law, the prohibition against the use of force, has as its principal tenet the right of response in self-defense. Self-defense, however, is an inherent right, shaped by custom and subject to customary interpretation. Its codification within Article 51 of the UN Charter recognizes this inherent quality: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."

According to some legal scholars, though, responding coercion cannot be justified under Article 51 unless the force directed against the "political independence" of another state has as its purpose "the permanent subjugation of that state to domination."[10] This interpretation envisions a broad-based and far-reaching attack; arguably, however, an attack against a smaller or isolated segment of a nation's governmental, military, or social apparatus is legally analogous to an attack against the whole. If U.S. citizens, diplomats, or military personnel are attacked or held captive by terrorists in an attempt to induce a change in American policy, the political independence of the United States has clearly been subjected to attack.

The final clause of Article 2(4) of the United Nations Charter, which forbids threat or use of force "in any other manner inconsistent with the Purposes of the United Nations," supports this interpretation. The principles codified in the Charter have it as their primary purpose to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment of or settlement of international disputes or situations that might lead to a breach of the peace."[11] Terrorist seizures of or attacks on U.S. citizens or instrumentalities are certainly uses of force "in a manner inconsistent" with the Charter. Article 2(4) and Article 51, its exception, must be read

together in a way that gives them both reasonable meaning. As Professor Myres McDougal explains,

> Article 2(4) refers to both the threat and use of force and commits the Members to refrain from "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations"; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion.[12]

A second restriction that doctrinaire legal scholars attempt to impose would permit self-defense against state supporters of terrorist violence only when an attack "occurs." This interpretation is based not only on Articles 51 and 2(4) of the Charter but also on Article 2(3), which states, "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." The late Ian Brownlie argued that while "isolated or sporadic" incidents may constitute aggression, they do not reach the level of an "armed attack."[13] It has thus been argued that because the definition of armed conflict is narrower than aggression, "certainly self-defense against armed bands would not seem to be included within the permitted area."[14]

Such rigid interpretations do violence to the very values underlying Article 51 of the Charter and to the customary international law it seeks to codify. Neither the plain language of Article 51 nor U.S. practice in addressing incidents of aggression under its inherent right of self-defense suggests such a restrictive interpretation.

Other considerations in addressing terrorist violence include the fact that the real-time relationship between threat and threat recognition is often compressed in the terrorist conflict arena. Strategy development is thus limited with respect to the nonmilitary initiatives, short of attack, that must always be the option of choice. Traditional means of conflict resolution, authorized by law and customary practice, are precluded, because terrorism by definition is covert in execution, unacknowledged by its state sponsor, and practiced with violent effectiveness. Thus diplomacy and conciliation may be of little utility in responding to a state that denies its actions and ultimately designs its practices to eliminate normal, lawful intercourse between nations.

It must be noted, however, that noncoercive efforts to avoid terrorist attack have their importance. Counterterrorism expert Dr. William Farrell notes, "Diplomatic action, alone or in concert with allies that could conceivably impact successfully upon a terrorist group and/or its sponsor, should be considered and employed initially. Political and economic sanctions are also alternatives which demand consideration before military force is employed."[15]

In a democratic society, however, the range of options open to an administration desirous of protecting its citizens and resources from terrorism, is limited. One of the best things a democratic government can do is educate the public and its military about the realistic options available in any crisis. Professor Abraham Miller suggests, "The image of an invincible and omnipotent America that can rescue hostages under any circumstance is patently unrealistic. It is a mindset that comes from a failure to realize how lucky the Israelis were at Entebbe and from the charges and countercharges of the 1980 election campaign, during which the Iranian hostage crisis was played to the hilt."[16] This further suggests that measures justified by law may not be feasible in terms of execution. Another value, identified by Dr. Farrell, that must be considered before using military force is moral justification.

Claiming justification in the protection of democratic values while employing tactics that are similar to those of the terrorists undermines public confidence. There may be some immediate emotional release no matter what the response, but thoughtful reflection over the long term will tolerate only action based on moral grounds.[17] These valid concerns underscore the need to weigh long-term values besides countering the immediate terrorist threat when determining an appropriate policy.

Proactive Responses Authorized under International Law

When the decision to use force is made, it must be as closely tied to a clear objective as would an action at the higher end of the coercion spectrum. Because the relationship between objective and threat is often unclear in the low-intensity-conflict arena, a strategy to fight state-supported terrorist violence must always focus on the underlying political purpose of the states supporting terrorist organizations. That purpose is unquestionably the removal of the United States from the region concerned.

How do we counter this purpose, this objective? George Shultz was correct when he stated that our policy "must be unambiguous. It must be clearly and unequivocally the policy of the United States to fight back—to resist challenges, to defend our interests, and to support those who put their lives on the line in a common cause."[18] Implementation of this proactive policy requires the fullest use of all the weapons in our arsenal. These should include not only defensive measures that reduce U.S. vulnerability but also new legal tools and agreements on international sanctions, as well as the collaboration of other concerned governments. While we should use our military power only if conditions justify it and other means are not available, there will be instances, as occurred after 11 September 2001, when the use of force is the only alternative. In that circumstance, our actions were fully justified as necessary defensive measures to eliminate a continuing threat to the United States.

Closely related to the legal question is the question of sponsorship. When clear evidence of state support exists, we must publicize that relationship and attack with discrimination, striking only those targets that most affect the well-being of the state sponsor. The "center of gravity" in the sponsoring state must always be that target the destruction of which will most significantly undermine the target state's will to commit future acts of terror. Since terrorism is a form of international conflict and thus bound by its rules, lawful response is limited to targets that do not enjoy civilian immunity.

Military targets may be preferable for two other reasons as well. First, the selection of military targets—while the terrorists are attacking our civilians in violation of international law—should alleviate any concern on the part of other states. Additionally, selection of military targets would refocus attention on the fact that terrorism is in fact a form of armed conflict.

Establishing Linkage between State Sponsor and Actor: The al-Qa'ida Model

Causal connectivity or linkage, the most important element in justifying the use of force in response to terrorist violence, can be established only if effective intelligence operatives are positioned to discover who the terrorists are, where they are, and who supports them. While U.S. intelligence did not prevent the attacks on the World Trade Center and the Pentagon, it did quickly establish critical linkages afterward. It was quickly learned that the perpetrators of the 11 September 2001 violence were members of the al-Qa'ida organization and that it was being protected and given safe haven in Afghanistan by the Pushtun Taliban militia.

The Taliban was the strongest of the ethnic militias in Afghanistan by mid-2001 and controlled the political machinery of state in Kabul. During that period it constituted the de facto government of Afghanistan, but it was unable to conduct normal foreign relations or to fulfill international legal obligations. Independent press reports concluded that it had become so subject to the domination and control of al-Qa'ida that it could not pursue independent policies with respect to other states.[19] Nonetheless, Afghanistan continued to have the essential elements of statehood.[20] Accordingly, it was called upon by the international community—in UN Security Council Resolutions 1333 (2000), 1267 (1999), and 1214 (1998)—to fulfill its obligations and the international agreements prior Afghan governments had signed.[21] The Taliban militia consistently refused.

Professor Robert Turner has explained that when "[Osama] bin Laden masterminded the attacks on New York and Washington, Afghanistan [was] in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states."[22] Prior to 11 September 2001 al-Qa'ida supplied

the Taliban with the money, material, and personnel it needed to gain the upper hand over its primary opposition, a multiethnic (but non-Pushtun) grouping known as the Northern Alliance.[23]

By 11 September 2001 and for some time thereafter the Taliban, with al-Qa'ida support, effectively controlled nearly 90 percent of Afghan territory, exercising governmental functions therein: operating a system of taxation, administering Islamic courts, appointing and confirming regional governors, district leaders, mayors, and other regional and local officials, and imposing law and order. Therefore, and because the Taliban, with its al-Qa'ida supporters, clearly opposed the coalition's use of force in Operation ENDURING FREEDOM, we must conclude that an armed conflict in fact existed between two "high contracting parties" to the Geneva Conventions, justifying all U.S. actions exercised in self-defense under Article 51 of the UN Charter.[24]

Protection of Diplomats from Terrorist Violence: The Iranian Hostage Crisis

Nor was 11 September 2001 the first time the United States had been attacked by terrorists so clearly linked to a state sponsor. The 1979 attacks on the U.S. embassy in Tehran and the consulates at Tabriz and Shiraz followed by one week the entrance of the shah into the United States for medical treatment.[25] On 4 November 1979 approximately three hundred demonstrators overran the embassy compound in Tehran. The Islamic government of Iran normally maintained ten to fifteen uniformed policemen outside the embassy compound as well as a nearby contingent of "Pasdaran" Revolutionary Guards.[26] On the day of the attack, however, these security personnel made no effort to deter or discourage the demonstrators from seizing the premises; they simply disappeared.[27]

The invading militants initially seized not only the lower floor of the chancery but also the U.S. security officials who had gone out to attempt to negotiate with them. After more than two hours, they gained entry to the upper floor of the chancery and seized the remaining personnel, with the exception of eleven American staff members who held out in the main vault for a further hour.[28]

Despite repeated calls for help to the Iranian Foreign Ministry, no Iranian security forces were sent to protect the Americans during this three-hour assault. No attempt was made by the Iranian government to clear the embassy premises, rescue the personnel held hostage, or persuade the invaders and demonstrators to terminate their action.[29] In fact, one Iranian spokesman stated in an interview the following day that the Revolutionary Guards had indeed been sent to the embassy following the appeal for help, but not to secure the release of the hostages and premises. According to a government statement of 5 November 1979: "Yesterday the American Embassy Chargé d'Affaires immediately contacted the Foreign Ministry and stated he lacked security and that he would need

protection. So, on orders of the government, the Revolutionary Guards entered to prevent clashes there. Last night the brothers who are occupying the Embassy thanked the guards for their presence and for maintaining security there."[30] On the same morning that this official statement was made, militant students seized the American consulates in Tabriz and Shiraz; once again the Iranian government took no protective action.[31]

The failure of the government of Iran on 4 and 5 November to protect the American diplomatic premises and its complicity in the attack—from the moment the Revolutionary Guards were sent to assist the militants—directly violated earlier assurances of that government to the United States.[32] During an attack on the embassy in February 1979, the government of Iran had moved quickly and efficiently to remove the insurgents.[33] Later, Prime Minister Mehdi Bazargan sent a letter to the embassy expressing deep regret, indicating Iran's readiness to indemnify the United States for the damage caused to its premises "by anti-revolutionary elements," and conveying assurances that the government had "made arrangements to prevent the repetition of such incidents."[34] On at least two other occasions prior to the November seizure, the embassy's chargé d'affaires, L. Bruce Laingen, discussed the security situation with Iranian Foreign Minister Ebrahim Yazdi, who repeated a pledge that Iran would fulfill its international obligation to protect the U.S. embassy.[35]

Following the 4 November takeover, the remaining fifty-three captured Americans were subjected to a harrowing ordeal in various "prisons." At the outset, some were paraded blindfolded with hands bound before hostile and jeering crowds.[36] For much of their captivity the hostages were to be bound and frequently blindfolded, forced to remain silent for extended periods of time, denied mail or the right to communicate with each other, subjected to interrogation, threatened with criminal trials, and threatened with death in the event of an American rescue attempt. Some were also physically abused and threatened directly with weapons.[37] All contact between the hostages and the U.S. government, even by telephone, was prohibited.[38] American archives and documents were seized and ransacked, with the apparent intent of using them as evidence in the event of hostage trials.[39]

Diplomatic Efforts

In the days immediately following the November 1979 attacks, the U.S. government moved quickly and quietly to secure the hostages' release and the clearing of the embassy through diplomatic means. Prime Minister Bazargan was immediately contacted, and his government, on 5 November 1979, gave assurances "that the hostages would be released."[40] Then, on 6 November, Bazargan resigned, in apparent protest at lack of support of the Revolutionary Council in opposing the militants' actions.

The following day, former U.S. attorney general Ramsey Clark arrived in Turkey en route to Iran at the head of a presidential mission. Before the Clark delegation could reach Tehran, the effective head of the Iranian state, the Ayatollah Ruhollah Khomeini, forbade any Iranian contact with the mission.[41] On 12 November a newly appointed "overseer" at the Iranian Foreign Ministry, Abdol Bani-Sadr, announced that before the hostages could be released the United States would have to admit that the property and the fortune of the shah were stolen, promise to refrain from further intervention in Iranian affairs, and extradite the shah to Iran for trial.[42] Clearly, the Iranian authorities had assumed full responsibility for the seizure of the diplomats and were unwilling to grant their immediate and unconditional release.

Thus four early developments indicated to President Jimmy Carter that diplomacy alone would not secure the hostages' freedom: Khomeini's support for the terrorism, the collapse of the relatively moderate Bazargan government, the unacceptable conditions announced by Bani-Sadr, and Khomeini's order forbidding contact with American representatives.[43]

As a result of the unwillingness of the Iranian leadership to accept diplomacy as a route to a solution, President Carter undertook a series of actions to demonstrate that the Iranian actions were legally and morally unacceptable and that the United States was determined to press Iran for an early release of the hostages. American efforts included application for relief at the International Court of Justice, bilateral contacts with other governments, multilateral initiatives at the United Nations, unilateral economic actions, advocacy of multilateral economic measures, and a failed attempt to use force.

Resort to the United Nations

The United States requested that the Security Council consider options for the release of the American hostages and the restoration of the diplomatic compound. This request came in the form of a letter dated 9 November 1979 from the U.S. permanent ambassador at the United Nations to the Security Council.[44] In response, the president of the Security Council, speaking for the Council, appealed the same day for the release of the hostages.[45] The president of the General Assembly similarly called for the release of the hostages.[46]

On 25 November 1979, Secretary General Kurt Waldheim requested that the Security Council convene to work out a peaceful solution to the crisis.[47] Addressing the Council on 29 November, Waldheim declared that the situation in Iran "threatens the peace and stability of the region and could well have very grave consequences for the entire world."[48] On 4 December the Security Council unanimously adopted Resolution 457, which called upon the government of Iran "to release immediately the personnel of the

Embassy of the United States of America being held in Tehran, to provide them protection and allow them to leave the country."[49] Resolution 457 also requested the secretary general to lend his good offices to the immediate implementation of the resolution and take all appropriate measures to that end.

On 29 December the United States again requested the Security Council to consider measures to induce Iran to comply with its international obligations. At that meeting, Secretary of State Cyrus Vance, speaking for the United States, stated that "the United States Government has, with determination, persistence and patience, pursued every peaceful channel available to us."[50] Two days later the Security Council adopted Resolution 461, which reaffirmed the earlier Resolution 457. This measure deplored Iran's detention of the hostages and once again called for their release.[51] Iran did not comply with the resolutions, and a Soviet veto blocked an American request that the Security Council implement sanctions.[52]

Application to the International Court of Justice

When it became apparent that violations of diplomatic immunity were supported by the ruling government in Iran and not merely acts of individual or group terrorism, the United States instituted proceedings against Iran in the ICJ. On 29 November a request for Interim Measures of Protection was filed.[53] Jurisdiction was grounded upon Article 36 of the Statute of the Court.[54] It was founded as well upon a number of treaties to which the United States and Iran are party and that govern the status, rights, and treatment to be accorded diplomatic personnel and premises.[55]

One day later, the president of the International Court of Justice, Sir Humphrey Waldock, in the exercise of the power conferred upon him by the Rules of Court, addressed a telegram to the governments of Iran and the United States calling attention to the need to act in such a way as would enable any subsequent order of the court to have an appropriate effect.[56] A hearing was held on the request for provisional measures;[57] thereafter, on 15 December 1979, the court unanimously ruled that Iran should release the American hostages and restore the seized premises to exclusive American control.[58]

On 17 December the Iranian foreign minister, Sadegh Ghotbzadeh, stated that "the prefabricated verdict of the Court was clear to us in advance; for this reason, Iran's Chargé d'Affaires at the Hague was ordered to officially reject the decision of the Hague Court."[59] President Waldock set 15 January 1980 as the deadline for the filing of an American memorial and 18 February for the Iranian countermemorial.[60] Oral proceedings were scheduled to begin on 19 February, but the United States obtained a postponement, in order to determine whether any of Secretary Waldheim's initiatives would bear fruit. They did not, and 18 March 1980 was assigned as the date for oral

proceedings.[61] Although the government of Iran did not participate, the court carefully addressed the potential objections that Iran might have raised to its subject-matter jurisdiction. Similarly, the court also considered possible substantive defenses that Iran might have raised to the American allegations of abuse. The ICJ ultimately found, as it had in its order of 15 December 1979, that this case was not—as Iran had claimed in its letter of 9 December—a matter solely within Iran's domestic jurisdiction. The court stated, "A dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one that by its very nature falls within international jurisdiction."[62]

Iran had also maintained that the hostage matter was only a "marginal and secondary aspect" of an "overall situation containing much more fundamental and more complex elements [that cannot be examined] divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the past 25 years."[63] The ICJ emphasized, as it had in its 15 December ruling, that the seizure of a nation's embassy, consulates, and diplomatic personnel could never be considered secondary or marginal to any other alleged violation.[64] The ruling emphasized that the secretary general had referred to the holding of diplomatic hostages as a "threat to . . . peace."

The court noted that the Security Council, in unanimously passing Resolution 457, had stressed the international community's concern at such action.[65] In ruling against Iran, the ICJ observed that "no provision of the Statute or Rules of Court contemplates that the court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[66]

Regarding substantive areas, the ICJ examined the special circumstances claimed by Iran in defense. It found Iran's broad, unspecific allegations of interference in internal affairs unconvincing and emphasized that if Iran had desired to present specific evidence of such claims, it certainly had been presented with the opportunity to do so.[67] More importantly, the court stressed that even if Iran had been able to establish interference, that would not have been a defense or justification for the seizure of diplomatic personnel.[68] President Waldock also delineated the contribution of Islam to an international norm of diplomatic protection.[69]

Even Judge Tarazi, in his dissenting opinion, concurred with the majority regarding Islamic leadership in this area. Quoting a 1937 lecture of Professor Ahmed Rechid of the Istanbul Law Faculty, Tarazi wrote, "In Arabia, the person of the Ambassador has always been regarded as sacred. Muhammed consecrated this inviolability. Never were ambassadors to Muhammed or to his successors molested. One day, the envoy of a foreign nation, at an audience, granted to him by the Prophet, was so bold as to use

insulting language. Muhammed said to him: 'If you were not an envoy I would have you put to death.'"[70]

The court's majority opinion noted that under the customary international law and under the agreements cited earlier—agreements to which the United States and Iran are signatories—diplomatic law has developed sanctions designed to be effective without destroying relations between states.[71] Unfortunately, Iran neither admitted the validity of nor adhered to the International Court's December 1979 suggestion of interim measures. Nor did Iran recognize the May 1980 decision on the merits.[72]

Economic Measures

In addition to the unsuccessful efforts at securing the hostages' freedom via diplomacy, and acting through the United Nations and the International Court of Justice, the United States took additional measures. On 12 November 1979, President Carter, under the Trade Expansion Act, banned U.S. purchases of Iranian oil.[73] He did so to make clear that the United States would not allow itself to be blackmailed because of oil requirements.[74] The United States then learned that Tehran planned to withdraw all Iranian assets held in American banking institutions. The removal of funds would have jeopardized billions of dollars in American claims against those assets—debts owed to both government and private enterprise.[75] The ripple effect of a mass withdrawal would have threatened the entire international financial system.

The president acted quickly to protect the interests of American creditors by blocking the removal of the Iranian funds. In order to do this, the president invoked the provisions of the International Emergency Powers Act of 1977.[76] This act permits the freezing of foreign assets when there exists "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[77] The secretary of the treasury implemented the president's executive order on 14 November 1979 with a series of Iranian Assets Control Regulations.[78]

A month later, the United States informed the Iranian chargé d'affaires in Washington that personnel assigned to the Iranian embassy and consular posts in the United States would be limited to fifteen at the embassy and five per consulate.[79] From January to March 1980, the United States exercised restraint, in order to allow time for the initiatives of Secretary General Waldheim, as well as those of intermediaries, to work. Unfortunately, factional disputes in Iran prevented Bani-Sadr and Iranian authorities from honoring their pledges regarding the authority of the United Nations Commission in Iran, and this in turn stifled Waldheim's diplomatic initiatives.

President Carter then moved to impose unilateral sanctions on Iran, and in April 1980 acted to prohibit all financial dealings and exports to Iran except food and medicine.[80]

On 17 April the Carter administration imposed additional prohibitions on imports, travel, and financial transfers related to Iran.[81] This executive order also restricted travel under the Immigration and Nationality Act.[82] Finally, that same month, the United States broke diplomatic relations with Iran and ordered the Iranian embassy in Washington closed.

While these unilateral measures were being implemented, our allies in Europe, Japan, and Canada were also imposing economic and diplomatic sanctions against Iran, in an effort to maintain a common front. At a 21 April 1980 meeting of the leaders of the European Community, nine allied nations reaffirmed their support for severe sanctions against Iran and stated they would seek legislation from their respective legislative branches enabling them to join the effort to isolate Iran internationally in the event the hostage crisis was not resolved by 17 May.[83] When no progress had been made by that date, these allies moved to accommodate an American request that no new contracts be entered into with Iran and that all contracts negotiated between these nations and Iran since 4 November 1979 be disavowed.[84]

Unfortunately, several European states—Great Britain included—were unable to gain parliamentary support for the entire package of sanctions promised. Thus their impact, while significant, failed to isolate Iran completely from a vital source of imports—Europe. The Soviet Union compounded the problem when it announced that if Iranian ports were blockaded or primary commodities became unavailable from the West, the Soviet Union would neutralize those measures by providing all necessary assistance. Specifically, the Soviet Union offered to move Iranian goods on its own roads and railway system if Iran's harbors should be blocked.[85] It also promised to supply Iran with primary foodstuffs if these became unavailable from customary sources. [86]

The economic measures adopted by the Western nations, while psychologically satisfying, thus proved singularly ineffective. In fact, the only noticeable impact was a rallying of Iranians behind Khomeini and the diversion of Iranian attention from internal difficulties to the foreign challenge. These measures ultimately tended to fragment international support for the United States while making it politically difficult for the Iranians to back down. In short, economic pressures, although perhaps politically expedient as a means to demonstrate presidential resolve, had the counterproductive effect of unifying Iranian opposition without coercing cooperation.

Humanitarian Intervention

Concurrently with its judicial, diplomatic, and economic initiatives, in November 1979 the United States began planning a military operation to rescue the hostages. Citing the same legal justification claimed by Israel in rescuing its citizens from terrorists at

Entebbe, Uganda, and by West Germany in a similar successful rescue at Mogadishu, Somalia, in 1977, the United States entered Iran during the night of 24 April 1980.[87] A team of approximately ninety American servicemen departed the aircraft carrier USS *Nimitz* (CVN 68) by helicopter for a remote, deserted airstrip in southern Iran, approximately three hundred miles from Tehran. There they met a C-130 transport aircraft for refueling. The plan then called for a flight to Tehran.[88] However, three of the eight RH-53 helicopters were disabled at the rendezvous point by mechanical failures resulting from sand intake, and the mission was aborted.[89] The remaining aircraft departed Iran, but not before a further helicopter and transport collided and exploded.[90]

International Law Violations with Respect to U.S. Diplomats

Article 29 of the 1961 Vienna Convention on Diplomatic Relations obligated Iran to treat each American diplomat with "due respect," to take "all appropriate steps to prevent any attack on his person, freedom, or dignity," and to ensure that diplomatic personnel were not subjected to "any form of arrest or detention."[91] Article 37 of this convention extends these same privileges and immunities to members of the administrative and technical staffs, as well as to their families.[92] These protections embody "the oldest established and the most fundamental rule of diplomatic law."[93] This was a point repeatedly emphasized by the ICJ in its 15 December 1979 order discussing provisional measures with respect to the American hostages:

> There is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose: . . . the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function.[94]

In addition to its obligation to protect diplomatic personnel, Iran also had a duty to bring the attacking militants to justice. Its failure to take either step laid the groundwork for subsequent American claims for reparations.[95]

When Khomeini's regime threatened the hostages with criminal trials, the provisions of Article 31 of the 1961 Vienna Convention, which exempts diplomatic personnel from the criminal jurisdiction of a host state and frees them of any obligation to appear as witnesses, also came into play.[96] This general immunity is so ingrained as customary international law that, in the view of one leading authority, no case can be cited where, without consent, a diplomatic agent has been tried or punished by local courts.[97]

History records many cases of diplomatic envoys who conspired against the receiving states but were not prosecuted. Thus, in 1584, when the Spanish ambassador in England, Don Bernardino de Mendoza, plotted to depose Queen Elizabeth, he was ordered to leave the country. In 1587, when the French ambassador in England, L'Aubespine, conspired

against the life of Queen Elizabeth, he was simply warned not to commit a similar act again. In 1654, when the French ambassador to England, De Bass, conspired against the life of Cromwell, he was ordered to leave the country within twenty-four hours.[98]

The 1961 Vienna Convention also obligates the receiving state to protect the diplomatic premises of the sending state, as well as its personnel. On 4 November 1979, according to Article 22 of the convention, Iran was and continued to be under an obligation to ensure that American diplomatic premises in Iran were held inviolable and immune from search. Article 22 required Iran to ensure that its agents did not enter the premises "except with the consent of the head of the mission." A "special duty" was placed upon Iran under this article "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."[99] Ironically, at the Vienna Conference, which approved this convention, Iran had been particularly vigorous in insisting that the special duty of protection not be qualified in any way, even under exceptional circumstances.[100]

Just as Khomeini's government failed in its obligation under Article 22 to preserve the inviolability of American diplomatic premises, so too did it fail in its related obligation to ensure the protection of archives and documents present there, as required by Article 24.[101] By approving the seizure, by ransacking and publishing documents from the mission, and by further threatening their use as "evidence" in judicial proceedings, the Khomeini government seriously impaired its international standing. By depriving itself of the respect that a state normally enjoys under the doctrine of sovereign equality, the regime forfeited an opportunity to gain world sympathy and also reduced its chances of cultivating friends and allies.[102]

Despite Iran's multiple violations of the 1961 Vienna Convention with respect to American diplomatic personnel, the diplomatic staffs of other nations—with the one exception of the arrest of the Soviet first secretary on 26 June 1980—continued to enjoy the requisite respect and protection.[103]

All governments have a shared interest in upholding the rights of their diplomatic representatives, since the relations between states depend on free communication in a myriad of interdependent ways. Iran's adherence to diplomatic law except in the case of the United States suggested that the Khomeini regime did not want to quarrel with this basic notion. Iran's willingness in 1979, however, in the case of American personnel, to defy both customary international practice as well as specific legal obligations underscored the intensity and virulence of its anti-American posture. From Khomeini's perspective, American interference since 1953, when the Central Intelligence Agency helped to overthrow Prime Minister Mohammed Mossadegh and restore the shah, had

delayed a true Islamic revolution for almost thirty years. The metaphor of America as "Satan" embodied Khomeini's notion of an ultimate foe, and the spasm of lawlessness that began on 4 November 1979 is perhaps best explained as a catharsis after three decades of bitterness and frustration.[104]

As in most developing countries, there were few internal factors—whether from opposition parties, a critical press, or an enlightened public—that could have constrained Khomeini to uphold the law. In the atmosphere of fervent nationalism that accompanied Khomeini's sweep to power, forces for moderation were depicted as tools of foreign interests. In such an atmosphere, the militant supporters of the clerical leadership fomented domestic pressure to violate other recognized norms as well—such as property ownership, religious freedom, and judicial protection. This combination of revolution and nationalism yielded explosive results, a reordering of both Iranian domestic society and its approach to foreign affairs.

Iran's breach of diplomatic law appears, in retrospect, to have had a greater impact on developed nations than it did on Iran itself or the rest of the world community. Because Iran was (and is) a vendor nation of an export commodity—oil—coveted by industrialized countries, it could survive economically despite the turbulence and xenophobia of Khomeini's regime.

Legal Analysis of U.S. Responses

International coercion can assume many forms. In addition to the use or threat of military force, coercion can also appear as economic or other nonviolent pressure, if it has the effect of altering significant national interests. Coercion in its many forms is a fact of international relations. Under the current norms of international law, coercion is impermissible when unreasonable, and reasonableness in turn is a function of both the necessity and proportionality of specific measures in a given context.[105]

Vital also to a viable system of world order is the concept of community response.[106] Group action is preferred, but in situations where a community response is either unavailable or too slow, unilateral response by the attacked nation may be necessary and legitimate.[107] In the days following the Iranian hostage seizure, Washington made every effort to mobilize the world community through the United Nations. The United States urgently addressed the president of the Security Council on 9 November 1979, requesting assistance in obtaining release of the hostages. The Security Council responded by unanimously adopting Resolution 457, which called upon Iran to free the hostages and clear the embassy premises immediately. When the Iranian government ignored this resolution, the Council unanimously affirmed its earlier action with Resolution 461. This second call was also ignored.

On 13 January 1980, in an effort to convince Iran that its best interests would be served by immediate compliance with community norms, the United States proposed enforcement measures in the Security Council. The draft resolution easily received a two-thirds majority within the Council, but a Soviet veto effectively ended any chance for the United Nations to back its words with actions and be more than an impotent onlooker as the crisis unfolded.[108]

Concurrently, the United States filed an action in the International Court of Justice. Both the interim measures endorsed in December 1979 and the later decision on the merits were repudiated by Iran. These avenues having been exhausted, the United States instituted a number of economic sanctions intended to be coercive.[109] The focus of American response turned from words to deeds.

But President Carter's inability to settle on a firm course of action made it difficult for America's European allies to be certain where the United States was headed. For five months after the hostage seizure, President Carter seemed ready to rely on a medley of political, judicial, and economic initiatives, in the belief that rational leadership in Iran would eventually prevail over the militants. When on 24 April 1980 he abandoned that policy without consulting the allies, he was stunned to find amazement among friends abroad. Months earlier, Carter had similarly imposed a series of unilateral sanctions against both Iran and the Soviet Union without first preparing the Western alliance. These turns of policy, taken without seeking consensus, suggested that President Carter did not believe that he could successfully mobilize a community response.

The attempt at forcible rescue in April 1980, had it been successful, would have solved the American part of the problem without resolving the larger issues of diplomatic rights and international order. The unsuccessful rescue operation followed an administration posture wherein it had first been severe toward Iran, then lenient, then harsh once again. While the Carter administration could have argued persuasively that these changes were justified in light of the constantly changing situation, the frequent reversals troubled European allies. Had the allies followed President Carter's initial call for strong measures, noted one European ambassador at the time, they would have been caught short by the change to leniency. "We would have been out on a limb and he could have sawed it off. That's why we are a little wary now of being told we have to be tough."[110]

As Under Secretary of State George Ball urged in early 1980, the European allies did have an important, although narrower, interest in the Iranian crisis: "We should welcome their counsel and not resent it."[111] He stated further at the time that the United States should listen carefully to the urging of its allies for a unified effort to isolate Iran politically so that the community of states could show the Iranian people "that the government which violates the sanctity of an embassy becomes an international pariah."[112]

Lessons in Crisis Diplomacy

In retrospect, certain implications of the 444-day Iranian hostage crisis are clear. The continued vitality of mutual world values depends on much more than a search for national catharsis. The American public's penchant for gestures, such as candlelight vigils and yellow ribbons, was matched by the Carter administration's tendency to confuse symbol with substance and to adopt poses in the name of policy.

Politically, the crisis put Carter in a difficult position. He perceived time as on the side of the Iranians. It appeared that the crisis controlled Carter rather than he the crisis. His willingness to take varying approaches in dealing with the crisis met the public demand for visible action and also provided moments of cathartic relief. In the longer term, however, this attempt to reconcile Iranian intransigence with the American appetite for action resulted in a settlement favorable to Iran. A country that confuses catharsis with defense of its interests is a nation uncertain of its values, and President Carter's effort to traverse differing courses of action at the same time proved counterproductive.

Upon his inauguration, President Reagan found himself bound by the terms of the Carter administration's negotiated settlement, terms that the Supreme Court upheld as legal, if not wise.[113] Certain of the terms, such as the requirement to return unencumbered Iranian financial assets, did no more than honor preexisting obligations. Other commitments that pertained directly to the official relationship between the U.S. and Iran, such as the formation of a Joint U.S.-Iranian Claims Tribunal, could be honored as positive contributions to community values.

Some parts of the agreement, however, were legally unenforceable. One such provision was the requirement that the United States "will order all persons within U.S. jurisdiction to report to the U.S. Treasury, within 30 days, for transmission to Iran, all information known to them, as of Nov. 3, 1979 . . . with respect to the property and assets of the former Shah. Violation of the requirement will be subject to civil and criminal penalties described by U.S. law."[114] No such order was ever issued, nor could it have been enforced if it had been.

President Reagan's pledge upon taking office of "swift and effective retribution" in case of further threats to Americans abroad was clearly meant to deter future attacks as well as reassure a concerned nation. Given the profusion of incidents throughout the world since, however, including the 1993 World Trade Center bombing and the attacks of 11 September 2001, it is clear that President Reagan's warnings did not turn back the tide of disorder.

Clearly, however, the painful lessons of the Iranian hostage crisis spurred subsequent administrations to review the entire range of alternatives available for protecting

limited—but highly visible—national interests like American diplomatic personnel and property. For example, National Security Decision Directives 62 and 63, approved in the Clinton administration, clearly identified specific U.S. interests and critical infrastructure for protection in a more definitive way than previously.[115] The George W. Bush administration, after the September 11 attacks, established the Department of Homeland Security to directly address these threats on an institutional basis. These actions make obvious a greater and heightened sensitivity and increased alertness to the possibility of terrorism against Americans than existed in 1979. These actions and those addressed in chapters 11 and 12 of this monograph will go far toward preparing the United States more effectively to address future attacks while at the same time promoting responsive contingency planning.

Notes

1. The four Geneva Conventions for the Protection of the Victims of War, dated 12 August 1949, addressed Wounded and Sick in Armed Forces in the Field (Geneva I), 6 UST 3115; Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), 6 UST 3219; Treatment of Prisoners of War (Geneva III), 6 UST 3517; and Protection of Civilian Persons in Time of War (Geneva IV), 6 UST 3317. The four conventions were ratified by the United States on 14 July 1955.
2. President Clinton issued Presidential Decision Directive (PDD) 62, "Combating Terrorism," on 22 May 1998. PDD 62 made the same points as President Reagan's NSDD 138 and mirrored President Bush's 2003 statements in a speech at West Point.
3. National Security Decision Directive 138, 3 April 1984, quoted in "Preemptive Anti-Terrorism Raids Allowed," *Washington Post,* 16 April 1984, p. A19.
4. Robert C. McFarlane, "Terrorism and the Future of Free Society," speech delivered at the National Strategic Information Center, Defense Strategy Forum, Washington, D.C., 25 March 1985.
5. George Shultz, "Terrorism and the Modern World," speech to Park Avenue Synagogue, New York City, 25 October 1984, p. 23.
6. See Phillip Taubman, "The Shultz-Weinberger Feud," *New York Times Magazine,* 14 April 1985, p. 3.
7. Hugh Tovar, "Low Intensity Conflict: Active Responses in an Open Society," prepared for the Conference on Terrorism and Other "Low Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy, Medford, Massachusetts, April 1985, p. 24.
8. The rules of land warfare are found primarily in Hague Convention IV of 1907.
9. See James Terry, "State Terrorism: A Juridical Analysis," *Journal of Palestine Studies* (Autumn 1980), pp. 94–117, for one view of the cost incurred when a state violates international law in the name of increased security.
10. See, e.g., Quincy Wright, "The Cuban Quarantine," *American Journal of International Law* 57 (1963), p. 588.
11. UN Charter, Art. 1, para. 1.
12. Myres McDougal, "The Soviet Quarantine and Self-Defense," *American Journal of International Law* 57 (1963), p. 598.
13. Ian Brownlie, "International Law and the Activities of Armed Bands," *International and Comparative Law Quarterly* 7 (1958), p. 731.
14. Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts against Foreign States* (The Hague: Martinus Nijhoff, 1962), pp. 118–20.
15. William Farrell, "Responding to Terrorism: What, Why and When," *Naval War College Review* 39 (January–February 1986), p. 51.

16. Abraham Miller, "Terrorism and Hostage Taking: Lessons from the Iranian Crisis," *Rutgers-Camden Law Journal* 13 (1982), p. 523.

17. Farrell, "Responding to Terrorism," p. 51.

18. George Shultz, address before the Low-Intensity Warfare Conference, National Defense University, Washington, D.C., 15 January 1986.

19. See, e.g., Michael Dobbs and Vernon Loeb, "2 U.S. Targets Bound by Fate," *Washington Post,* 14 November 2001, p. A22.

20. No Security Council document ever claimed that Afghanistan had lost its right to nationhood or that it had ceased to exist as a viable state.

21. UN Security Council Resolution (UNSCR) 1333 (2000) "strongly condemn[ed]" the Taliban for the "sheltering and training of terrorists and [the] planning of terrorist acts," and "deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." UNSCR 1267(1999) stated in paragraph 2 that the Taliban's failure to comply with the council's 1998 demand to terminate use of Afghanistan as a base from which to sponsor international terrorism constituted a threat to the peace. UNSCR 1214 (1998), in paragraph 13, enjoined the Taliban to stop providing a sanctuary and training for terrorists.

22. Robert F. Turner, "International Law and the Use of Force in Response to the World Trade Center Pentagon Attacks." available at jurist.law.pitt.edu/forumnew/34.htm.

23. Michael Jansen, "U.S. Focused Initially on bin Laden Mercenaries," *Irish Times,* 30 October 2001, available at www.ireland.com/newspaper/world/2001/1030/wor6.htm.

24. See James P. Terry, "Al Qaeda and Taliban Detainees: An Examination of Legal Rights and Appropriate Treatment," in *International Law and the War on Terror,* ed. Frederic L. Borch and Paul S. Wilson, International Law Studies, vol. 69 (Newport, R.I.: Naval War College, 2003) for a full discussion of these issues.

25. See discussion in James P. Terry, "The Iranian Hostage Crisis: International Law and U.S. Policy," *JAG Journal* 31 (1982), p. 31.

26. *Memorial of the United States on the merits in Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran),* ICJ General List no. 64, p. 15 (Memorial presented January 1980) [hereafter *U.S. Memorial*].

27. "Iranian Security Personnel Absent," *Washington Star,* November 10, 1979, p. A7.

28. *U.S. Memorial,* p. 13. Thirteen of the original 66 American hostages were released on 20 November 1979—eight black Americans and five women. Three U.S. diplomats present at the Iranian Foreign Ministry on 4 November 1979 were subsequently informed that their protection could not be assured should they leave the ministry, and they came to be considered hostages as well.

29. Ibid., p. 14.

30. Telephone interview with Sadeq Tabatabai, 5 November 1979 as reported in *Foreign Broadcast Information Service* [*FBIS*] *Daily Report,* 5 November 1979, p. R16. In an interview published 1 December 1979 in Beirut, the Revolutionary Guards operations commander, asked about the role of the Guards in the occupation of the U.S. embassy, replied, "As a matter of fact, we played no role in the occupation of the Embassy, which was occupied by students supporting Imam Khomeini. The Guards' role was to protect the safety of the hostages and secure the area. There were signs of a serious plot to exploit the situation around the Embassy. Our task was to protect *the safety of both the hostages and the students*" [emphasis added]. Interview with Abu Shasrif, n.d., *as-Safir* (Beirut), 1 December 1979, as reported in *FBIS Daily Report,* 4 December 1979, p. 40.

31. Operations at those consular posts had been suspended as a result of the attacks in February 1979, and no U.S. personnel were at these posts when the 5 November attacks occurred. See response by the United States, 11 December 1979, to a question presented by the International Court of Justice on 10 December 1979, reprinted in *U.S. Memorial,* selected documents, no. 2.

32. In its memorial the United States detailed the assurances given on 1 November, three days prior to the seizure: "In the early morning of 1 November, in anticipation of a demonstration in the vicinity of the U.S. Embassy, the Embassy reported to the State Department that the normal complement of police was outside the compound and that

the Embassy felt confident that it could get more protection if needed. Thirty minutes later Chargé Laingen reported that several hundred demonstrators were marching back and forth in front of the Embassy, but that the police detachment had been strengthened, providing "more than enough for now." The Chief of Police came to the Embassy personally and met with Mr. Laingen, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously." Mr. Laingen reported that the prayer leader at the main demonstration in another location in the city, the Ayatollah Montazeri, had repeated an announcement on the radio that the people should not go to the Embassy. The number of demonstrators at the Embassy varied during the day, up to 5000 or more, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Chief of Protocol and the Chief of Police expressed relief to Chargé Laingen that everything had gone well." *U.S. Memorial,* p. 15.

33. President Waldock of the ICJ addressed this and other attacks in paras. 14–16 and 64. *United States v. Iran,* pp. 9–10, 29.

34. See response of the United States, 12 December 1979, to a question asked by Judge Gross on 11 December during oral argument of U.S. request for interim measures. *U.S. Memorial,* p. 246.

35. Ibid., p. 15 note 3.

36. Ambassador Donald McHenry, statement to the UN on Iran, in U.S. State Dept., *Current Policy,* no. 116 (Washington, D.C.: Bureau of Public Affairs, 1 December 1979), p. 1.

37. Ibid. See also *Washington Post,* 25 January 1981, p. A21 (former hostage Malcolm Kolp reports being held in solitary confinement for 374 of the 444 days, and other physical abuses).

38. The only U.S. official to visit the hostages, Representative Hansen of Idaho, did so in a private capacity. Deprivation of contact became even more significant after the unsuccessful rescue attempt in April 1980, when the location of the hostages was changed and ensuring their safety became more difficult.

39. Interview with Ahmed Khomeini, Belgrade, 6 December 1979, reported in *FBIS Daily Report,* supp. 41, 17 December 1979, pp. 21–22.

40. House of Representatives, testimony of Peter Constable, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs, before the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs, 8 May 1980, p. 1.

41. Ibid., p. 3.

42. U.S. State Dept., *Current Policy,* no. 179 (Washington, D.C.: Bureau of Public Affairs, May 1980), p. 1.

43. Ibid.

44. UN Doc. S/13615 (1979).

45. UN Doc. S/13616 (1979).

46. UN Docs. A/6076 and A/6096 (1979) (statements by the president of the United Nations General Assembly on 9 and 10 November 1979).

47. Precedent for such a request by the secretary general under Article 99 of the United Nations Charter was firmly established by Secretary General Hammarskjold when he requested a similar Security Council session during the Congo crisis. See chapter 3.

48. UN Doc. S/PV 2172 (1979).

49. UN Security Council Resolution [UNSCR] 457, reproduced in *U.S. Memorial,* annex 46, p. 140.

50. Address of Secretary of State Vance before the United Nations Security Council, 29 December 1979.

51. UNSCR 461, reproduced in *U.S. Memorial,* p. 27.

52. Thirteen of fifteen members of the Security Council voted in favor of the U.S. draft resolution calling for sanctions. East Germany and the Soviet Union voted no.

53. U.S. State Dept., *Selected Documents* [hereafter Sel. Doc.], no. 14 (1979), p. 5.

54. Because of the "Connally" reservation taken by the United States regarding subject matter jurisdiction of the ICJ, if there had been no applicable treaty providing for dispute resolution before the court, the United States would have undoubtedly suffered the same fate as France in 1956 in the case of Certain Norwegian Loans, 1957 ICJ 9, 36, 43, where jurisdiction had been found wanting as a result of its "self-judging" reservation.

55. See, e.g., the following treaty articles: Art. XXI, para. 2, of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, 15 August

1955, 284 UNTS 93; Art. I of the Optional Protocol Concerning the Compulsory Settlement of Disputes Accompanying the Vienna Convention on Diplomatic Relations of 1961, 500 UNTS 95, 241; Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, the Vienna Convention on Consular Relations of 1963, 596 UNTS 261, 487; Article 13, para. 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, TIAS no. 8532.

56. This request is reported verbatim at Sel. Doc. 14, p. 5.

57. The arguments made on behalf of the United States by Mr. Civiletti and Mr. Owen for interim measures are reported verbatim in Sel. Doc. 15 (1979), p. 2.

58. Order of December 15, 1979, *U.S. v. Iran,* Provisional Measures, 1979, ICJ 16–17.

59. Tehran Domestic Service, 17 December 1979, reported in *FBIS Daily Report,* 18 December 1979, p. 3.

60. *U.S. v. Iran,* p. 3.

61. Iran refused to participate in any manner. It filed no countermemorial, appointed no agent, and did not participate in the oral proceedings held on 18–20 March 1980. The only communications received by the court from the government of Iran were two messages, dated 9 December 1979 and 16 March 1980.

62. See 1979 ICJ 16.

63. Message from Iran to the International Court of Justice, 9 December 1979, quoted in *U.S. v. Iran,* p. 18.

64. *U.S. v. Iran,* p. 18.

65. Ibid.

66. Ibid.

67. Ibid., p. 35.

68. Ibid., p. 36.

69. Ibid., pp. 37–38.

70. Dissenting Opinion of Judge Tarazi, *U.S. v. Iran,* p. 55.

71. *U.S. v. Iran,* pp. 36–38 (discussion of the customary remedies then available).

72. It is interesting to note that the United States did not petition the Security Council under Article 94 of the United Nations Charter for assistance in implementing the 4 May decision. It may be that the Carter administration believed that such an effort would be unavailing since the former Soviet Union would have vetoed such a resolution as it had vetoed the January 13, 1980 resolution calling for economic sanctions against Iran. In case of such a veto, the Carter administration feared that it could not obtain the necessary two-thirds vote in the General Assembly since many Third World countries considered the U.S. record in cases of clearly established threats to the peace (e.g., Israeli attacks on Lebanon) to be inconsistent.

73. The Carter administration elected not to risk being embarrassed in the United Nations by a Security Council veto and lack of support in the General Assembly for a request made under the "Uniting for Peace" rationale. Unfortunately, by not exhausting this possible remedy to force compliance with the court's decision, other options may have been precluded.

    There was one other possible rationale for not invoking Security Council assistance under Article 94. Since the Security Council, although a political body, would effectively be acting as an appellate court in reviewing and acting in the International Court of Justice's decision, it is quite possible that portions of the decision favorable to the United States might not have been supported by the council. In that case, certain U.S. options would have been precluded and a veto of Security Council action might have become necessary. Since the invocation of Article 94 is discretionary and the court's decision is effective without further implementation, it could be that the Carter administration determined it would preserve more options by simply impressing on the world community the importance of the 24 May 1980 decision. "President Imposes Oil Ban," *Washington Post,* 13 November 1979, p. A1.

74. Ibid., p. A16.

75. A discussion of these claims can be found in U.S. State Dept., *Current Policy* 179, p. 2.

76. Exec. Order 12,170, 3 CFR 457 (1979).

77. *International Emergency Economic Powers Act,* 50 USC 1702 (Supp. III 1979). This law had been enacted in anticipation of emergency situations involving nations not on a war footing with the United States. Preceding legislation, the Foreign Assets Control Regulations, permitted the freezing of assets only of those nations with which the

United States was at war. When difficulties with Cuba required similar protection in the late 1950s, the Cuban Assets Control Regulations were enacted. The 1977 Emergency Economic Powers legislation precludes the need for specific legislation each time the interests of American creditors are threatened and allows for implementation of protective measures despite the absence of a declaration of war.

78. U.S. State Dept., *Current Policy* 179, p. 2.

79. See "Iran's Embassy Staff Cut," *Washington Post,* 13 December 1979, p. A1.

80. Exec. Order 12,205, 3 CFR 248 (1980).

81. Exec. Order 12,211, 3 CFR 253 (1980).

82. Ibid.

83. U.S. State Dept., *Current Policy* 179, p. 2.

84. Of our allies, Great Britain proved to be the major surprise; Parliament refused to implement Prime Minister Thatcher's proposed sanctions and agreed only to suspend contracting with Iran from the date of the isolation measures. All contracts negotiated between 4 November 1979 and 17 May 1980 remained in effect, including long-term contracts negotiated in anticipation of possible sanctions. As a result, the impact on Iran and the appearance of solidarity among the allies was severely reduced.

    Conversely, the United States received unexpected support from Japan and Portugal. Japan, 90 percent dependent on foreign fossil fuels, announced in late May that it would purchase no further Iranian crude at the announced price of thirty-five dollars a barrel, seven dollars more at the time than Saudi Arabian crude. The degree to which this determination by Japan was based on American efforts to impose sanctions on Iran as opposed to the economics of the situation is difficult to determine.

    At the same time, Portugal denounced the Iranian actions and announced an intent to apply all the U.S.-requested measures. This was unexpected, since the United States had recently been critical of human rights policies in Portuguese territories.

85. "Russia Supports Iran," *Washington Post,* 15 April 1980, p. A1. For a contrary interpretation of the importance of this Soviet announcement, see U.S. State Dept., *Current Policy* 165 (Washington, D.C.: Bureau of Public Affairs, April 1980), p. 2, wherein President Carter is quoted as discounting the Soviet promise of assistance to Iran. Carter argues that the Soviet transportation routes were insufficient to offset the impact of a blockade or boycott.

86. Ibid., p. A1.

87. See Richard Lillich, "Forcible Self Help by States to Protect Human Rights," *Iowa Law Review* 53 (1967), p. 325, and elsewhere in this chapter, for the argument that neither customary international law nor Article 51 of the Charter prohibits such acts of intervention. Interestingly, the International Court of Justice largely ignored the American rescue attempt of April 1980, finding it irrelevant to the determination of whether Iran's conduct in seizing the diplomatic hostages and entering the diplomatic premises violated international law. *U.S. v. Iran,* pp. 40–41.

88. See U.S. State Dept., *Current Policy* 170 (Washington, D.C.: Bureau of Public Affairs, April 1980), pp. 2–4, for a full explanation of the purpose and plan of the rescue mission, including the thinking that went into the decision to abort.

89. Secretary of Defense Harold Brown later claimed that it had been predetermined that the mission would be impossible with fewer than six RH-53 helicopters. Ibid., p. 3.

90. Ibid.

91. Vienna Convention on Diplomatic Relations of 1961, 500 UNTS 95 [hereafter Vienna Convention]. Article 29 of the Convention provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

92. Ibid., Art. 37 which, in pertinent part, provides:

    > 1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
    >
    > 2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of, or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29–35, except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 1 of

Article 31 shall not extend to acts performed outside the course of their duties.

93. See Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y.: Oceana, 1976), p. 135.

94. Order of 15 December 1979, p. 19.

95. It is interesting to note that the ICJ ruling in favor of the United States with respect to reparations (12–3) indicated that an award could be fully determined by that court only when the full extent of damages was known. *U.S. v. Iran,* p. 43.

96. The Vienna Convention, Art. 31, provides:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> 2. A diplomatic agent is not required to give evidence as a witness.
>
> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b), and (c) of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or his residence.
>
> 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 37 extends this immunity, with some limited exceptions, to members of the administrative and technical staff of the diplomatic mission as well as to the families of both diplomatic agents and staff. The ICJ, in its 24 May 1980 decision, did not address the threats of prosecution or threats to compel testimony as violations of the 1961 Vienna Conventions. The court did state, however, that "if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31 of the 1961 Vienna Convention." *U.S. v. Iran,* p. 34.

97. Sir Ernest Satow, *Satow's Guide to Diplomatic Practice,* ed. Lord Gore-Booth, 5th ed. (London: Longmans, 1979) [hereafter *Satow's Guide*], p. 120.

98. L. Oppenheim, *International Law: A Treatise,* ed. Hersh Lauterpacht, 8th ed. (London: Longman's 1955), p. 793.

99. The Vienna Convention, Art. 22, provides:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

100. Official Records, vol. I, UN Doc. A. Conf. 20/14, n.d., pp. 141–43.

101. The Vienna Convention, Art. 24, provides: "The archives and documents of the mission shall be inviolable at any time and wherever they may be."

102. Iran also disregarded other requirements of the 1961 Vienna Convention. The ICJ noted that Iran had not met its obligations under Article 25 of the 1961 convention to "accord full facilities for the performance of the functions of the [American] mission"; under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory"; and under Article 27 "to permit and protect free communication on the part of the mission for all official purposes." Vienna Convention.

103. The ICJ recognized this and made a point of contrasting the Iranian actions of 4 November 1979 with its conduct on other occasions. The court stated: "The total inaction of the Iranian authorities on that date in the face of urgent and repeated requests for help contrasts very sharply with its conduct on

several other occasions of a similar kind. Some eight months earlier, on February 14, 1979 the United States Embassy in Tehran had itself been subjected to [an] armed attack . . . in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On March 1, 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On November 1, 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated." *U.S. v. Iran,* p. 24.

104. After the shah's return to power in 1953—a return promoted by the CIA—Iran either acceded to or ratified each of the four international agreements upon which the United States relied when it asserted ICJ jurisdiction. Although none of these agreements had been repudiated by the Khomeini regime, their nonapplication with respect to the United States arguably represents thirty years of frustration impossible to translate into a legal context.

105. Proposals at the 1951 drafting conference for the unratified Draft Code of Offenses against the Peace and Security of Mankind included ideological and economic coercion. See Myres McDougal and F. Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale Univ. Press, 1961), pp. 190–96. The Bolivian draft used terminology that incorporated secondary methods of aggression/coercion—methods that would have applied to Articles 2(4) and 51 of the UN Charter: "Unilateral action whereby a state is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defense or cooperate in the collective of peace shall likewise be deemed to constitute an act of aggression" (ibid., p. 195).

106. The concept of a minimum world order system as defined by Professors McDougal and Lasswell of the Yale Law School would include the prohibition against the illegal use of international coercion by states as defined in Article 2(4) of the UN Charter, tempered by the strictly limited exception codified in Article 51. The optimum world order system would include the higher legal and humanitarian values codified within Articles 1, 2, 55, and 56 of the UN Charter. For a discussion of interests significant to such a comprehensive system of world order, see Myres McDougal and Harold Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law* 53 (1963), p. 595.

107. See Brunson MacChesney, "Some Comments on the Quarantine of Cuba," *American Journal of International Law* 57 (1963), p. 595.

108. It is believed that the Soviet Union vetoed the 13 January 1980 draft resolution in the Security Council in retaliation for U.S. sponsorship of an earlier General Assembly resolution condemning the Soviet invasion of Afghanistan. The General Assembly resolution was passed under the "Uniting for Peace" rationale (GA Res. 377 V, UN Doc. A/1775 [1950]) following a Soviet veto in the Security Council.

109. See below, this chapter.

110. "Allies Question Carter's Measures," *Time,* 28 April 1980, p. 15.

111. "State's Ball on Iranian Crisis," *Time,* 12 May 1980, p. 29.

112. Ibid.

113. *Dames & Moore v. Regan,* 453 U.S. 654 (1981).

114. "Settlement May Be Unenforceable," *Washington Star,* 29 January 1981, p. A12.

115. See chapter 11, below.

PART THREE

Major Conflict

CHAPTER SIX

Operation DESERT STORM

U.S. air, ground, and naval forces assigned to the United Nations–sponsored coalition in DESERT SHIELD/DESERT STORM during 1990–91 endured legal scrutiny unlike that of any other prior military campaign. Unlike other recent combat in which U.S. forces were involved (Vietnam, Grenada, and Panama), DESERT STORM was conducted under the threat of chemical strikes and indiscriminate surface-to-surface missile attacks. Nevertheless, coalition forces carefully adhered both to the law regarding means and methods of warfare and to the protections to be accorded the victims of armed conflict. In contrast, the Iraqi forces operated with no apparent sense of legal obligation.

This chapter addresses Iraq's August 1990 invasion of Kuwait and the response of the United States and its coalition partners, leading up to the decision to use force. It then examines the conduct of hostilities by both sides during the conflict. The chapter concludes with some observations on the role of law in the postwar enforcement regime in Iraq prior to Operation IRAQI FREEDOM in 2003.[1]

Invasion of Kuwait

On 2 August 1990, an Iraqi force of over a hundred thousand troops and several hundred tanks invaded Kuwait, with great precision. The Kuwaiti military, consisting of only twenty thousand men and 250 tanks, was quickly routed. The emir and crown prince (who also served as prime minister) fled to Saudi Arabia.

The invasion followed by less than one day the collapse of negotiations on financial and territorial claims made by Iraq's Saddam Hussein. Iraq's rationale for war was multifaceted. In July 1990, Iraq was burdened with a huge debt, eighty-two billion dollars, largely as a result of its 1980–88 war with Iran. Twenty-five billion dollars of this amount was owed to Kuwait's emir, who claimed and administered the contested islands of Warba and Bubiyan, which controlled Iraqi access to the Persian Gulf. Kuwait had sown further displeasure in Baghdad in early 1990 by producing more than its OPEC allocation of crude oil, thus helping to drive down world prices. Finally, in Iraq's

view, the invasion would resolve a long-standing territorial grievance with Kuwait dating to the British demarcation of Arab borders in 1922, after the collapse of the Ottoman Empire.

The Conflict as Bounded by International Law

The law governing the actions of participant states in the Persian Gulf War can be found in custom and convention. International conventions shaping the actions of the parties on the battlefields of Kuwait and Iraq largely codify customary international law, embracing restrictions on the means and methods of warfare and requirements for the treatment for the victims of the conflict. In addition to the UN Charter and Hague Convention IV of 1907 addressing weapons and modalities of warfare, the 1949 Geneva Conventions, which provide protections for noncombatants and those *hors de combat,* were also applicable to all parties.[2]

Because of the threat posed to the coalition of states that mobilized to oppose Iraq by the possible Iraqi use of chemical and biological weapons, the prohibitions within the 1925 Geneva Protocol became important as well.[3] The United States, its coalition partners (except Oman and the United Arab Emirates), and Iraq were parties to that agreement, which preceded the current Chemical Weapons Convention. The 1925 protocol prohibited the use of chemical and bacteriological (biological) weapons in time of war. Both the United States and Iraq had filed reservations to this treaty, providing they would not engage in "first use" of these weapons but would not be precluded from a response "in kind" if they were attacked.[4] The United States was also (and is today) a party to the 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction;[5] Iraq became a party on 18 April 1991, after the conclusion of hostilities.

Several important conventions addressing the law of armed conflict had no legal application to the first Gulf war. These include the 1977 Protocol I Additional to the Geneva Conventions of 1949 (Protocol I);[6] the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention);[7] and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.[8] Protocol I was intended to modernize the law of war by updating and strengthening the 1949 Geneva Conventions but had objectionable provisions resulting in its rejection by the United States, Great Britain, France, Israel, and Iraq. The ENMOD Convention, which outlaws environmental modifications of a hostile nature, had been ratified by most coalition states, but not by Iraq. Because it requires one party to enforce an action against another, it did not apply in DESERT STORM.

The Conventional Weapons Convention, proscribing certain especially debilitating instruments in combat (such as certain uses of flame weapons, certain mines, and booby traps), had no direct applicability, because the belligerents were not parties to the convention. Nevertheless, all coalition activities were consistent with its language; Iraqi actions, however, would have violated provisions addressing booby traps and land mines.

Response to Iraqi Aggression

The actions undertaken on behalf of Kuwait were pursued under Chapter VII of the United Nations Charter.[9] On the day of the Iraqi invasion, the Security Council condemned the invasion and demanded that Iraq "withdraw immediately and unconditionally all its forces" (Resolution 660). On 6 August 1990, the Council ordered a comprehensive trade and financial embargo (Resolution 661). On 9 August it voted fifteen to none to declare null and void Iraq's purported annexation of Kuwait of 8 August (Resolution 662). On 18 August the Council again voted fifteen to none to demand that Iraq free all detained foreigners (Resolution 664). Resolution 665 reflected an acceptance of the U.S. position that force might be necessary to enforce the sanctions.

The Council was concerned with strict compliance with the embargo authorized by Resolution 661. As it continued, some countries began to suggest they would allow food shipments to Iraq; Resolution 661 allowed distribution to those most in need, but not to the Iraqi military. Another issue that arose was whether aircraft flying to Iraq were adhering to the economic sanctions. Resolution 670, adopted on 25 September, directed states to take steps to ensure that their aircraft and aircraft flying over their territory were in compliance. On 30 October 1990, the Security Council tightened the pressure on Baghdad by approving Resolution 674, which laid the groundwork for seizing Iraqi assets that had been frozen around the world. Resolution 674 declared Iraq responsible for all damage and personal injuries resulting from its invasion and illegal occupation of Kuwait; it further requested states to collect relevant information regarding their claims and those of their nationals and corporations "for restitution or financial compensation by Iraq." Finally, when it was apparent that these lesser measures were inadequate, the Council authorized (in Resolution 678 of 29 November) "all necessary means" after 15 January 1991 to enforce its edict that Iraq withdraw all forces from Kuwait.

The resulting use of force against Iraq pursuant to UN authorization and the right of collective self-defense embraced the customary principles of necessity and proportionality.[10] As shown below, the forces of the U.S. Central Command and those of the coalition partners carefully avoided both intentional destruction of civilian objects not imperatively required by military necessity and direct attacks on civilians not taking part in the hostilities. Coalition forces adhered to these principles through target

selection and the matching of available forces and weapons systems to selected targets and Iraqi defenses, notwithstanding Iraq's violations of its law-of-war obligations toward the Kuwaiti civilian population and civilian objects.

The Iraqi Occupation of Kuwait

When Iraqi forces entered Kuwaiti territory on 2 August 1990, the provisions of the Fourth Geneva Convention, or Civilians Convention (CC) were immediately applicable.[11] By its actions, Iraq had become an "occupying power" in Kuwait, with specific obligations to the Kuwaiti people and other third-country citizens in Kuwait and in Iraq.[12] Although Iraqi officials were quick to claim that U.S. citizens in Iraq and Kuwait were spies, Security Council Resolution 664 of 18 August 1990 made clear that the Iraqi government was obliged to comply completely with the CC and carefully outlined its legal obligations with regard to foreign civilians under Iraqi control. The resolution obligated Iraq to allow the departure of U.S. citizens and other third-country nationals from Kuwait or Iraq unless national security dictated otherwise. Under Articles 5, 42, and 78 of the CC, Iraq could intern foreign nationals in Iraq only if internal security made it "absolutely necessary," in Kuwait only if "imperative." Iraq did not assert these provisions in defense of its illegal hostage taking.

The conduct of the Iraqi government was the more onerous because of its placement of American and other forced detainees in or around military targets as "human shields," in violation of Articles 28 and 38(4) of the CC. This act, coupled with the taking of hostages in violation of Article 34, unlawful deportations in violation of Article 49 of the same convention, and compelling hostages to serve in the Iraqi military, were all grave breaches under CC Article 147 and thus punishable as war crimes should trial and conviction result.[13]

As a result of intense international pressure, noncombatant hostages from the United States and other third parties (except Kuwaitis) were released in December 1990, well before the commencement of coalition combatant operations. Not only, however, did Iraq not release Kuwaiti civilians, but it seized many more during the final phase of DESERT STORM and used them to shield retreating Iraqi forces from coalition forces liberating Kuwait.

Iraq treated civilians in the occupied state brutally. The government of Kuwait has estimated that 1,082 civilians were murdered during the occupation and that many more were forcibly deported to Iraq. The 2 August invasion implicated not only the CC on behalf of Kuwaiti citizens but also the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, the 1948 Genocide Convention, and the 1954 Hague Convention on the Protection of Cultural Property.[14] Although Iraq is not a party to

the 1907 Hague Convention, the International Military Tribunal at Nuremburg stated in 1946 that its rules are recognized by "all civilized nations . . . as being a declaration of the laws and customs of war."[15]

From the outset, Iraqi forces and its government leaders denied Iraq's status as an occupying power. That denial was belied, however, by Iraq's claim of Kuwait as the nineteenth Iraqi province and its transfer of a part of the Iraqi civilian infrastructure into it for the purpose of annexation and resettlement, both of which constituted clear violations of Article 49 of the CC.[16]

Similarly, the confiscation of certain private and public Kuwaiti property was prohibited by Articles 46, 53, 55, and 56 of the regulations annexed to Hague Convention IV. Confiscation of immovable national public property (e.g., buildings) is authorized and its use allowed, but it may not be damaged. Movable national public property may not be seized without a military requirement for its use, and the property is subject to cash compensation at the conclusion of hostilities. Iraq violated each of these requirements.

The provisions of the 1954 Hague Convention (concerning cultural property) were applied by all parties to the coalition. Although the United States is not party to the convention, it specifically applied its provisions in its targeting portfolios. Article 4(1) provides specific protections for cultural property, to include shrines, temples, and recognized structures of national and religious significance.[17] Waiver of these protections is permitted under Article 4(2) in the case of "imperative military necessity," such as when an enemy uses otherwise protected property to shield lawful military objectives. An example during DESERT STORM was the placement of Iraqi combat aircraft contiguous to the ancient Temple of Ur.[18] Despite such actions, U.S. and other coalition members made every attempt to respect Iraqi cultural property.

The most disturbing abuse of civilians witnessed during the Gulf War concerned the obvious attempt to destroy the identity of the Kuwaiti people, in violation of the Genocide Convention. The 1948 convention made it an international crime to commit acts with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. These acts include killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part, imposing measures intended to prevent births, or forcibly transferring children of the group to another group. Evidence indicates Iraq committed acts violative of each of these categories except forcible transfer of Kuwaiti children to another group. Kuwaiti citizens were murdered and tortured; others were forcibly removed to Iraq. Women of childbearing age were brutalized and rendered incapable of conceiving. Collective executions were commonplace. Public records were collected and destroyed, and Kuwaiti identification

cards and license plates were replaced with Iraqi credentials, identifying the people and property as belonging to the state of Iraq.

In the process of destroying the identity of Kuwait's civilian population, Iraqi administrators denied Kuwaitis, those who had not succeeded in escaping to Saudi Arabia, the necessities of survival (such as adequate food, water, and basic medical care), in violation of Articles 55 and 56 of the Civilians Convention. Equally significant, medical supplies and equipment in Kuwaiti hospitals necessary for the needs of the civilian population were removed, in violation of Article 57 of the CC. This brutal disregard for law was evident in the findings of U.S. Army war crimes investigators that many Kuwaiti infants died as a result of the removal of infant-care equipment from Kuwaiti hospitals.[19]

Law of Armed Conflict Issues

Targeting considerations during the hostilities presented another area of stark contrast. As the air and ground portions of the campaign unfolded, it became clear that Iraq lacked any significant capability to project force accurately outside of Iraq through its missile batteries. Despite its lack of targeting capacity, Iraq proved very willing to direct Scud ballistic missiles toward the cities of its enemies. Under the best of circumstances, Scuds are indiscriminate; however, Iraq deliberately employed these missiles as terror weapons, declaring that it intended to rain random destruction on enemy civilian populations. Even less excusably, Iraq made a number of Scud attacks on Israel, a country not a party to the conflict and not in the coalition. Iraq also possessed chemical and biological weapons capabilities, which it had previously used in both internal and external conflicts. Iraq had made clear that their use would not be constrained by any legal limitations, although in the event, apparently for practical reasons, it did not use either weapon during DESERT STORM. In short, Iraq complied with the law of armed conflict only to the extent it was not able to violate it.

In contrast, coalition forces placed major emphasis on targeting only military and military-related targets in Iraq and occupied Kuwait. It subjected targeting to legal review at all levels, both the broadest war plan and each specific mission.

The law of targeting is based upon the customary international law principles of necessity and proportionality.[20] Necessity requires that only objectives of military importance be attacked; it permits the use of overwhelming mass to destroy those objectives. However, proportionality, the coaxial principle to necessity, requires that unnecessary destruction be avoided. The law of targeting, therefore, requires that, consistent with mission accomplishment, all reasonable precautions be taken to ensure that only military objectives are targeted and that civilians and civilian objects are protected to the extent possible.

The customary principles described above reflect three parallel but fundamental principles of the law of armed conflict. These provide that the right of belligerents to adopt means of injuring the enemy is not unlimited; that it is prohibited to launch attacks against the civilian population as such; and that distinctions must be made between combatants and noncombatants, to the effect that noncombatants are spared insofar as possible.[21]

Coalition forces during DESERT STORM made every effort to comply with these requirements. They took a number of immediate steps to minimize the risk to noncombatants when attacking lawful targets in populated areas. Aircraft and munitions were selected, whenever possible, so as to achieve the greatest possible accuracy. Support aircraft accompanied and protected attacking aircraft so their crews could concentrate on their mission. Positive identification of targets was required before munitions were released; for this reason, 25 percent of all attack aircraft missions never dropped their munitions. In the ground war, similar precautions were invoked. The maneuver plan was designed in part to avoid the heavily populated areas along the coast of Kuwait, where civilian casualties and damage to civilian objects would have been high.[22]

Despite every reasonable effort to minimize collateral damage, there were 2,500–3,000 civilian casualties as a result of the air campaign.[23] This can be attributed to several causes: the integration by Iraq of its civilian and military infrastructure in Baghdad; Iraq's refusal to move critical targets outside of populated areas; and Iraq's failure to implement civil defense evacuation procedures that had been rehearsed in Baghdad prior to the inception of the air campaign. In any case, compared to the thirty thousand lost in Rotterdam during one day of German bombing during World War II, the Iraqi civilian losses, though significant, gain some perspective.

The U.S. and coalition effort to apply discrimination in all targeting associated with ground and air missions over Iraq and occupied Kuwait must be juxtaposed against indiscriminate Iraqi practices. Not only did the Iraqis attack cities and other civilian objects in Saudi Arabia and Israel with unguided ballistic missiles, but they attacked petroleum facilities in Kuwait and fouled Gulf waters, with no military advantage to be gained, reflecting a total repudiation of Hague and Geneva law.

Prisoners of War

In DESERT STORM, U.S. practice in dealing with enemy prisoners of war (EPWs) reflected great improvement over Vietnam.[24] During the Vietnam conflict, U.S. forces experienced significant difficulty in providing for captured personnel as a result of a lack of centralized management, inadequate training of prisoner-handling units, delayed establishment of a prisoner of war information center, and loose accountability.[25]

Coalition forces in DESERT STORM, in contrast, carefully followed the tenets of the Third Geneva Convention for all EPWs and the Fourth Geneva Convention, the Civilians Convention, for all civilian internees. During the operation, 86,743 Iraqi prisoners of war were captured, with a total of 69,820 EPWs and civilian internees marshaled through U.S.-operated facilities between 19 January and 2 May 1991.[26] During the preceding, preparatory operation, DESERT SHIELD, because of the Arab occupation of the defense belt along the Kuwait-Saudi border, the Saudi government handled all detained persons and Iraqi deserters.

Centralized management of EPW operations began during DESERT SHIELD. The National Prisoner of War Information Center was in place and operational well before the ground offensive began. The Center used for collecting information and accounting for personnel a new automated program that satisfied all requirements of the Third and Fourth Geneva Conventions.[27]

Consistent with the requirements for transfer in Articles 46–48 of the Third Geneva Convention, U.S. policy required that a formal international agreement approved by the Assistant Secretary of Defense for International Security Affairs and by the State Department be concluded as a prerequisite for transferring any EPWs to a coalition partner.[28] Agreements were concluded with Saudi Arabia on 15 January 1991, with the United Kingdom on 31 January 1991, and with France on 24 February.[29] These agreements outlined the actions to be taken by capturing forces in processing the prisoners and internees to the U.S. camps, through medical channels, and then to the Saudi government for final repatriation. Officials of the International Committee of the Red Cross stated at the time that the coalition handling of Iraqi prisoners was the best they had observed under the Third Geneva Convention.

Conversely, Iraqi treatment of the twenty-one captured coalition personnel failed to comply with most articles of the Geneva Convention Relative to the Treatment of Prisoners of War. Coalition prisoners were not given "capture cards"; never registered with the ICRC; used in propaganda videos; paraded before the Iraqi populace; beaten, shocked, and generally mistreated; and denied writing privileges.[30]

Coalition prisoners were transported to Baghdad, where they were interrogated, then incarcerated. Navy, Marine Corps, and Air Force personnel were confined in the Iraqi Intelligence Service Regional Headquarters, a legitimate military target of the coalition, in violation of Article 23 of the Third Geneva Convention.[31] American prisoners were placed at great risk on 23 February 1991, when the facility was bombed by U.S. aircraft. Army prisoners of war were detained at the Ar Rashid Military Prison, where they remained until repatriation. The detention of prisoners of war in criminal confinement facilities is expressly prohibited by Article 22 of the Third Convention unless justified

by the conduct of the prisoners themselves.[32] That circumstance was never asserted by the Iraqi government.

Damage to the Environment

Another significant issue was the carnage to the natural environment wrought by Iraqi forces during Operation DESERT STORM. The damage was unprecedented among recent conflicts. Iraqi forces had wired with explosives, and ultimately detonated, more than six hundred oil wells in occupied Kuwait. Additionally, Iraq dumped more than seven million barrels of Kuwaiti crude oil into Gulf waters.[33] The extensive and intentional damage caused by the fires and oil spills represented precisely the kind of vindictive and wanton destruction that has long been prohibited by the laws of war. This basic principle is reflected in many specific rules, such as the prohibition on pillage.[34] Even if a case could be made that these acts were accomplished for a military purpose, the magnitude of destruction was clearly disproportionate under the circumstances.[35] Equally significant, Iraq's status as an occupying power placed it under a special obligation with respect to property in Kuwait.[36]

The Iraqi case during DESERT STORM demonstrated two principles. First, the Hague and Geneva Convention rules governing armed conflict, though designed to protect civilian lives, health, and property, also protect the environment. Second, knowledge of the environmental consequences of military action affects the application of these rules, broadening the restraint imposed upon combatants. In other words, the Iraqi leadership was required to consider the effects of their actions on the environment, if only because failure to do so would result in unlawful injury to civilians and nonmilitary objects.[37]

The Regulations Annexed to the 1907 Hague Convention IV have direct application to Iraqi actions. Article 22 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23g specifies that it is especially forbidden "to destroy or seize the enemy's property, unless such seizure be imperatively demanded by the necessities of war." Article 46 adds that "private property cannot be confiscated" by an occupying force, and Article 47 states that "pillage is formally forbidden."

To clarify further the restrictions upon occupying powers such as Iraq during DESERT STORM, Article 55 states, "The occupying State shall not be regarded only as administrator . . . of . . . real estate . . . belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and safeguard them in accordance with the rules of usufruct." Had these strictures been observed by Iraq, there would have been no significant violation of Kuwait's environment or that of its Gulf neighbors.

The Geneva Conventions of 1949 built upon the requirements and prohibitions of the 1907 Hague Conventions. Article 50 of Geneva Convention I (Wounded and Sick in the Field), for example, provides that it shall be a grave breach for any state to commit extensive destruction of property that is not justified by military necessity and is carried out unlawfully or wantonly. Article 51 of Geneva Convention II (Wounded, Sick, and Shipwrecked at Sea) merely restates this rule. The Fourth Geneva Convention (Civilians Convention), while restating in Article 147 the general protections for the environment seen in the Hague Rules, also places significant responsibilities upon an occupying power. Article 53 provides that "any destruction by the Occupying Power of real or personal property belonging individually, or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." It can certainly be argued that Kuwait's territorial seas, bays, beaches, and oil fields were subjected to wanton, unlawful destruction unjustified by military necessity.[38]

In comparison to those activities related to the environment directed by Saddam Hussein, coalition forces planned their campaign to preserve, rather than destroy, human and material values to the extent possible. Targeting of Iraqi military installations was conducted such that minimal collateral damage was inflicted. The most discriminate weapons available were used. Psychological operations advised of opportunities to surrender without penalty, and those who surrendered were treated with dignity. In short, the coalition forces were scrupulous in their adherence to law.

Availability of a Post–DESERT STORM Enforcement Regime

The importance of the Geneva Conventions of 1949 to Operation DESERT STORM extended beyond the provisions of the articles themselves. The enforcement regime represented in articles common to each of the four conventions required that grave breaches by each of the contracting parties be identified and addressed.[39] Moreover, another article common to each required penal sanctions.[40] That article, the cornerstone of the enforcement regime, obligates each contracting party to enact implementing legislation, search for persons alleged to have committed breaches of the conventions, and bring such persons before its own courts or, if it prefers, hand them over for trial to another state party concerned. Article 146 of Geneva Convention IV provides further that the accused persons shall benefit from proper trial and defense no less favorable than the safeguards provided in Article 105 (and those following) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. When those provisions addressing violations by individuals are considered in conjunction with the requirements of Article 3 of Hague Convention IV (that violating states are liable to pay compensation

to the injured state), a comprehensive scheme, and one appropriate for addressing Iraqi actions in the First Gulf War, becomes apparent.[41]

The First Gulf Conflict in Perspective

The events leading up to the 1990–91 first Gulf war, the DESERT SHIELD and DESERT STORM operations, and the follow-on PROVIDE COMFORT and SOUTHERN WATCH initiatives, will continue to be reviewed by historians and lawyers, because they represent textbook examples of both disregard for and compliance with the rule of law. In precipitating the 1990 crisis, in invading and occupying Kuwait, and in engaging coalition forces, Saddam Hussein reached ever-greater heights of ingenuity in flouting the rule of law of civilized nations. Conversely, the coalition forces complied with both *jus ad bellum* (the law of self-defense) and *jus in bello* (the law of the conduct of war).

Of importance, the United Nations Security Council has never worked harder than it did then to ensure that a victim of aggression was returned to the status quo ante and that the aggressor was appropriately penalized for its actions. The UN-sponsored coalition successfully expelled Iraq from Kuwaiti territory, but the compensation for damage and depletion of resources was not forthcoming. Stonewalling by the Baathist regime of Saddam Hussein was to be very costly for the government of Kuwait.

Resolution 692 created an effective regime for compensation drawn from Iraqi oil export revenues. This resolution also allocated a share of those revenues to providing relief to the Iraqi people. Nevertheless, Saddam Hussein refused to avail himself of this opportunity, denying not only compensation to Kuwait but all but minimal food and medicine to his own people.

The actions of the Iraqi leadership under Saddam Hussein not only frustrated the Kuwaitis' right to reparations but emphasized that the people of Iraq, with no history of democratic participation and no cohesive infrastructure capable of mobilizing against tyrannical leadership, would suffer not only from without but also, more egregiously, from within. This had nothing to do with the law of armed conflict, but everything to do with the failed political system in Baghdad.

The actions on the part of the Baathists during and after DESERT STORM emphasized that the failure to enforce acceptable behavior on the part of Iraq during and following armed conflict could not be attributed to an inadequacy of law but rather to an incomplete implementation of an enforcement regime by the member states of the United Nations. In form, the enforcement mechanisms were more than satisfactory. In substance, the United Nations proved incapable of exerting sufficient pressure on the Iraqi government to enforce anything near full compliance.

Notes

1. See chapter 8.
2. UN Charter, 26 June 1945, 59 Stat. 1031, TS no. 993, 3 Bevans 1153; Hague Convention no. IV Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2227, TS no. 539. The Geneva Conventions are reprinted, with background material, in International Committee of the Red Cross, *Geneva Conventions of 12 August 1949,* 2d ed. (Geneva: 1950).
3. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacterialogical [*sic*] Methods of Warfare, 17 June 1925, 26 UST 571; TIAS no. 8061; 94 LNTS 65 (entered into force for the United States 10 April 1975).
4. *Congressional Record,* 120 no. 176; 26 UST 571; 14 ILM 49 (1975).
5. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological and Toxin Weapons on Their Destruction, 10 April 1972, 26 UST 583; TIAS no. 8062.
6. Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, with Annexes, UN Doc. A/32/144 (15 August 1977); 16 ILM 1391 (1977).
7. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 UST 333; 16 ILM 88.
8. Conventions on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, UN Docs. A/Conf.95/9/Add.1; A/Conf.95/DC/CRP.1/Rev.1; A/Conf.95/DC/CRP.4.
9. Chapter VII of the UN Charter includes Articles 39–51 and provides that the Security Council may authorize enforcement action such as authorized in Resolution 678 of 29 November 1990.
10. As set forth in chapters 1 and 2, the concept of "necessity" in the law of armed conflict permits only that degree and kind of force, not otherwise prohibited by the law, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.
11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516; TIAS no. 3365; 75 UNTS 287.
12. Ibid. Arts. 47–48 describe the requirements and responsibilities imposed upon a nation occupying territory of an adversary.
13. Ibid. Art. 146 requires that all those alleged to have committed grave breaches as defined in Article 147 must be searched for and brought before the courts of a party to the convention, which can make a prima facie case.
14. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Doc. A/810, p. 174; 78 UNTS 277. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, reprinted in Dietrich Schindler and Jirí Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Leiden, Neth.: Sijthoff; and Geneva: Henry Dunant Institute, 1973), p. 529.
15. International Military Tribunal (Nuremburg), "Judgment and Sentence," *American Journal of International Law* 41 (1947), p. 172.
16. Article 49 provides, in part, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."
17. During review of proposed target lists, command judge advocates and lawyers on the staff of the chairman of the Joint Chiefs of Staff in Washington ensured that Article 4(1) was carefully adhered to as a matter of policy, even though the United States was not a party to the 1954 convention.
18. Although it was recognized by American military officials that the Iraqi actions made the Temple of Ur a legitimate target, U.S. control of the air made it unnecessary to eliminate those two aircraft.
19. The U.S. Army investigation was conducted in 1991 by reservists coordinated by the International Affairs Division, Office of the Judge Advocate General of the Army.
20. See chapter 1.
21. For a thorough review of these principles, see U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations,* NWP-9 (Rev. A) (Washington, D.C.: 1989).

22. A discussion of the thinking that went into the decision to adopt the maneuver plan in DESERT STORM is included in appendix O to the Title V Report (on the Conduct of the Persian Gulf Conflict) of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 [hereafter Title V Report].

23. See William Arkin, *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (New York: Human Rights Watch, 1991), p. 19.

24. See Title V Report, appendix L, for a thorough discussion of the Vietnam difficulties in EPW management.

25. Ibid.

26. Ibid. U.S. EPW facilities were operational until 2 May 1991, when the last EPW was turned over to the Saudis for repatriation.

27. Ibid.

28. This process is further explained in appendix L to the Title V Report.

29. Ibid.

30. See Title V Report, appendix L, pp. 29–33.

31. Article 23 states, in part: "No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points of areas immune from military operations."

32. Article 22 states in part, "Except in particular cases which are justified by the interests of the prisoners themselves, they shall not be interned in penitentiaries."

33. Title V Report, appendix L, p. 49.

34. See, e.g., the principles reflected in Articles 22, 23(a), 23(e), and 28 of the 1907 Hague (IV) Convention Respecting the Laws and Customs of War on Land; Article 33 of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War; and Articles 35(2), 48, 51, and 57 of the 1977 Protocol I Additional to the Geneva Conventions.

35. Article 147 of the 1949 Geneva Civilians Convention describes as a "grave breach" of the convention "willfully causing . . . extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

36. See, e.g., the principles reflected in Articles 46, 47, and 55 of the regulations annexed to the 1907 Hague (IV) Convention Respecting the Laws and Customs of War on Land, as well as Article 56 of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

37. See James P. Terry, "The Environment and the Laws of War: The Impact of DESERT STORM," *Naval War College Review* 45, no. 1 (Winter 1992), p. 61.

38. See ibid., pp. 61–67.

39. See Art. 51, Geneva Convention I (GC I); Art. 52, GC II; Art 131, GC III; and Art. 148, GC IV.

40. See Art. 49, GC I; Art. 50, GC II; Art. 129, GC III; and Art. 146, GC IV.

41. UN Security Council Resolution 687, requiring Iraqi compensation to Kuwait, had its underpinning in Art. 3, Hague Convention IV of 1907.

CHAPTER SEVEN

Operation IRAQI FREEDOM

The determination by the Bush administration to enter Iraq and remove the regime of Saddam Hussein from power in early 2003 followed twelve years of Iraqi violations of United Nations Security Council resolutions following Operation DESERT STORM. Prior to the decision by the United States and its coalition partners to intervene, Saddam Hussein had done everything possible to avoid complying with the will of the international community. Of the twenty-six demands made by the Security Council since 1991, Iraq had complied with only three. Equally significant, the regime's repression of the Iraqi people had continued.

The 2 October 2002 joint resolution of the Congress authorizing the use of all means, including force, to bring Iraq into compliance was merely one of a series of actions by the Congress to address the noncompliance by Baghdad of its international obligations.[1] In 1998, for example, the Congress passed a similar resolution.[2] It declared that Iraq's continuing "weapons of mass destruction" programs threatened vital American interests and international peace and security; declared Iraq to be "in material breach of its international obligations"; and urged President Clinton "to take all appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations."[3]

These congressional and UN Security Council resolutions were not the only outcry for change. In the Iraq Liberation Act, passed in 1998, U.S. lawmakers expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime.[4] The reasons for this strong congressional reaction to the Hussein regime rested not solely on Iraqi defiance of United Nations resolutions but also on Saddam Hussein's repression of the Iraqi people, his support for international terrorism, his refusal to account for Gulf War prisoners, his refusal to return stolen property to Kuwait following the 1990–91 conflict, and the Baathist regime's efforts to circumvent economic sanctions.

Framework for Discussion

This chapter examines these Iraqi violations in the context of contemporary international law standards justifying intervention. More significantly, it examines the right of states to enforce mandates issued by the Security Council and to redress violations of its edicts when the Council, as a body, subsequently refuses to do so; this is precisely what occurred with respect to Iraq when the Baathist regime refused to comply fully with the requirements of UN Security Council Resolution 1441.[5] Finally, the chapter examines the independent authorities available to states, such as the right to intervene to address a threat to international peace and security under Article 51 of the Charter, and the right to invoke the doctrine of humanitarian intervention, when the Security Council cannot or will not act in circumstances in which its edicts have been clearly violated.

The U.S. intervention with its coalition partners in Iraq in March 2003 must be viewed as a significant historical precedent in the relationship of a major power to the Security Council. Previously, in 1998 in Kosovo, the United States and a coalition largely made up of NATO partners intervened, as we have seen, to rescue and protect the threatened Albanian population from Serb aggression without specific Security Council approval. The military action in Kosovo could arguably be justified as a humanitarian intervention;[6] in contrast, the coalition entry into Iraq in 2003 was justified on the basis of repeated violations of UN Security Council Resolutions under Chapter VII (authorizing all necessary means) and the threat to international peace and security in the region and to the world community posed by the Saddam Hussein regime as a result thereof. As President Bush stated to the UN General Assembly on 12 September 2002,

> Twelve years ago, Iraq invaded Kuwait without provocation. And the regime's forces were poised to continue their march to seize other countries and their resources. Had Saddam Hussein been appeased instead of stopped, he would have endangered the peace and stability of the world. Yet the aggression was stopped—by the might of coalition forces and the will of the United Nations.
>
> To suspend hostilities, to spare himself, Iraq's dictator accepted a series of commitments. The terms were clear, to him and to all. And he agreed to prove he is complying with every one of those obligations.
>
> He has proven instead only his contempt for the United Nations, and for all his pledges. By breaking every pledge—by his deceptions, and by his cruelties—Saddam Hussein has made the case against himself. . . .
>
> The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace. Iraq has answered a decade of U.N. demands with a decade of defiance. All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?[7]

Thus, the intervention in Iraq must be viewed through a different lens than either our intervention in Afghanistan, where we responded to a direct attack on America, or our intervention in Kosovo, where the coalition responded to a solely humanitarian crisis.[8] In Iraq, the coalition led by the United States and the United Kingdom was responding

to an attack on the very effectiveness of the United Nations security system, by seeking redress for repeated violations of Security Council resolutions that, if not addressed directly, would have done irreparable harm to the minimum world order system represented by Article 2(4) and Chapter VII of the Charter, to the peace and security of the region, and to the well-being of the Iraqi people, through continued repression.[9]

Analysis of Iraqi Violations of Security Council Mandates

Prior to intervention on 19 March 2003 and the inception of Operation IRAQI FREEDOM, the regime of Saddam Hussein had repeatedly violated sixteen UN Security Council resolutions (UNSCRs) designed to place sharp controls on the regime's activities and to ensure that Iraq did not pose a threat to international peace and security.[10] These violations spanned a period of more than twelve years and were first addressed in Security Council resolutions arising from the Iraqi invasion of Kuwait in August 1990.

In UNSCR 678, passed in the fall of 1990, UN member states were authorized "to use all necessary means" to redress the Iraqi invasion of Kuwait.[11] Resolution 686 (1991) placed requirements on Iraq to return all prisoners, restore all property seized, and accept liability for all damages arising from its illegal invasion of Kuwait.[12] The most significant of the early resolutions addressing Iraqi violations, UNSCR 687 (cease-fire resolution of 3 April 1991), required that Iraq "unconditionally accept" the destruction, removal, or neutralization "under international supervision" of all "chemical and biological weapons and all stocks of agents and all related subsystems and components," and further required that Iraq declare fully its weapons of mass destruction programs, not "use, develop, construct or acquire" any weapons of mass destruction, and reaffirm its obligations under the Nuclear Non-Proliferation Treaty.[13] This was followed by UNSCR 688 (1991), which "condemn[ed]" Iraq's repression of its civilian population, "the consequences of which threaten international peace and security," and demanded that this repression cease.[14]

In UNSCR 707 (1991), the Security Council "condemn[ed]" Iraq's "serious violation" of UNSCR 687 and further "condemn[ed]" Iraq's noncompliance with the International Atomic Energy Agency (IAEA) and its obligations under the Nuclear Non-Proliferation Treaty. This resolution required that Iraq halt nuclear activities of all kinds and mandated a full and complete disclosure of all aspects of its weapons of mass destruction and missile programs.[15] When Iraq did not cooperate as required, the Council passed UNSCR 715 (1991), mandating that Iraq cooperate fully with UN and IAEA inspectors.[16]

In 1994, Saddam Hussein's regime began military deployments once again designed to threaten Kuwait. The Security Council passed UNSCR 949 (1994) condemning these movements and directing Iraq not to utilize its military or other forces in a hostile manner so as to threaten its neighbors or UN operations in Iraq.[17]

Within two years, it was apparent that Saddam Hussein was again acquiring unauthorized weapons components. In response, in 1996 the Security Council passed UNSCRs 1051 and 1060. In UNSCR 1051, the Council demanded that Iraq report to the UN and IAEA shipments of dual-use items related to weapons of mass destruction.[18] It also required that Iraq cooperate fully with UN and IAEA inspectors and allow them immediate, unconditional, and unrestricted access. UNSCR 1060, in turn, "deplored" Iraq's refusal to allow access to UN inspectors and its "clear violations" of previous UN resolutions.[19]

In 1997, with access for inspectors still effectively denied, the Security Council passed UNSCR 1115, which "condemn[ed] repeated refusal of Iraqi officials to allow access" to UN officials. The Council claimed these actions to be a "clear and flagrant violation" of UNSCRs 687, 707, 715, and 1060.[20] In UNSCR 1134 (1997) the Security Council repeated the demands contained in UNSCR 1115.[21] When Iraqi actions threatened the safety of UN personnel in late 1997, the Council "condemn[ed] the continued violations by Iraq" of previous UN resolutions, including its "implicit threat" to the safety of aircraft operated by UN inspectors and its tampering with UN inspector monitoring equipment.[22]

The Iraqi lack of cooperation with the inspection regime continued in 1998, and in March the Security Council passed UNSCR 1154, which stated that any violation would have the "severest consequences for Iraq."[23] On 5 August 1998, the Baathist regime suspended all cooperation with UN and IAEA inspectors. This led to Security Council condemnation in Resolution 1194 (1998) and the declaration that Iraqi actions constituted "a totally unacceptable contravention" of its obligations under UNSCRs 687, 707, 715, and 1060.[24] On 31 October 1998 the Iraqis made their August suspension permanent and ceased cooperation with UN inspectors. The Council, in UNSCR 1205, "condemn[ed]" this decision and described it as a "flagrant violation" of UNSCR 687 and other resolutions.[25]

In 1999, frustrated with the continued lack of Iraqi cooperation, the Security Council passed Resolution 1284, which created the United Nations Monitoring, Verification, and Inspections Commission (UNMOVIC) to replace the previous weapons inspection team, the United Nations Special Commission (UNSCOM), which had existed since 1991. In creating this new entity, the Council stated that Iraq must allow UNMOVIC "immediate, unconditional and unrestricted access" to Iraqi officials and facilities.[26] This concern with Iraqi weapons was reemphasized in UNSCR 1382 (2001), which reaffirmed the obligation of all states to prevent the sale or supply to Iraq of weapons or any other military equipment.[27]

Finally, in UNSCR 1441 (2002), under Chapter VII of the Charter, the Security Council stated it was "determined to secure full compliance with its decisions."[28] The Council

"decide[d] that Iraq ha[d] been and remain[ed] in material breach of its obligations under relevant resolutions . . ., [d]ecide[d] . . . to afford Iraq . . . a final opportunity to comply with its disarmament obligations . . .," and "decide[d] that false statements or omissions in the declarations submitted . . . shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment."[29]

Equally disturbing, during the period represented by the preceding resolutions Saddam Hussein had repeatedly circumvented UN economic sanctions, refused to allow weapons inspectors to oversee the destruction of his weapons of mass destruction, failed to destroy his ballistic missiles of range greater than 150 kilometers, failed to stop support for terrorism or prevent terrorist organizations from operating within Iraq, declined to help account for missing Kuwaitis, refused to return stolen Kuwaiti property or bear financial responsibility for damage from the first Gulf war, and continued his repression of the Iraqi people.[30]

In addition to the legally binding resolutions, the Security Council had also issued at least thirty statements from its president regarding Saddam Hussein's continued violations of these resolutions.[31] On 7 March, following the thirty days provided in Resolution 1441 for an Iraqi response to the unanimous adoption of UNSCR 1441 and full compliance therewith, Secretary of State Colin Powell documented for the Council Iraq's unresponsiveness.[32] He summarized:

> Iraq's current behavior, like the behavior chronicled in Dr. Blix's document*, reveals its strategic decision to continue to delay, to deceive, to try to throw us off the trail, to make it more difficult, to hope that the will of the international community will be fractured, that we will go off in different directions, that we will get bored with the task, that we will remove the pressure, we will remove the force. And we know what has happened when that has been done in the past.
>
> We know that the Iraqis are still not volunteering information and, when they do, what they are giving is often partial and misleading. We know that when confronted with facts, the Iraqis are still changing their story to explain those facts—but not enough to give us the truth.[33]

Confronting Security Council Inaction

When President Bush secured broad bipartisan support for the Joint Resolution to Authorize the Use of United States Armed Forces against Iraq on 2 October 2002, few could have imagined that the Security Council would not ultimately follow suit.[34] After all, U.S. leaders had obtained unanimous support in the Council for UNSCR 1441, which all but constituted an ultimatum. Secretary Powell clearly defined the burden of Council membership in his 7 March 2003 address, in which he had carefully outlined the failure of Iraq to comply with UNSCR 1441:

> Security Council membership carries heavy responsibilities. We must not walk away. We must not find ourselves here this coming November with the pressure removed and with Iraq once again marching down the merry path to weapons of mass destruction, threatening the region, threatening the world.

* Dr. Hans Blix, the chief UN weapons inspector, had submitted a formal report on 27 January.

> If we fail to meet our responsibilities, the credibility of this Council and its ability to deal with all the critical challenges we face will suffer. As we sit here, let us not forget the horror still going on in Iraq, with a spare moment to remember the suffering Iraqi people whose treasure is being spent on these kinds of programs and not for their own benefit; people who are being beaten, brutalized and robbed by Saddam Hussein and his regime.
>
> Colleagues, now is the time for the Council to send a clear message to Saddam that we have not been taken in by his transparent tactics. Nobody wants war, but it is clear that the limited progress we have seen, the slight substantive changes we have seen, come from the presence of a large military force—nations who are willing to put their young men and women in harm's way in order to rid the world of these dangerous weapons.
>
> It doesn't come simply from resolutions. It doesn't come simply from inspectors. It comes from the will of this Council, the unified will of this Council and the willingness to use force, if it comes to that, to make sure that we achieve the disarmament of Iraq.
>
> Now is the time for the Council to tell Saddam Hussein that the clock has not been stopped by his stratagems and his machinations. We believe that the resolution that has been put forward for action by this Council is appropriate and, in the very near future, we should bring it before this Council for a vote.[35]

The draft resolution Secretary Powell spoke of was opposed by Russia and France and thus was never formally proposed for a vote within that body. The provisional draft of 7 March 2003, brought under Chapter VII of the Charter, stated that the Council was determined to secure full compliance with its decisions and to restore international peace and security in the area.[36] It further stated

> that Iraq will have failed to take the final opportunity afforded by resolution 1441 (2002) unless, on or before 17 March 2003, the Council concludes that Iraq has demonstrated full, unconditional, immediate and active cooperation in accordance with its disarmament obligations under resolution 1441 (2002) and previous relevant resolutions, and is yielding possession to UNMOVIC and the IAEA of all weapons, weapon delivery and support systems and structures, prohibited by resolution 687 (1991) and all subsequent relevant resolutions, and all information regarding prior destruction of such items.[37]

When the Council did not agree to the proposed resolution, President Bush, with the support of the United Kingdom, Spain, and more than forty other nations, directed U.S. forces, in a coalition with the British, to enter Iraq on 19 March and remove the regime of Saddam Hussein.[38] This decision came only after President Bush determined that reliance by the United States on further diplomatic or other peaceful means alone would not lead to enforcement of all relevant United Nations Security Council Resolutions regarding Iraq, and further that the Security Council, despite the Iraqi lack of compliance with UNSCR 1441, would not act.

Not surprisingly, on 22 May 2003, after the United States and Great Britain freed the region from the threat posed by the Baathist regime in Iraq and the Iraqi people from the repression of Saddam Hussein, the Security Council passed UNSCR 1483, by a vote of fourteen to none.[39] This resolution recognized the United States and the United Kingdom as the "authority" in Iraq pending establishment of an independent democratic Iraqi government and affirmed "the need for accountability for crimes and atrocities committed by the previous Iraqi regime." Acting under Chapter VII of the

UN Charter (and expressly recognizing that the situation in Iraq "continues to constitute a threat to international peace and security"), the Security Council "call[ed] upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."[40]

Analysis of the Lawfulness of the Use of Force in Iraq

It is important to consider whether the failure of the Council to act to enforce UNSCR 1441 and the preceding relevant resolutions with respect to Iraq authorizes any individual state or coalition of member states to enforce them. In the case of the United States, President Bush persuasively argued his case before the United Nations on 12 February 2003;[41] further, Congress had endorsed the use of force by the president in its 2 October 2002 joint resolution.[42] In that resolution, Congress had identified both the threat to the United States and to international peace and security, and the need for humanitarian intervention:

> Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;
>
> Whereas Iraq persists in violating resolutions of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait.[43]

While the main responsibility for maintaining peace and security in the UN system is lodged with the fifteen-member Security Council, its effectiveness of the latter as an instrument of collective action has often been neutralized when the approval, required in Article 27(3), of all permanent members is not forthcoming.[44] This situation obtained in March 1999, when the Chinese and Russian delegates refused to support a draft Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis, despite the support of twelve of the fifteen Council members, and in March 2003, when the Russian and French delegates refused to support the coalition-led intervention in Iraq.

Precisely this possibility had led legal experts to debate long prior to the Kosovo and Iraq crises criteria to address Council inaction in the face of obvious violations of Charter principles. In 1974, Professor Lillich, lamenting the inability of the Security Council to function in matters requiring the unanimous approval of the permanent

members for Chapter VII "all necessary means" operations, argued that the most important task confronting international lawyers was to clarify the legitimacy of a state's use of force in support of Charter principles.[45]

In Iraq, as in Kosovo, the coalition's use of military force was supportive of state practice that has established the lawfulness of intervention as carefully circumscribed by the parameters outlined in Article 2(4). Articles 39 to 51 of the Charter establish a framework for collective security based on the use of military forces and provide the Security Council authority for enforcement.[46] Despite these powers, the reluctance of certain members in 1998 and 2003 left the organization on the sidelines at a time when, according to the Charter, its possibilities should have been used to the maximum. Evidence of partisanship and division among members, and especially among the Permanent Five, may in part explain the sidetracking of the Security Council. Nevertheless, we should take such matters with the utmost seriousness and ask ourselves what can be done to restore the Council to the position of influence it was given in the Charter.

In fact, Chapter VII makes extensive provision for collective action "to maintain or restore international peace and security" when a threat to the peace or an act of aggression has occurred.[47] Under Chapter VII it is the Council that must decide whether, in any particular instance, a threat to the peace exists or aggression has been committed, and if so, by whom, and finally what collective steps, if any, by the world organization would best remedy the situation. With the exception of UN-sanctioned action in the defense of Kuwait in 1990, however, it has never been possible to invoke these collective enforcement provisions.[48] Even in Korea, the potential veto of the Soviet ambassador obliged the organization to turn to the General Assembly for the necessary authority under Articles 11, 14, 18, and 24 of the Charter.[49]

The scarcity of actions brought under the collective action provisions of Chapter VII does not in any way suggest the existence of a peaceful world. By 1970, Professor Thomas Franck had already recorded more than one hundred outbreaks of hostility between states in the some twenty-five years the UN had been in existence.[50] The total is now easily double that number. If the Chapter VII collective action provisions have been markedly inconspicuous, increasing use has been made by states, including the United States, of Articles 51, 52, and 53, which set out the rights of states themselves, under certain exceptional circumstances, to resort to force outside the UN framework. In fact, it is fair to say that the exceptions have overwhelmed the rule and transformed the system. This was certainly the case in Iraq in 2003.

In Iraq, the Security Council had repeatedly condemned Iraqi actions that had violated international peace and security.[51] It is important to note that after the United States and Great Britain successfully intervened in March 2003 to eliminate the threat to

international peace described in numerous Security Council resolutions and eliminate the violations of international human rights law described in UNSCR 1441 (2002) and preceding statements, the Council quickly passed UNSCR 1483 unanimously recognizing the coalition as the appropriate "authority" in Iraq pending establishment of a lawful government. The incongruity of the refusal of the Security Council to support the coalition intervention that directly supported the repeated demands it had made of Iraq followed by unanimous approval of a resolution recognizing the interveners as the legitimate "authority" in Iraq is obvious.

An equally significant credibility gap exists between the noninterventionist policy resulting from a divided Council and fulfillment of the humanitarian principles of the UN Charter with respect to Iraq. Examining the UN Charter as a whole, it becomes apparent that its two main purposes are the maintenance of peace and security and the protection of human rights.[52] Article 2(4), the Charter provision relevant to both these purposes, prohibits "the threat or use of force against the territorial integrity or political independence of *any state, or in any other manner inconsistent with the Purposes of the United Nations*" (emphasis supplied).

The intervention, as argued above, clearly reflected the humanitarian purposes stated in a myriad of United Nations resolutions. I would further argue that this intervention did not violate but actually supported the other requirements in Article 2(4), in that it did not significantly affect, other than in a positive way, the "territorial integrity" or "political independence" of the state against which directed. The territorial integrity of Iraq remains undisturbed. Under the Baathist regime of Saddam Hussein, there was no political independence, at least not for the people of Iraq. Nor did political independence exist for the regime. Heavily sanctioned by the UN for repeated violations of international law, the economy was increasingly restricted; the only international intercourse available to the Baathist leaders lay with other rogue nations.

This argument is even more attractive legally when one studies the actual language of the Charter. While it is admittedly best known for the articles that create a minimum world order system, as represented by Article 2(4) (prohibition on the use of force), Article 51 (exception for self-defense), and Chapter VII (Articles 39–51, addressing Security Council responsibilities), there is certainly an equal emphasis on protection of human rights. The Preamble, in fact, focuses on the rights of individuals vice the rights of nations:

> The purpose of the Charter is to save succeeding generations from the scourge of war, which twice in our lifetime have brought unto sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

Article 1(3) reinforces this preambular language, stating that a principal purpose of the organization is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 55 emphasizes the need to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The Economic and Social Council established in Article 61 provides the means by which the humanitarian objectives set forth in Article 55 are to be addressed and reported to the Security Council for action.

A New Paradigm

The Iraqi intervention reflects an uneasy recognition that the Charter system is inadequate to address certain of the security and humanitarian crises that may come before the United Nations, if unanimity among the five permanent members of the Security Council continues to be a requirement. Only the United States and United Kingdom among the Permanent Five on the Security Council were willing to support an enforcement resolution in the case of Iraq. Nevertheless, some forty nations found that authorization of the Security Council was not necessary, since the action was supportive of, rather than contrary to, the values represented in Article 2(4).

The March 2003 intervention in Iraq thus requires we once again examine the law related to intervention in the case of violations of international peace, security, and human rights. We must attempt to reconcile the Charter's values, on the one hand, and its procedures, on the other. Iraq is especially appropriate for consideration since the widespread violations of its international obligations were acknowledged in the Council unanimously in numerous resolutions. Additionally, the human rights violations attributed to the Baathist regime in Baghdad met all the requirements for humanitarian intervention under pre-Charter law. Specifically, the horrendous crimes against Kurds in the north and Shiites in the south were widely recognized and little disputed. The intervention had as its purpose only to redress the threat and end the abuses. There was no intention other than to restore political independence to the Iraqi people and nation. Its territorial integrity remains intact.

Professor Louis Henkin suggests that the likely result, unless the unanimity requirement can be separated from Security Council decisions, will be establishment of precedent whereby states or collectives, confident that the Security Council will acquiesce in their decision to intervene, shift the burden of the veto. That is, instead of seeking authorization in advance by resolution subject to veto, states or collectives will act and then challenge the Council to terminate the action. A permanent member favoring the intervention could frustrate the adoption of such a resolution.[53]

Henkin argues, in fact, that this situation may already exist. He suggests that after-the-fact Security Council ratifications in the Kosovo intervention (with UNSCR 1244) and by extension in Iraq (with UNSCR 1483) effectively confirmed what might have constituted unilateral action questionable as a matter of law.[54] The actions of the Security Council in adopting Resolution 1483 and endorsing the authority of the coalition during the transition to an independent Iraq clearly reflected a step toward a change in the law. While it is unlikely there will be a formal change, the Council's behavior supports an interpretation of law such that intervention consistent with Charter values (i.e., when neither the territorial integrity nor the political independence of the target state are impacted in ways inconsistent with the values represented by Article 2[4]) will be endorsed and not condemned.

International law requires that the community of nations first consider all means short of force to address threats to international peace and security. Where diplomacy fails and egregious human rights violations are observed, the international community must not be allowed to excuse its failure to act by pre-Charter references to principles of nonintervention and sovereign immunity or to the Charter requirement for Security Council approval when the lack of approval is contrary to the values for which the Charter stands.

Notes

1. Public Law 107-243, *Authorization for Use of Military Force against Iraq Resolution,* 2 October 2002.
2. Public Law 105-235.
3. Ibid.
4. Public Law 105-338, *Iraq Liberation Act,* 31 October 1998.
5. UN Security Council Resolution [UNSCR] 1441, 8 November 2002. Resolution 1441, in paragraph 3, placed the burden on Iraq to provide full disclosure, within thirty days, of all its WMD programs, ballistic missiles and other delivery systems, and the precise locations of all such components.
6. See James P. Terry, "Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism," *Military Law Review* (Summer 2004). See also chap. 5, above.
7. "Statement of President Bush before UN General Assembly," 12 September 2002, available at www.whitehouse.gov.
8. See statement of Christopher Greenwood on behalf of the United Kingdom: "There is a right to humanitarian intervention when a government—or the factions in a civil war—create a human tragedy of such magnitude that it creates a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so. It is from this state practice that the right of humanitarian intervention on which NATO now relies has emerged." "Yes, But Is It Legal? *Observer,* 28 March 1999, p. 2.
9. Article 2(4) prohibits the use of force by states, while Chapter VII, and specifically Article 51 within Chapter VII, provides the one exception for states and states acting collectively to respond to breaches of the peace when necessary in national self-defense.
10. See UNSCR 678, 29 November 1990; UNSCR 686, 2 March 1991; UNSCR 687, 3 April 1991; UNSCR 688, 5 April 1991; UNSCR 707, 15 August 1991; UNSCR 715,

11 October 1991; UNSCR 949, 15 October 1994; UNSCR 1051, 27 March 1996; UNSCR 1060, 12 June 1996; UNSCR 1115, 21 June 1997; UNSCR 1134, 23 October 1997; UNSCR 1137, 12 November 1997; UNSCR 1154, 2 March 1998; UNSCR 1194, 9 September 1998; UNSCR 1205, 5 November 1998; UNSCR 1284, 17 December 1999.

11. UNSCR 678, 29 November 1990, also required that Iraq comply fully with UNSCR 660, regarding Iraq's illegal invasion of Kuwait "and all subsequent relevant resolutions."
12. UNSCR 686, 2 March 1991.
13. UNSCR 687 also required Iraq to not commit or support terrorism or allow terrorist organizations to operate in Iraq, and it reiterated the requirements respecting the return of seized Kuwaiti property and persons addressed in UNSCR 686.
14. UNSCR 688, 5 April 1991, further obligated Iraq to allow immediate access to international humanitarian organizations to those in need of assistance.
15. UNSCR 707, 15 August 1991, additionally required that Iraq allow immediate, unconditional, and unrestricted access to UN and IAEA inspectors and that it cease attempts to conceal or move weapons of mass destruction, related materials, and facilities.
16. UNSCR 715, 11 October 1991.
17. UNSCR 949, 15 October 1994, also reiterated that Iraq must cooperate fully with UN weapons inspectors and that it must not enhance its military capability in southern Iraq.
18. UNSCR 1051, 27 March 1996.
19. UNSCR 1060, 12 June 1996. It reiterated UNSCR 1051's requirement to cooperate and provide unrestricted access.
20. UNSCR 1115, 21 June 1997, further required that Iraq give UN inspectors immediate, unconditional, and unrestricted access to Iraqi officials for interviews.
21. UNSCR 1134, 23 October 1997.
22. UNSCR 1137, 12 November 1997. This resolution reaffirmed Iraq's responsibility to ensure the safety of UN inspectors.
23. UNSCR 1154, 2 March 1998.
24. UNSCR 1194, 9 September 1998.
25. UNSCR 1205, 5 November 1998, also required, once again, that Iraq provide "immediate, complete and unconditional cooperation" with UN and IAEA inspectors.
26. UNSCR 1284, 17 December 1999, further provided that Iraq must fulfill its commitment to return Gulf War prisoners and called upon Iraq to distribute humanitarian goods and medical supplies to its people and address the needs of vulnerable Iraqis without discrimination.
27. UNSCR 1382, 29 November 2001.
28. UNSCR 1441, 8 November 2002.
29. Ibid.
30. UNSCR 1441 addressed each of these continuing violations.
31. See UN Security Council presidential statements of 28 June 1991; 5 February 1992; 19 February 1992; 28 February 1992; 6 March 1992; 11 March 1992; 12 March 1992; 10 April 1992; 17 June 1992; 6 July 1992; 2 September 1992; 23 November 1992; 24 November 1992; 8 January 1993; 11 January 1993; 18 June 1993; 28 June 1993; 23 November 1993; 8 October 1994; 19 March 1996; 14 June 1996; 23 August 1996; 30 December 1996; 13 June 1997; 29 October 1997; 13 November 1997; 3 December 1997; 22 December 1997; 14 January 1998; and 14 May 1998.
32. Remarks of Secretary of State Colin L. Powell before the UN Security Council, 7 March 2003, U.S. Department Of State Doc. 2003/256.
33. Ibid.
34. See chap. 7.
35. UN Charter, Art. 2, para. 4.
36. Draft resolution of 7 March 2003, S/2003/215. The United States was joined in sponsorship by Spain and the United Kingdom.
37. Ibid.
38. The nations indicating support for the U.S.-British intervention, in addition to Spain, were Italy, Australia, the Czech Republic, Denmark, Netherlands, Norway, Portugal, Romania, Poland, Ukraine, Hungary, Bulgaria, Slovakia, the Dominican Republic, El Salvador, Honduras, Latvia, Lithuania, Finland, Armenia, Azerbaijan, Kazakhstan, Uzbekistan, Moldova, the Philippines, Korea, Thailand, Singapore, Mongolia, Fiji, Tonga, Argentina, Nicaragua, and Nepal. The remaining nations are not listed by their request.
39. UNSCR 1483, 22 May 2003.
40. Ibid.

41. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological and Toxin Weapons on Their Destruction, 10 April 1972, 26 UST 583; TIAS no. 8062.

42. See chap. 7.

43. Ibid.

44. Article 23 of the Charter provides that the Republic of China, Russia, France, Great Britain, and the United States are permanent members of the Security Council.

45. See Richard Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlee and a Plan for Constructive Alternatives," in *National Security Law,* ed. John N. Moore (Durham, N.C.: Carolina Academic, 1990), pp. 152–53.

46. Articles 39–51 constitute Chapter VII of the UN Charter and provide the authority for the Council to direct intervention to restore international peace and security.

47. See UN Charter, Art. 39.

48. See UNSCR 678 (1990).

49. See UN General Assembly [UNGA] 377(V) (1950).

50. Thomas Frank, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force of States," *American Journal of International Law* 64 (1970), pp. 810–11.

51. Chapter VII of the UN Charter includes Articles 39–51 and provides that the Security Council may authorize enforcement action such as authorized in Resolution 678 of 29 November 1990. See also UNSCR 1441 (2002).

52. See discussion in *National Security Law,* ed. Moore, pp. 148–49.

53. Louis Henkin, "Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention," *American Journal of International Law* 93 (1999), p. 827.

54. Ibid.

PART FOUR

U.S. Policy for Peace Operations

CHAPTER EIGHT

The Development of Criteria for Peace Operations

The new world order that replaced the Cold War political relationships in 1991 required the United States and other nations to counter threats that did not challenge their national interests directly but were no less real. Nearly every contingency operation in which the United States participated in the 1990s and since has been conducted in support of a United Nations Security Council mandate under Chapter VII and has been consistent with our obligations under Articles 25 and 103 of the UN Charter. The 1990s were truly the peacekeeping "era."[1]

U.S. Policy Development for Peace Operations

Whether in Haiti, Somalia, the former Yugoslavia, or Rwanda, Presidents George H. W. Bush and William "Bill" Clinton drew their authority to commit U.S. forces from Charter commitments represented in Security Council resolutions, which they themselves could influence through votes and U.S. "muscle" in the Council.[2] This was absolutely critical to buttress their Article II authority as commanders in chief under the Constitution, as none of the foregoing crises posed a threat to vital national interests or implicated any mutual defense accord ratified by the Senate.

The conventional criteria for commitment of forces is found in our national security strategy, which is reflected in the Defense Planning Guidance and the Contingency Planning Guidance.[3] This guidance is designed to address potential threats to U.S. national interests, which would implicate Article 51 of the UN Charter and our inherent right of self-defense. The U.S. commitments to peacekeeping and peace-enforcement operations in the 1990s, however, required an expansion of this conventional thinking, as each of our commitments in Rwanda, Somalia, Haiti, and Bosnia was predicated upon a UN request for assistance, with no corresponding threat to vital U.S. interests or those of an ally.

By the mid-1990s, the Clinton administration had put in place new criteria for determining when to commit forces to preserve the peace in areas of instability or unrest, restore the peace in areas of conflict, reduce the impact of regional strife, and curtail human suffering. The publication in 1994 of Presidential Decision Directive (PDD) 25, "Reforming Multilateral Peace Operations," reflected this new thinking.[4] The strategy in PDD 25 embraced the U.S. government's soul-searching in the aftermath of our experience in Somalia, just as the earlier Weinberger Doctrine had arisen in the wake of the Beirut bombing in October 1983.[5] In fact, the criteria formulated by Secretary of Defense Caspar Weinberger for U.S. military response to crises abroad was largely adopted by President Clinton in PDD 25.

The criteria for military support under PDD 25 and for our vote in support of any given peacekeeping or peace-enforcement operation in the Security Council required that we first ask whether the situation represented a threat to international peace and security. Second, did the operation as proposed by the secretary general have a defined scope with clear objectives? Third, was there an international community of interest to deal with the problem on a multilateral basis? Fourth, if a Chapter VI peacekeeping operation was contemplated, was there a working cease-fire in effect? Fifth, were financial and human resources available? Finally, was there an identifiable end point to the proposed operation?[6]

When the commitment of U.S. forces to a UN contingency was to be considered under PDD 25, interagency representatives would ask whether the peace operation advanced U.S. interests; whether personnel, funds, and resources were available; whether American participation was necessary for the operation to be successful; whether an end point for U.S. involvement could be identified; whether congressional and domestic support existed; and whether command and control arrangements would be acceptable.[7] Satisfactory response to each of these inquiries was viewed as critical.

Finally, when the use of force was contemplated in circumstances where significant numbers of U.S. personnel had been committed, Presidential Decision Directive 25 required that it be asked whether we had the ability to commit sufficient forces to achieve the defined military objectives, whether the leaders of the operation had a clear intention to achieve decisively the stated objectives, and whether there was sufficient commitment on the part of the UN or other sponsoring body continually to reassess and adjust the objectives and composition of the force to meet changing security and operational requirements.[8] These criteria, although articulated specifically for UN operations and other coalition efforts where direct challenges to vital national interests were not present, offer prudent guidance for any U.S. commitment of forces.

These policy formulations followed a series of events in 1992 in which Secretary General Boutros Boutros-Ghali had attempted to take advantage of a Security Council no longer threatened with a Soviet or Chinese veto during debates on possible peace-enforcement operations.[9] In a January 1992 Security Council meeting attended by President George H. W. Bush, the president of the Council asked the secretary general to provide a report on ways to improve the UN peacekeeping process. In July 1992, the secretary general submitted his report, *An Agenda for Peace.*[10] President Bush's September 1992 address to the UN responded to the positive steps of the secretary general by announcing a series of American initiatives for improving the ability of the United Nations to conduct peacekeeping and humanitarian operations effectively. Included were commitments concerning an improved intelligence capability and establishment of an operations center, as well as assurance that means would be found to provide better price and availability data for ordering critical equipment, supplies, and services necessary to sustain sizable operations.[11]

A Bush administration review of peacekeeping policies culminated in National Security Directive (NSD) 74. NSD 74 codified the main elements of President Bush's September 1992 speech.[12] The principal elements of the Bush peacekeeping effort outlined in NSD 74 were presented to our allies in a January 1993 meeting.

In February 1993, however, the new Clinton administration directed a "clean slate," bottom-up review of U.S. policies toward the United Nations and UN peacekeeping. NSD 74 was set aside in order to make room for the new administration's ideas for improving, supporting, and participating in United Nations operations. It was from this review that PDD 25 emerged.

Events Precipitating Policy Change

Presidential Decision Directive 25 resulted from the confluence of two parallel processes. The first was the increased power and influence of a newly unified United Nations Security Council and its resultant vigor in addressing breaches of international peace and security—often without the required expertise or assets.[13] The second strand reflected a Congress increasingly wary of U.S. participation in UN and other coalition activities without clear safeguards.

The rejuvenation of the Security Council posed for the United States some significant concerns. The requirement to address international crises through UN mechanisms had brought many problems unforeseen by U.S. leaders at the end of the Cold War.[14] The most trying of these was the lack of an effective operational capability within the UN Department of Peacekeeping Operations, then headed by Kofi Annan.

There being no operations center at the UN that could fuse information/intelligence capabilities into effective military planning, that function had to be "contracted out." Further, with no cadre of experienced military advisors and planners available to the secretary general, the United Nations was at the mercy of its more affluent and experienced members for military leadership. Further, the UN, having no intelligence-gathering capability, either human or electronic, and no access to overhead satellite systems that could provide real-time intelligence, was able to consider only the information that its suitably sophisticated member states were willing to share. Of similar concern was the UN's lack of an in-house logistics capability. The support of an operation at great distance from the contributing states could pose staggering costs; members were reluctant to supply large operations like UNPROFOR in the former Yugoslavia or UNOSOM II in Somalia even with UN reimbursement.

Finally, even if an operation were fully funded, complete with adequate logistics support, very few states had militaries or officer corps with recent experience in planning and executing sophisticated operations. Moreover, effective artillery/infantry coordination in an era of highly mobile forces required the most modern communications, and the use of tactical aviation necessitated an understanding of close air support and air/ground coordination. It was such shortcomings, especially in Somalia, that ultimately led Congress to place restrictions on U.S. participation in UN peace operations.[15]

Congress and Peace Operations

The loss of Pakistani lives in Somalia in June 1993 and then of eighteen Americans in Mogadishu in October may have been the death knell of U.S. support for UN peace operations under Chapter VII of the UN Charter—unless led by American officers and conducted with a preponderance of U.S. forces.[16] In passing the Byrd Amendment to the fiscal year (FY) 1994 Defense Appropriations Act, the Congress sent a strong message that the president's authority to deploy forces without congressional approval in circumstances where no vital national interest is implicated was not unlimited.[17] Using the "power of the purse," the Congress was quick to limit defense funding where it determined U.S. interests were not well served. When the Byrd legislation lapsed on 30 September 1994, Congress quickly passed the Kempthorne Amendment, continuing funding restrictions, to the FY 1995 Defense Authorization Act.[18]

The Congress likewise showed itself entirely willing to dictate to President Clinton when it considered he was not doing enough in a peace-enforcement effort. In early 1994 Senator Robert Dole led an attempt to compel legislatively the unilateral lifting of an arms embargo on the Bosnian Muslims and thus vitiate the UN resolution establishing the embargo. Senators Sam Nunn and George Mitchell, attempting to moderate this effort through compromise, drafted what became known as the Nunn-Mitchell

Amendment to the FY 1995 Defense Authorization Act. This provision, which was enacted, did not lift the arms embargo unilaterally but precluded enforcement against the Bosnian Muslims while continuing our obligations as they related to the other parties to the conflict.[19] Even this compromise measure undoubtedly contributed to an earlier-than-planned withdrawal from Bosnia by UNPROFOR.

Congress made in 1994 two other efforts, both of which failed passage, to interject itself into military affairs long thought the sole province of the president. In Senate bill S 5 (the Peace Powers Act) and House of Representatives bill HR 7 (the National Security Revitalization Act, or NSRA, part of the "Contract with America"), Congress attempted to restrict the president's authority as commander in chief and limit U.S. involvement in future peace operations. The Peace Powers Act, an initiative of Senator Dole, would have prohibited U.S. forces from serving under foreign operational control even where it might be in the American interest, as in DESERT STORM.[20] Similarly, Speaker Newt Gingrich's National Security Revitalization Act would have limited the use of Defense Department funds for peacekeeping activities and restricted the sharing of intelligence with the UN. Either of these measures, if passed, would have severely impacted the president's constitutional prerogatives. Despite their failure, however, there remained bipartisan concern in the Congress after UNOSOM II in Somalia that the president (whether the incumbent or successors) would have to exercise greater stewardship with regard to peace operations managed by the UN.

Operational Lessons of Peace Operations in the 1990s

Just as the Congress and the United Nations in the mid-1990s became focal points for debate concerning peacekeeping and peace enforcement, the operations themselves provided many insights into American strengths and weaknesses in these tasks. When Iraq massed its Republican Guards on Kuwait's border in September 1994, for example, our post–DESERT STORM defense strategy was immediately put to the test.

Operation VIGILANT WARRIOR, which followed, was an excellent test of the U.S. ability to deploy forces rapidly to Southwest Asia. We learned quickly that prepositioned stocks had to be packed for efficient breakout—both ashore and afloat.[21] We reconfirmed that timely indications and warning of Iraqi movements and intentions were essential. We also confirmed the need to build and maintain relationships and understandings among regional states, such that "bedding-down" of aircraft and overflight rights were secured in advance.

Other issues also surfaced. United Nations leadership in UNOSOM II proved inadequate to enforce the mandate of that operation, brought under Chapter VII of the UN Charter.[22] The mission—which was heavily tied to nation building—was simply too

ambitious, especially since the Somali leaders in 1993–94 were unwilling to commit themselves to the process. The chairman of the Joint Chiefs of Staff, General Colin Powell, and the Commander, U.S. Central Command, Marine general Joe Hoar, had clearly recognized the need to circumscribe carefully the mission to that which was achievable during the preceding UNITAF operation. They had limited that effort to humanitarian relief. Unfortunately, the UN had not learned the same lesson.

Notes

1. Article 25, UN Charter provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
2. As a permanent member of the UN Security Council, the president, through his UN ambassador, has significant weight in shaping decisions within that body. See UN Charter, Art. 23(1).
3. Defense Planning Guidance (DPG) is published every five years by the secretary of defense (current version 2001–2006). It describes the role of U.S. military power in support of the president's national military strategy. The Contingency Planning Guidance (CPG), published yearly by the secretary of defense, ensures that contingency planning is consistent with national strategy.
4. PDD 25 is classified. An unclassified white paper prepared by the Department of State carefully records these criteria: *The Clinton Administration's Policy on Reforming Multilateral Peace Operations*, DOS Pub. 10161 (Washington, D.C.: May 1994) [hereafter PDD 25 White Paper].
5. See discussion of Weinberger Doctrine in chapter 4.
6. PDD 25 White Paper, p. 2.
7. Ibid. Assurance that American personnel were always under U.S. or NATO operational control when engaged in Chapter VII (peace enforcement) operations to redress breaches of the peace became the critical concern of the Congress after the UNOSOM II operation in Somalia.
8. Ibid. Many believe that the Beirut bombing incident in 1983 and the attack on U.S. personnel in Mogadishu in October 1993 during UNOSOM II were watershed events in shaping our policy with regard to commitment of forces to peace operations.
9. Prior to the dissolution of the Soviet Union in 1991 and the 1989 Tiananmen Square massacre in China, an ideological schism divided the council's five permanent members along capitalist/communist lines. However, in the five years following these events, Russia's dependence on the United States for financial assistance and China's desire to protect its newly gained most-favored-nation (now "normalized trade relations," or NTR) status resulted in a pragmatic determination on the part of these states to support Security Council peace operations. See discussion in James P. Terry, "The Criteria for Intervention: An Evaluation of U.S. Military Policy in UN Operations," *University of Texas Journal of International Law* (Winter 1995), pp. 101–105.
10. *An Agenda for Peace: Report of the Secretary General,* UN Doc. A/47/277-S/24111 (New York: United Nations, 31 January 1992).
11. See James P. Terry, "The Evolving U.S. Policy for Peace Operations," *Southern Illinois University Law Journal* (Fall 1994), p. 119.
12. Ibid., p. 120.
13. Article 27 of the UN Charter requires a vote of nine of the fifteen members, including all five permanent members, to reach a decision concerning a breach of the peace. Russia and China are permanent members, along with Great Britain, France, and the United States.

14. The UN Charter, as a binding international treaty ratified by each of its members, creates clear, unavoidable obligations on UN member states through Articles 25 and 103. These articles obligate members to support Security Council resolutions and abide by their dictates.

15. See discussion in James P. Terry, "A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations," *Naval Law Review* (1995), p. 79.

16. The capture of Warrant Officer Durant and the UN inability to control the situation in Mogadishu may have been the final straw leading the U.S. Senate to pass the Byrd Amendment limiting funding.

17. The Byrd Amendment, section 8156 of the fiscal year 1994 Defense Appropriations Act, provided that funds appropriated for the Defense Department for "the Operations of U.S. Armed Forces in Somalia" could be obligated only for expenses incurred through 31 March 1994.

18. The Kempthorne Amendment, although less onerous than the Byrd Amendment, restricted funding for U.S. military personnel in Somalia on a "continuous basis" after 30 September 1994.

19. The Nunn-Mitchell Amendment also provided specific direction, in paragraph (f)(1)(B), for the president to submit a plan to Congress on the manner in which the Bosnian army would be trained by U.S. and allied forces outside Bosnian territory. The amendment, however, has to be read in light of UN Security Council Resolution (UNSCR) 713, which called "upon all States to refrain from any action which might contribute to increasing tension or impeding or delaying a peaceful and negotiated outcome to the conflict in Yugoslavia." This training was viewed by many as making the U.S. a party to the conflict, just as the USS *New Jersey*'s fire missions on behalf of the Lebanese armed forces in 1983 had taken the United States over the line and into the conflict, thus legally (if not morally) justifying the attack on the Marine Barracks at Beirut International Airport.

20. In Operation Desert Storm, a brigade of the 82d Infantry Division and a Marine Corps artillery unit of the 12th Marine Regiment were assigned to the command of French and British forces, respectively, to allow their advance at the same pace as other coalition forces.

21. Following the conclusion of Desert Storm, the Defense and State departments jointly negotiated Defense Cooperation Agreements (DCAs) with many of our Gulf partners. These executive agreements permitted the prepositioning of defense stocks on their territory in order that the United States could assist these states should another crisis arise in the region. This prepositioning was to prove invaluable during Operation Iraqi Freedom.

22. Chapter VII comprises Articles 39–51 of the UN Charter, relates to peace enforcement vice peacekeeping, and authorizes "all necessary means."

CHAPTER NINE

The Role of Regional Organizations in Peace-Enforcement Operations

The experience in Somalia in 1992–94 and in Bosnia during the same period renewed questions for the United States concerning the future role of the UN in enforcement operations requiring a Chapter VII ("all necessary means") mandate. The sheer number of peace-enforcement requirements had obliged the United Nations itself to seek new venues of cooperation with groups of member states already organized for joint military action, such as NATO.[1] This fact, coupled with congressional insistence that American forces serve under responsible leadership and that strict standards be adhered to in determining whether U.S. forces should participate in any peace-enforcement operation, suggested that American participation in such operations would be restructured in the future.[2]

This restructured participation in international peacekeeping and peace enforcement drove similar rethinking among our major allies and other regular contributors to these operations. From the U.S. perspective, participation in these operations had to comply with Presidential Decision Directive (PDD) 25.[3] This directive, which requires clear accountability in deciding when to participate, when to assign forces, and under what conditions, now precludes U.S. participation in Somalia-style operations where UN leadership is not viewed by the United States as adequate.[4]

Chapter VIII of the UN Charter refers to regional organizations, such as NATO, in the context of appropriate regional action in the maintenance of international peace and security.[5] In this connection a relationship exists between the two organizations, with ultimate authority centered in the United Nations. Excepting the area of international peace and security, however, the relationship is not hierarchical.

The Treaty of Washington, which established the NATO Charter in 1949, made no reference to any relationship to the Security Council as a "regional arrangement," nor did it contain any requirement that actions of the organization be predicated upon authorization of the Council, or for reporting activities "in contemplation."[6] Instead, the

treaty obligated NATO's member states to "collective self-defense" under Article 51 of the UN Charter and, correspondingly, embodied only the requirement to report "measures taken" to the Security Council.[7] This formulation was adopted by the United States and its NATO allies because subjecting in advance NATO actions as regional arrangements to Security Council review would have made all of its actions vulnerable to Soviet veto. The characterization of NATO's military actions as "collective self-defense" under Article 51 meant that there would be no "regional arrangement" action in the sense of Chapter VIII of the UN Charter and no prior Security Council review. However, the internal disintegration of the Soviet Union in 1990–91 and the events in Tiananmen Square in the People's Republic of China have made Moscow and Beijing more willing over the past fifteen years to support UN-requested involvement in peacekeeping and peace-enforcement operations.

The adaptation of NATO to a role as a regional organization under Chapter VIII of the UN Charter with a peace-enforcement mandate must be viewed as part of a broad, long-term American and allied strategy that supports a peaceful and democratic Europe. This strategy benefits U.S. security and builds on the bipartisan premise that the security of Europe is a vital interest. Certainly, American sacrifices in two world wars and the Cold War have proven our commitment to the region as a community of shared values, and those sacrifices have more than established the nation's interest in recognizing and encouraging the rapid settlement of disputes in Europe.

When the Cold War ended, the United States and its NATO allies pursued a number of initiatives to advance this strategy. These included negotiation and implementation of the 1990 Conventional Armed Forces in Europe Treaty (CFE), support for the unification of Germany, bilateral assistance to support reforms in former Soviet states, negotiation of the START II strategic arms control treaty, programs to dismantle nuclear stockpiles in Russia, the elimination of intermediate nuclear forces (INF), including a 90 percent overall reduction in NATO's nuclear weapons in Europe, and most importantly, active American diplomacy and the deployment of U.S. troops as part of a NATO-led force in 1994–95 that helped stop the war and secure the peace in Bosnia-Herzegovina.[8]

NATO plays an important role today in this broader strategy, for many of the same reasons that it has played an essential role in maintaining peace and security in Europe during the past sixty years. NATO's success during this period went far beyond its accomplishments as an effective military mechanism for collective defense and deterrence. It has proved invaluable as a political institution in fostering continuing involvement of the United States and Canada in European security.

Adaptation of NATO's interest in broader European security to activities under the UN Charter's Chapter VIII began in 1990, soon after the fall of the Berlin Wall. In July 1990, under the active leadership of the George H. W. Bush administration, NATO set out in its London Summit Declaration new goals for the alliance, called for changes in strategy and military structure, and declared that the alliance no longer considered Russia an adversary. These efforts were reaffirmed by a declaration in Copenhagen in June 1991 that NATO's objective was "to help create a Europe whole and free." At the Rome Summit in November 1991 the alliance adopted a new strategic concept that reaffirmed the continuing importance of collective defense while orienting NATO toward new security challenges, such as out-of-area missions, crisis management, and peacekeeping.

Since then, NATO has taken further steps to pursue a Chapter VIII role. At its January 1994 summit in Brussels, the alliance made three important decisions related to its status as a regional organization. First, it launched the Partnership for Peace (PFP), to enable intensive political and military-to-military cooperation with Europe's new democracies as well as states that had considered themselves neutrals during the Cold War. PFP has proven an important and effective program for these states and for the alliance. A PFP Coordination Office was established in Mons, Belgium; major PFP exercises have been held each year since 1994; and numerous exercises have been conducted with partners "in the spirit" of PFP. The program has more than proved its merit in Bosnia-Herzegovina, where thirteen PFP states have made substantial contributions to the NATO-led peace enforcement in the Balkans. Similarly, then–partner states such as Poland, Hungary, and the Czech Republic generously contributed their resources to NATO's Operation ALLIED FORCE in Kosovo in 1999 and to the follow-on UN peacekeeping operation.

The second major initiative related to adaptation to Chapter VIII undertaken by NATO in Brussels in 1994 was a decision to embrace the concept of combined joint task forces. This approach would enable NATO forces and national military assets to be employed in a more flexible manner for peace enforcement. The final initiative involved the invitation of additional European states to join NATO (the first tranche included Hungary, Poland, and the Czech Republic in 1999; seven more were added in 2004, for a total of twenty-six NATO members).[9] While this NATO enlargement initiative was not directly related to Chapter VIII, the training and increased military-to-military relations that have accompanied it will complement NATO's increased capacity to perform as a regional organization.

The benefits of a broadened NATO doctrine that emphasizes flexible response as a regional organization are both immediate and long term, and they accrue not only to existing and prospective NATO allies but to states outside the alliance. Europe is a more secure and stable region because of NATO's commitment to work within Chapter VIII

of the UN Charter. Even now, Central and Eastern European states are reconstructing their foreign and defense policies to bring them in line with alliance values and norms.

The NATO acceptance of Chapter VIII responsibilities has been most significant in Bosnia. NATO countries made a profound contribution to European security through their participation in the NATO-led Implementation Force (IFOR) and are still doing so ten years later under its successor Stabilization Force (SFOR), which is continuing to implement the military aspects of the Dayton Peace Accords. It is clear from these Bosnian missions that NATO members are already restructuring their forces so they can participate in the full spectrum of current and new alliance demands, including Article V (of the NATO charter) missions and peace-enforcement missions. The NATO involvement in Kosovo in 1999, while not executed pursuant to a Security Council resolution, nevertheless reflected an important opportunity for the alliance to demonstrate, through a non–Article V mission, a cohesive out-of-area presence to preclude genocide and restore peace to an important region.[10]

NATO acceptance of non–Article V missions has been necessary and was contemplated by the alliance charter. With the end of the Cold War came a unique opportunity to improve the security structure to increase stability in the Euro-Atlantic area without creating divisions among NATO members. The NATO alignment, with its history of military integration and cooperation brought about by years of successful planning and training for mutual defense responsibilities, was in an ideal position to participate effectively in peace-enforcement activities requiring the exercise of "all necessary means" under Chapter VII of the UN Charter.

As noted earlier, peace-enforcement operations, to be effective, require careful planning, experienced leadership, and highly integrated command and control arrangements. The Bosnia operation has demonstrated that NATO-led forces can meet these requirements as well as comply with the principles of force commitment embodied in PDD 25. The carefully developed response of leaders of the North Atlantic Alliance to the military requirements of the Dayton Peace Accords have reflected the immense potential resident in NATO for peace enforcement. The UN has recognized the need for regional leadership, and NATO has proven that it can successfully execute missions under United Nations authority.

Notes

1. The North Atlantic Treaty Organization, comprising twenty-six member states, provides for collective defense in Article V of its charter. Non–Article V missions authorized for consideration include peacekeeping and peace enforcement, now properly considered under Chapter VIII of the UN Charter (Regional Organizations).

2. See James P. Terry, "The Emerging Role of NATO in UN Peace Enforcement Operations," in *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt,* International Law Studies vol. 72, ed. Michael N. Schmitt (Newport, R.I.: Naval War College, 1998), p. 297.
3. See below in this chapter.
4. See James P. Terry, "U.N. Peacekeeping and Military Reality," *Brown Journal of World Affairs* 3 (1996), p. 136, for a review of UN inadequacies in peacekeeping and peace enforcement.
5. Chapter VIII, in Articles 52–54 of the UN Charter, specifically provides for "regional arrangements or agencies" for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action. Article 53 provides, in pertinent part: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be undertaken under regional agencies without the authorization of the Security Council." On the maintenance of international peace and security, see *An Agenda for Peace: Report of the Secretary General,* UN Doc. A/47/277-S/24111 (New York: United Nations, 31 January 1992).

   In paragraphs 60–65, Boutros Boutros-Ghali called upon regional organizations to do more. In his *Supplement to an Agenda for Peace: Report of the Secretary General,* UN Doc. A/50/60-5/1995/1 (New York: United Nations, 3 January 1995), the secretary general specifically endorsed the 1994–95 NATO-led operation in Bosnia-Herzegovina.
6. *Treaty of Washington* (North Atlantic Treaty), 63 Stat. 2241, TIAS 1964 (entered into force 24 August 1949).
7. Art. 5 of the Treaty of Washington provides, in pertinent part: "Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."
8. The CFE agreement alone has resulted in the elimination of more than fifty thousand pieces of military equipment in Europe.
9. The seven new members added in 2004 included Bulgaria, Rumania, Latvia, Estonia, Lithuania, Slovenia, and Slovakia.
10. See chapter 4.

PART FIVE

Challenges for the Twenty-first Century

CHAPTER TEN

Defense of Critical Infrastructure
Computer Network Defense

In 1997, in an exercise emphasizing infrastructure security, the National Security Agency exposed the vulnerability of the United States to disruption of computer operations at its major military commands at the hands of a hostile state or an organization with hostile intent.[1] A year earlier, U.S. authorities had detected the introduction of software, called a "sniffer," into computers at NASA's Goddard Space Flight Center, permitting the perpetrator to download a large volume of complex telemetry information transmitted from satellites. The deputy attorney general reported that the "sniffer" had remained in place for a significant period of time.[2]

Of equal concern, an FBI report in 1999 detailed Chinese efforts to attack U.S. government information systems, including that of the White House.[3] These actual and projected interstate intrusions into government computer networks once thought secure raise important questions concerning what, if any, rights in self-defense are triggered by such attacks, and more importantly, how would the right of self-defense, if an attack impacts a vital national security interest, be translated into effective rules of engagement, and more specifically, legally defensible targeting decisions.

Understanding the Threat

The world of information operations represents an environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures. The concern addressed here relates to the threat posed when operations of these systems are unlawfully disrupted, denied, or degraded, or when secure information that is stored in computers or computer networks is destroyed, compromised, or altered in such a way as to have a destructive effect on national security interests. Computer espionage, computer network attacks, and the subversion of political, economic, or nonmilitary information bearing on a nation's capabilities and vulnerabilities may well constitute an unlawful use of force warranting a military response under traditional international law principles.

The threshold issues that emerge are: Which peacetime interstate activities within the telecommunications "highway" constitute a threat or use of force? When does such a threat constitute an attack under the international law such that the right of self-defense exists? What is an appropriate response? To answer these questions, we must understand the military applications of information technology. This requires an understanding of the Internet. The Internet was originally, in the 1970s, a network of computers linked by communications infrastructure and managed by the Department of Defense. The key breakthrough by which the internal computer networks of universities and private research facilities were ultimately merged was the development in 1989 of hypertext, which translates diverse computer protocols into standard format.

The hypertext approach, while extremely beneficial to both the military and civilian sectors, has created vulnerabilities. The World Wide Web, which resides on the Internet and of which hypertext is the primary vehicle, is the heart of the Defense Reform Initiative and of the reengineering and streamlining of Defense business practices. Yet it can at the same time provide adversaries a potent instrument to obtain, correlate, evaluate, and *adversely affect* an unprecedented volume of critical aggregated information.

This chapter addresses these attacks on U.S. infrastructure. International law could not have anticipated these specific concerns when the Hague Conventions of 1899, addressing means and methods of warfare, were negotiated; nonetheless, the drafters of those conventions did anticipate technological change. The "Martins Clause," included within both Hague II and Hague IV of the 1899 Conventions, provides that even in cases not covered by specific agreements, civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from principles of humanity, and from the dictates of public conscience; they are not merely subject to the arbitrary judgment of military commanders.[4] This provision was considered necessary to prevent unnecessary or disproportionate destruction from future weapons systems. The drafters had just witnessed previously unimaginable carnage in the Crimean War and the American Civil War resulting from advanced rifle-manufacturing techniques and other innovations, and they were well aware that warfare was rapidly changing. The Martins Clause that resulted means, as Greenberg and colleagues so accurately state, that "attacks will be judged largely by their effects, rather than by their methods."[5]

The Legal and Operational Parameters for Response

Because time is often compressed in the techno-violence arena, legal recourse and strategy development are often severely limited. This is especially true of nonmilitary initiatives that may be considered in response to cyber-attack, although these are always the options of choice where available. Traditional means of conflict resolution,

authorized by law and customary practice, are often precluded by the fact that attacks on computer systems are by nature covert in execution, unacknowledged by the state or group sponsor, and silently effective.

However, noncoercive efforts to counter attacks on computer systems and telecommunications networks are also important. Diplomatic action, alone or in concert with allies or international organizations, that might conceivably influence a state or group considering such a cyber-initiative, should be considered and employed wherever possible. In 1998, for example, the UN General Assembly passed Resolution 53/70, an initiative of the Russian Federation;[6] it called upon member states "to promote at multilateral levels the consideration of existing and potential threats in the field of information security."[7] The United States supported this resolution, with the following pertinent comments:

> The General Assembly's adoption of the resolution in plenary session will launch the international community on a complex enterprise encompassing many interrelated factors which delegates . . . do not ordinarily address. For example, the topic includes technical aspects that relate to global communications—as well as nontechnical issues associated with economic cooperation and trade, intellectual property rights, law enforcement, antiterrorist cooperation, and other issues that are considered in the Second and Sixth Committees. Further the actions and programs of governments are by no means the only appropriate focus, for the initiative also involves important concerns of individuals, associations, enterprises, and other organizations that are active in the private sector.[8]

Despite such international initiatives focusing on multilateral cooperation, the hope of outside assistance in protecting secure transmissions and critical systems in circumstances where national security is threatened is likely illusory. That burden will most likely remain exclusively that of the National Command Authorities.

The rules of necessity and proportionality in the information-warfare scenario are given operational significance through rules of engagement. ROE are directives by which a government may define the circumstances and limitations under which its forces will initiate and continue responses to eliminate a threat, in this case that posed by an attack through technical or other means on critical communications/information infrastructure. In the U.S. context, ROE embody the guidance of National Command Authorities provided through the Joint Chiefs of Staff (JCS) to subordinate headquarters and deployed U.S. forces both during armed conflict and in crisis short of war.

ROE reflect domestic law requirements and national commitments under international law. They are impacted by political as well as operational considerations. For American commanders concerned with threats to communications and command and control infrastructure, ROE represent limitations, or upper bounds, on how defensive or responsive systems and forces may be used but do not diminish their authority to protect critical infrastructure effectively from attack.

Evolution of United States Rules of Engagement

Techno-violence against a critical U.S. computer system, whether related to information, communications, or command and control, represents hostile activity and so may trigger ROE. Until 1986, the only U.S. peacetime rules of engagement applicable worldwide were the JCS peacetime rules for seaborne forces. These ROE, which served as the basis for local rules issued by all commands, were designed exclusively for the maritime environment. In June 1986, Secretary of Defense Caspar Weinberger promulgated more comprehensive ROE for peacetime land, sea, and air operations worldwide.[9] These rules gave on-scene commanders flexibility to respond to hostile intent, hostile acts, or unconventional threats, with minimum force necessary to limit the scope and intensity of the threat. The rationale underlying the 1986 ROE was to terminate violence quickly, decisively, and on terms favorable to the United States. In October 1994, Secretary of Defense Les Aspen approved "Standing Rules of Engagement for U.S. Forces" (SROE), which significantly broadened the scope of national rules.[10]

The SROE provide that should deterrence fail, crisis response options are to be proportional to the provocation, limit the scope and intensity of conflict, discourage escalation, and achieve political and military objectives. The inherent right of self-defense establishes the policy framework. The SROE are general guidelines on self-defense applicable worldwide to all echelons of command. They govern the use of force in ways consistent with mission accomplishment and are to be used in operations other than war, in the transition from peace to armed conflict or war, and, in the absence of superceding guidance, during armed conflict.

The national guidance represented in the 1994 SROE has greatly clarified and expanded the flexibility of action available to theater commanders. Issued with the authority of the secretary of defense, they ensure consistency in the way all military commanders, wherever assigned, address unconventional threats—including the destruction or compromise of, or tampering with, advanced command and control systems or computer networks with adverse effects on the security interests of the nation.

Application of the Law of Targeting to Infrastructure Protection

The SROE, as they relate to information warfare, are implemented through the law of targeting, a subset of the law of armed conflict. The law of targeting is based upon three fundamental principles: the right of states to adopt means of injuring the enemy is not unlimited; prohibition of attacks against civilian population as such; and the necessity of distinction between combatants and noncombatants, such that noncombatants are spared to the extent possible.[11]

Because the law of armed conflict is eminently practical and takes into account military efficiency, these basic principles are also applicable to responses to such nonviolent but nonetheless destructive coercive activity as sabotage of defense computer systems. Moreover, targeting theory is premised upon practical considerations that define the objects of legitimate and proportional response to various forms of aggression and establish functional targeting criteria for responsible officials, military or civilian.

The key, then, is to address attacks against critical infrastructure within the scope of the law of armed conflict. We must think of cyber-aggression as a variant of terrorist activity. This is precisely the direction in which recent U.S. administrations have proceeded.

President Clinton's Executive Order (EO) 13010 of 15 July 1996 established the President's Commission on Critical Infrastructure Protection (CCIP). The president declared that certain designated "national infrastructures are so vital that their incapacity or destruction . . . would have a debilitating impact on the defense or economic security of the United States."[12] The EO designated eight categories of critical infrastructure as requiring a national strategy for their protection: continuity of government, telecommunications, transportation, electric power, banking and finance, water supply, gas and oil storage and transportation, and emergency services (medical, police, fire, and rescue).

Initially chaired by Robert T. Marsh, a retired Air Force general, CCIP was tasked with developing a comprehensive national strategy for protecting these critical infrastructures from electronic and physical threats. On 13 October 1997, CCIP issued an unclassified version of its report, *Critical Foundations: Protecting America's Infrastructure.* The report recognized the challenge of adaptation to a changing culture; the existing legal framework, it found, was inadequate to deal with threats to critical infrastructure. The report itself provided few specifics, but on 22 May 1998 the Clinton administration issued Presidential Decision Directives (PDDs) 62 and 63 to implement its policy framework.

PDD 62, "Combating Terrorism," was the successor to National Security Decision Directive 138, signed by President Reagan on 3 April 1984, which determined that the threat of terrorism constitutes a form of aggression and justifies actions in self-defense.[13] PDD 62 was more expansive, addressing a broad range of unconventional threats that included attacks on critical infrastructure, terrorist acts, and weapons of mass destruction. The aim was to establish a more pragmatic and systems-based approach to protection of critical infrastructure and counterterrorism, in which preparedness was the key to effective consequence management. PDD 62 created a National Coordinator for Security, Infrastructure Protection and Counterterrorism, who would coordinate program management through the Office of the National Security Advisor.[14]

PDD 63, "Critical Infrastructure Protection," directed the National Coordinator, established in PDD 62, to initiate immediate action within the public and private sectors to

ensure the continuity and viability of political infrastructures. The goal of PDD 63 was to increase significantly the security of government systems and to establish a reliable, interconnected, and secure information system. A National Plan Coordination Staff was to integrate the plans developed by the various lead agencies into a comprehensive National Infrastructure Assurance Plan, to be overseen by a National Infrastructure Assurance Council, embracing both the public and private sectors. The Federal Bureau of Investigation's National Infrastructure Protection Center, established in February 1998, would continue to act as a control and crisis-management point, gathering information on threats to critical infrastructure and coordinating the federal government's response.[15]

The New Approach to Infrastructure Protection

The issue remains, however, of what legal remedy can be applied under the law of armed conflict should the Critical Infrastructure Plan fail, as it did on 11 September 2001. If a response is justified, as it was in Afghanistan after 9/11, what targets in a perpetrator country are proportional to the threat posed by destruction or compromise of critical infrastructure? Again, experience in addressing terrorism must be reviewed. The law of armed conflict provides more salient options against unconventional threats than does domestic or intelligence law, in cases where national security is at risk.

For example, an unlawful entry into or compromise of a critical national security system by individuals can be viewed as criminal activity under the jurisdiction of law enforcement officials. The same intrusion by the same individuals could be viewed as lawful espionage or intelligence gathering, as practiced by all states. If, however, that intrusion and its debilitating effect can appropriately be characterized as an attack on vital U.S. national interests, the range of options in response is greatly increased.[16] This is important because the state or group attempting to compromise our national security through the calculated sabotage of critical infrastructure *is attacking the nation*—not with bombs or bullets but with the intent of destroying equally critical elements of national well-being and sovereignty. The loss of a power grid or telecommunications network through computer-generated viruses for an extended period of time could place more Americans at risk than even a sizable military threat.

The United States was jolted into an awareness of the changing character of aggression in general when its embassy in Tehran was seized on 4 November 1979 by Iranian militants who enjoyed the support of Ayatollah Khomeini's revolutionary government.[17] A decade later, in August 1998, U.S. embassies in Nairobi and Dar es Salaam were the subject of unconventional warfare attacks, resulting in significant loss of life in Nairobi. In the case of the 11 September attacks, a U.S. response was possible only because of the linkage established between bin Laden's organization and the assault on U.S. personnel and property.[18] The thrust of the new U.S. strategy, outlined in PDD 62 and

reflected in Operation ENDURING FREEDOM in Afghanistan, was to reclaim the initiative lost when the U.S. pursued a reactive policy toward unconventional threats and attacks, as represented by inaction in response to the attacks on embassies in Beirut, Nairobi, and Dar es Salaam, and on the USS *Cole* (DDG 67).

An examination of authorized responses to techno-violence (and the selection of appropriate targets) requires an understanding that it, like other unconventional threats, does not follow any of the traditional military patterns. In fact, a fundamental characteristic of such attacks is violation of international law. The only norm for cyber-terrorism, as for other terrorist attacks, is effectiveness. While traditional international law requires discrimination and proportion, the success of cyber-terrorism is measured by the extent and duration of destructiveness, with no concern for those affected.

For this reason, there must be an assured, effective reaction that imposes unacceptable costs on the perpetrators and those who make possible their activities. For domestic intruders, the criminal law may suffice. Outside the United States, the reaction must counter the cyber-terrorist's strategy within the parameters of international law and PDD 62.

In this regard, no case for response in national self-defense can be persuasive either on the political or legal level unless a reasonable basis of necessity is perceived and carefully structured. Those to whom a justification is addressed (that is, other governments or the public) will consider whether it is well founded; they will not support the use of force as a purely discretionary act. An important dimension of this question, then, is when the use of force is necessary to produce adherence to the norm of information security. As Professor Lauterpacht has pointed out, every state judges "for itself, in the first instance, whether a case of necessity in self-defense has arisen," but "it is obvious that the question of legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a judicial authority or political body."[19] The United States has long taken the position that each nation is free to defend itself and is the "judge of what constitutes the right of self-defense and the necessity . . . of same."[20]

The decision to respond with force against techno-violence must always focus on the underlying political purpose of the state or group attacking an element of critical U.S. infrastructure, whether that element be commercial, communications, intelligence, or defense related. That purpose must unquestionably be the degradation of critical systems such that we are unable to defend ourselves militarily or protect ourselves from political or financial overreaching by adversaries.

Countering this threat requires taking full advantage of the proactive policies represented in PDDs 62 and 63, and making the fullest use of all the weapons in our arsenal. These should include not only defensive and protective measures that reduce systems

vulnerability but also new legal tools and agreements on international sanctions and collaboration with other governments. While military power should be used only as a last resort, there will be instances where it is the only alternative. The thrust of this new strategy must be to reclaim the initiative lost while the United States pursued a reactive policy to incidents of information warfare that neither deterred cyber-terrorists nor encouraged successful response. The key to an effective, coordinated policy for the protection of critical infrastructure is a commitment to hold those accountable responsible under the law of armed conflict.

Full implementation of the two PDDs should lead to increased planning for protective and defensive measures and, where deterrence fails, for responses that eliminate the threat, rather than treating each incident after the fact as a singular crisis provoked by international criminals. Treating cyber-terrorists and others attempting to destroy critical infrastructure as participants in international coercion triggers, where clear linkage can be made to a state actor, the right of self-defense, and coercion (political, economic, or military) may be the only proportional response.

This proactive strategy to the threat posed by attacks on our critical infrastructure embraces protective, defensive, nonmilitary, and military measures. It attempts for the first time to define acts designed to destabilize our eight most important infrastructure systems in terms of "aggression" and asserts the concomitant right of self-defense as a basis for lawful and effective response. The use of international law, and more specifically the law of armed conflict, will not only complement the current criminal law approaches but give pause to those who would target vital U.S. interests.

Notes

1. See Bradley Graham, "U.S. Studies New Threat: Cyber Attack," *Washington Post,* 24 May 1998, p. A1. The author describes Operation ELIGIBLE RECEIVER, conducted by the NSA and other government agencies.
2. Jamie Gorelick, speech before the Corps of Cadets, U.S. Air Force Academy, Colorado Springs, Colorado, 29 February 1996.
3. See William Gertz, "Chinese Hackers Raid U.S. Computers," *Washington Times,* 16 May 1999, p. C1, for a troubling review of Chinese efforts to attack White House, State Department, and other government computer systems.
4. Hague II, Hague IV, Additional Protocol I.
5. Lawrence T. Greenberg, et al., *Information Warfare and International Law* (Washington, D.C.: Institute for National Security Studies, 1997), p. 32.
6. GA Res. 53/70, UN GAOR, 53rd sess., UN Doc. A/RES/53/70 (1998).
7. Ibid.
8. "United States Explanation of Vote after the Vote," re: GA Res. 53/70 (1998), in W. Gary Sharp, Sr., *Cyberspace and the Use of Force* (Falls Church, Va.: Aegis, 1999), p. 189.
9. Joint Chiefs of Staff, *Peacetime Rules of Engagement for U.S. Forces* (Washington, D.C.: June 1986).

10. "Standing Rules of Engagement for U.S. Forces," Chairman of the Joint Chiefs of Staff Instruction 3121.01, 1 October 1994, as amended 22 December 1994.

11. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations,* NWP 1-14M (Washington, D.C.: 1997), para. 8.1.

12. Executive Order 13010, *Federal Register* 61, p. 37347.

13. Classified document described by Robert C. McFarlane in "Terrorism and the Future of a Free Society" speech at the National Strategic Information Center, Defense Strategy Forum, Washington, D.C., 25 March 1985. See discussion in James P. Terry, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May–June 1986), p. 58.

14. "Combating Terrorism," Presidential Decision Directive 62, 22 May 1998. Richard A. Clarke, longtime senior National Security Council staff member, was appointed the first National Security Coordinator. In early 2004, during the 9/11 Commission hearings, Clarke testified that his strong advice to the Clinton and Bush administrations to take the threat of bin Laden seriously had not been heeded sufficiently. In one embarrassing moment, former National Security Advisor Sandy Berger attempted to remove from the National Archives draft memoranda containing recommendations of Clarke that had not been acted on during the Clinton administration.

15. "Critical Infrastructure Protection," Presidential Decision Directive 63, 22 May 1998. See Sharp, *Cyberspace and the Use of Force,* pp. 201–204, for a comprehensive review of the major elements of PDD 63 and the requirements that it imposed upon the various departments of government and the private sector.

16. Sharp, *Cyberspace and the Use of Force,* pp. 205–206.

17. See chapter 5.

18. Ibid.

19. Quoted in R. Oppenheim, *International Law,* 8th ed. (London: Longmans, 1955), p. 299.

20. Ian Brownlee, "The Use of Force in Self-Defense," *Brown Year Book of International Law* (1961), p. 207.

CHAPTER ELEVEN

Attacks on Foreign Infrastructure That Pose a Threat to the United States

Computer Network Attack

The fiscal year (FY) 2000 version of the Defense Department's Unified Command Plan (UCP), signed on 29 September 1999, marked a new era in operational planning for information warfare, to include the targeting of an adversary's computer networks where necessary to protect vital U.S. or allied interests. The UCP provides planning guidance and requirements for operational commands.

Significantly, the FY 2000 version transferred responsibility for maintaining and managing the Joint Information Operations Center (JIOC), in San Antonio, Texas, to the U.S. Space Command at Petersen Air Force Base, Colorado.[1] JIOC, formerly known as the Joint Command and Control Warfare Center, provides "full spectrum" information warfare and information-operations support to commanders worldwide. In effect, JIOC supports the planning, coordination, and execution of all Defense Department information-warfare and information-operations missions, and assists in the development of related doctrine, tactics, and procedures.

Defining the Debate: The State of Information Warfare

What made the transfer of oversight of JIOC notable was the recent enhancement of its missions, in August 1999, from command and control to include operations support. The functions now required of JIOC include psychological operations, security, electronic warfare, targeting of command and control facilities, military deception, computer network defense, computer network attack (CNA), civil affairs, and public affairs.[2]

The 2000 UCP was the first to address computer network attack specifically as a planning requirement for unified commanders (that is, commanders of worldwide functional or regional command comprising substantial forces from all services).[3] This was significant because, by implication, it recognized the legality of targeting critical foreign computer infrastructure when U.S. or allied vital national interests are threatened.

The renewed emphasis on considering critical computer infrastructure as a legitimate target category arises from recent incidents where it has been threatened by government-sponsored intrusions or by individual hackers using sophisticated software. These incidents have led to the recognition that electronic or physical elimination of this threat may be necessary to protect our defense capability or ensure the continued effective operation of other critical infrastructure.

Several incidents beyond those described in chapter 10 are significant. In February 1998, two California teenagers were able to breach computer systems at eleven Air Force and Navy bases, causing a series of "denial of service" cyber-attacks and forcing defense officials to reassess the security of their networks.[4] The investigation of these incidents, code-named SOLAR SUNRISE, pales in comparison with MOONLIGHT MAZE, the investigation of an early 1999 electronic assault involving hackers based in Russia. These intruders accessed sensitive Defense Department science and technology information.[5] Computer tracing determined that MOONLIGHT MAZE attacks had originated from the Russian Academy of Science, a government organization that interacts closely with the military.[6] This raises the possibility of a future asymmetrical attack sponsored by a nation-state.

These incidents raise important issues for defense planning. How can these threats be discovered and eliminated? What is the interplay between the role of investigating agency and that of operational planner? It is clear that while the targeting of these threats may require a military component, gathering indicators of an imminent threat requires a far broader participation. It is for this reason that the United States established the National Infrastructure Protection Center (NIPC) in February 1998.[7]

NIPC serves as the government's focal point for threat assessment, warning, investigation, and response to threats or attacks against critical infrastructures. These include defense communication networks, telecommunications, energy grids, banking and finance organizations, water systems, government operations apparatus, and emergency service organizations.[8] NIPC contains an "indications and warning" arm and an operational arm. The Analysis and Warning Section provides analytical support during computer intrusion investigations and long-term analysis of vulnerability and threat trends. The Computer Investigations and Operations Section is the operational arm of NIPC. This section manages computer intrusion investigations conducted by FBI field offices throughout the country; provides subject-matter experts, equipment, and technical support to investigators in federal, state, and local government agencies involved in critical infrastructure protection; and provides an emergency response capability to help resolve cyber-incidents.[9]

Neither JIOC nor NIPC, however, possesses the capability to eliminate a cyber-threat. Only the operational assets assigned to the various unified commands within the Department of Defense possess that capability, and they may be employed only when the strict parameters of the law of armed conflict are satisfied.

Legal Constraints on Attacks on Critical Infrastructure

The legal regime available to authorize responding attacks in lawful self-defense on critical enemy infrastructure includes the UN Charter system and customary international law. The basic provision restricting the threat or use of force in international relations is Article 2, paragraph 4, of the UN Charter, addressed extensively in previous chapters. That provision states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."[10]

The underlying purpose of Article 2, paragraph 4, to regulate aggressive behavior between states is identical to that of its precursor in the Covenant of the League of Nations. Article 12 of the Covenant stated that the League members were obliged not to "resort to war."[11] This language, however, left unnoticed actions that, although hostile, could not be considered acts of war. Thus it was that Article 2, paragraph 4 replaced term "war" with "threat or use of force," to include applications of force of a lesser intensity.[12] This distinction may be all-important when, for example, a nation's commercial infrastructure is attacked and it contemplates actions in lawful self-defense that include targeting critical infrastructure of the adversary, an element of which may have been used in the initial attack.

When the UN Charter was drafted in 1945, the right of self-defense was the only stated exception, codified in Article 51, to the prohibition on the use of force. The use of the word "inherent" in the text of Article 51 suggests that self-defense is broader than the immediate Charter parameters. During the drafting of the Kellogg-Briand Treaty, for example, the United States expressed its view as follows:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.[13]

Because self-defense is an inherent right, its contours have been shaped by custom and are subject to customary interpretation. The drafters of Article 51 may not have anticipated its use in protecting states through defensive actions using technological means, but international law has long recognized the need for flexible application.[14]

When a vital U.S. national interest, such as one of the critical infrastructure systems defined in Presidential Decision Directive 63, "Critical Infrastructure Protection," is

threatened or attacked by electronic or other computer-based means, the system generating the threat may constitute a legally appropriate target for destruction or neutralization by military assets;[15] destruction may then be both necessary and proportionate, under the law of armed conflict, to eliminate the threat perceived.[16] If, however, military objectives, including computer networks supporting military requirements, are properly included within target sets, civilians and civilian objects are not.[17] Civilian objects consist of all civilian property and activities *other than those used to support or sustain the capability for armed aggression on the part of the attacker.*[18] Thus, activities normally considered civilian in character would, when conducted in support of a nation's aggression to shield an aggressor from identification, or to preclude effective and lawful response to unlawful attack, become the lawful objects of attack. The point has been made succinctly by the Defense Department general counsel in a May 1999 treatise on information operations:

> If the international community were persuaded that a particular computer attack or a pattern of such attacks should be considered to be an "armed attack," or the equivalent to an "armed attack," it would seem to follow that the victim nation would be entitled to respond in self-defense either by computer network attack or by traditional military means in order to disable the equipment and personnel that were used to mount the offending attack.[19]

Stated another way, a civilian computer system used either to conduct against critical infrastructure an attack tantamount to an armed attack or to shield an aggression from discovery becomes a valid and lawful target if the total or partial destruction, capture, or neutralization, in the circumstances at the time, offers a definite military advantage.[20]

From this examination, we see that computer networks are not per se illegal targets under traditional international law criteria. We must apply the standard law-of-armed-conflict analysis in every instance to determine whether critical computer infrastructure of an attacking state or other nonstate aggressor constitutes a valid target. In that review, as in all reviews of target lists, we must determine whether the specific computer network or other critical infrastructure system under consideration, by its nature, location, capability, purpose or use, makes an effective contribution to the military capability of the offending state and whether its destruction, capture, or neutralization offers the United States or its allies a definite military advantage.

The fact that a computer system or other critical infrastructure is a valid target does not mean in itself that it *should* be attacked, however. The political and strategic implications may suggest that although a response in kind would be legally justified, refraining from it may provide greater benefit—producing perhaps a shift in world sentiment, a movement of certain nations in terms of their allegiances, an opportunity for international bodies such as the UN to become engaged, and an opportunity to open previously closed political channels.

A final concern related to responding to attacks on computer-based critical infrastructure under traditional international law principles relates to the issue of collateral damage. While collateral damage does not have a different definition in a CNA context, additional steps may be necessary to show that reasonable precautions were taken to avoid unnecessary destruction. This arises from the fact that the effects of conventional weapons and delivery systems are more predictable and the maxim that a weapon must be targetable and not so indiscriminate that it unnecessarily endangers the civilian population of the offending state. Lawrence G. Downs, Jr., explains a related and even more important consideration for the state using digital data warfare in lawful self-defense:

> When the U.S. Army contracted a study to determine the feasibility of developing DDW [digital data warfare]–type viruses for military use, many people had misgivings that were summed up by Gary Chapman, program director of Computer Professionals for Professional Responsibility. "Unleashing this kind of thing is dangerous," he said. "Should the virus escape, the United States heads the list of vulnerable countries. Our computers are by far the most networked."[21]

From this it is clear that any weapon developed to provide CNA capability must be both predictable and capable of being armed and disarmed if it is not to threaten unduly innocent civilians in the target state *or the user state*. Downs is correct when he suggests that weaponeers should, in general, develop a detection and immunization program in parallel for all viruses they intend to use. In this way, an attack gone wrong cannot do inadvertent harm to the attacker. In short, users and developers of DDW need to be aware of risks and the absolute requirement for predictability when developing code.[22]

The Impact of International Agreements and Domestic Communications Law on CNA

Another consideration of military planners developing a cyber-defense capability must be international agreements regulating the use of space through which data used for CNA must travel. Those agreements include four principal multilateral conventions to which the United States is party: the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (known as the Outer Space Treaty);[23] the 1968 Agreement on the Rescue Astronauts, Return of Astronauts, and Return of Objects Launched in Space (the Rescue and Return Agreement);[24] the 1972 Convention on International Liability for Damages Caused by Space Objects (Liability Convention);[25] and the 1975 Convention on Registration of Objects Launched into Outer Space (Space Objects Registration Treaty).[26] The four conventions collectively reiterate principles that are so widely accepted that they are viewed as reflective of customary international law, even between nonparties. These general principles include the premises that access to space is free and open to all nations;[27] that each user of space must show due regard for the rights of others;[28] that states launching space objects are liable for any damage they may do in

space, in the air, or on land;[29] and that space activities are subject to general principles of international law.[30]

The Defense Department general counsel concluded in a 1999 assessment of international legal issues related to information operations, however, that the noninterference principle recited in these and other conventions addressing the right to use space does not apply during armed conflict:

> There appears to be a strong argument that the principle of non-interference established by these agreements is inconsistent with a state of hostilities, at least where the systems concerned are of such high military value that there is a strong military imperative for the adversary to be free to interfere with them, even to the extent of destroying the satellites in the system. As indicated in the discussion of treaty law in the introduction to this paper, the outcome of this debate may depend on the circumstances in which it first arises in practice. Nevertheless, it seems most likely that these agreements will be considered to be suspended between the belligerents for the duration of any armed conflict, at least to the extent necessary for the conduct of the conflict.[31]

Underlying this statement by the Defense Department General Counsel is the obvious principle that the right of self-defense is in no way abrogated by other international commitments entered into by a nation.

One significant convention with apparent applicability to U.S. interdiction of foreign communications infrastructure is the International Telecommunications Convention (ITC) of 1982. In Article 35, the convention prohibits interference by member states with the communications of other member states. The convention has an exception for military transmissions in Article 38, however, which arguably would authorize information operations conducted by military forces.[32] In fact, the Office of Legal Counsel in the U.S. Department Justice ruled in July 1994, with respect to planned broadcasts into Haiti concerning boat operations, that the ITC did not prohibit these broadcasts.[33]

An older convention that must be considered when discussing cyber operations is the 1907 Hague Convention on Neutrality on Land, which could impact satellite relay operations.[34] This convention does not apply to systems that generate information, but it does apply to relay facilities and requires that those of other states not be disrupted. While Articles 8 and 9 contemplate only telegraph and telephone cable links, they would arguably apply to satellite links as well. Since most computer-based systems, and certainly all that control critical infrastructure, generate information as well as relay that information, the prohibition against disruption would likely not apply.

Another potential concern is raised by international consortia that lease satellite nodes for commercial communications. These organizations include INTELSAT, INMARSAT, ARABSAT, EUTELSAT, and EUMETSAT. The contracts signed by users (those of the respective providers are nearly identical) state that the system must be used exclusively for peaceful purposes.[35] The United States has leased one or more nodes from at least

one of these providers in the past, but it retains separate satellite capabilities should it need to defend itself through digital data warfare.

Finally, domestic communications law must also be considered. The United States Congress passed 47 USC 502 to implement the ITC requirement that member states enact legislation to prohibit interference with the communications of other members.[36] During Haiti operations in 1993, Office of Legal Counsel to the Department of Justice issued, as it would in July 1994, a written opinion to the effect that Section 502 does not apply to military actions of the United States executing the instructions of the president.[37] Thus, domestic law will not preclude the appropriate use of CNA by the United States where it is engaged in an armed conflict or where necessity and proportionality dictate in circumstances short of war.

Analytical Review and Conclusions

From this examination, it is clear that the method of computer network attack first authorized under the FY 2000 Unified Command Plan, whether it be digital data, kinetic, or electronic, does not change the legal analysis. Computer networks critical to the functioning of enemy infrastructure systems can be, under proper circumstances, valid military targets under traditional international law principles, and CNA does not violate applicable international conventions. This follows because military and dual-use infrastructure are legitimate targets at all times during armed conflict as long as they meet the two-pronged test that they make an effective contribution to the adversary's military effort and that their destruction would offer a definite military advantage.

The analysis under the law of armed conflict that must be followed to determine whether a military advantage is to be expected requires examination of the nature, location, purpose, or use of the offending network and whether it is used to threaten U.S. or allied interests. Similarly, these same computer networks may constitute a lawful target in self-defense *prior* to armed conflict if their neutralization or elimination is a necessary and proportional response to an attack the planning of which has been completed and execution ordered. A corollary to this rule is that a particular target's being valid in a military sense does not mean it must be attacked. A nation must always analyze any potential target in light of the political, tactical, and strategic implications.

In the target analysis required for CNA, just as for more traditional target sets, reasonable precautions must be taken to discriminate military targets from civilian networks. This will be most difficult with regard to those dual-use systems—such as commercial telephone exchanges, which can serve both civilian and military purposes. It is here that the political implications described above must be most carefully weighed. However, from our analysis, it is clear that networks serving commercial infrastructure, government

agencies, and banking and financial institutions can constitute legitimate targets if they contribute to the enemy's war-sustaining capability in such a way that their destruction would constitute a definite military advantage. Conversely, attacks on computer networks serving infrastructure that is designed solely to support the civilian population, such as civilian food distribution and civilian water supply, would be prohibited.

International communications law likewise contains no direct or specific prohibition against the conduct of CNA or other information operations by military forces during armed conflict or in response to aggression, a fact that underlines the superior position enjoyed by self-defense in the hierarchy of a nation's sovereign rights. Moreover, the practice of nations as established in World War II provides persuasive evidence that telecommunications treaties are to be regarded as suspended among belligerents during international armed conflict. Similarly, domestic communications laws, and specifically 47 USC 502, do not prohibit properly authorized military information operations. It is clear, then, that CNA, as authorized by the president in the FY 2000 Unified Command Plan and implemented through the JIOC and the NIPC, can be employed in a manner consistent with domestic law as well as with customary and conventional international law principles.

Finally, when CNA is lawfully employed in response to asymmetric attacks on our critical infrastructure, we must be aware that the international system will tend to ignore the original aggression (the extent of which we are likely to mask, in order to shield our resulting vulnerability), while focusing on the more visible defensive response. If, however, we are to discourage the low-intensity portion of the aggressive attack spectrum, including cyber-terrorism, a full range of computer network defense and deterrence measures against cyber attack is essential.

The international legal system can effectively contribute to such deterrence if, but only if, we make a clear distinction between the treatment of cyber-aggression, on the one hand, and computer-generated defensive responses, which can and must include CNA, on the other. That is, we must strengthen the international legal system to condemn strongly all acts of aggression, whether a cyber-attack such as employed by the Russians in MOONLIGHT MAZE or the violent acts of war seen in the targeting of the guided-missile destroyer USS *Cole* in Aden Harbor and in the 1998 attacks on our embassies in Nairobi and Dar es Salaam. Just as importantly, the system must be strengthened to support strongly and embrace legally defensive computer-generated digital-data-warfare responses to such aggression. Under such a strengthened system, CNA will provide an important new arrow in our quiver of available responses to aggression under the law of armed conflict.

Notes

1. U.S. Space Command News Release 20–99, October 1, 1999, p. 1.
2. Ibid.
3. Unclassified paragraph 22(a)(12) of the FY 2000 UCP provided that USSpaceCom's responsibilities include: "In coordination with the Joint Staff and appropriate CinCs, serving as the military lead for computer network defense (CND) and, effective 1 October 2000, computer network attack (CNA), to include advocating the CND and CNA requirements of all CinCs, conducting CND and CNA operations, planning and developing national requirements for CND and CNA, and supporting other CinC for CND and CNA."
4. See *Defense Information and Electronics Report* [DIER] (Washington, D.C.: U.S. Defense Dept., 22 October 1999), p. 1.
5. DIER (Washington, D.C.: 8 October 1999), p. 1.
6. Ibid.
7. NIPC is located in the Hoover Building in Washington, D.C. NIPC brings together representatives from the FBI, Defense Department, other government agencies, State and local governments, and the private sector.
8. PDD 63, "Critical Infrastructure Protection," establishes these categories as critical infrastructure, the protection of which constitutes defense of vital national interests.
9. NIPC works closely with USSpaceCom's JIOC and with the Critical Infrastructure Coordination Group, which answers to the National Coordinator for Infrastructure Protection.
10. UN Charter Art. 2, para. 4. The Charter is codified at 59 Stat. 1031; TS 993; 3 Bevans 1153. Signed at San Francisco 26 June 1945. Reprinted in U.S. State Department Publication 2368, pp. 1–20.
11. See Covenant of the League of Nations, Art. 12.
12. Myres McDougal and Florentine Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn.: Yale Univ. Press, 1961), pp. 142–43.
13. Marjorie Whiteman, *Digest of International Law* (Washington, D.C.: U.S. Government Printing Office, 1965), vol. 5, sec. 25, pp. 971–72.
14. See George Shultz, address before the Low-Intensity Warfare Conference, National Defense University, Washington, D.C., 15 January 1986.
15. See discussion in chapter 10.
16. The law of targeting is a subset of the Law of Armed Conflict; the dual requirements of necessity and proportionality, the twin pillars of that body of law, are equally applicable to target selection and approval.
17. See Art. 51(1), Protocol I Additional to the 1949 Geneva Conventions (1977), 16 ILM 1391, in Dietrich Schindler and Jirí Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Leiden, Neth.: Sijthoff; and Geneva: Henry Dunant Institute, 1973). Art. 51(1), defines civilian objects as "all objects which are not military objectives as defined in paragraph 2."
18. Ibid.
19. U.S. Defense Dept. General Counsel, "An Assessment of International Legal Issues in Information Operations," 19 May 1999, p. 22.
20. See Protocol I, Art. 52(2).
21. Lawrence G. Downs, Jr., *Digital Data Warfare: Using Malicious Computer Code as a Weapon* (Washington, D.C.: National Defense Univ., Institute for Strategic Studies, 1995), p. 58. Superscript and footnote omitted from the quotation.
22. Ibid.
23. 18 UST 2411, TIAS 5433, 480 UNTS 43 (1967).
24. 19 UST 7570, TIAS 6599, 672 UNTS 119 (1968).
25. 24 UST 2389, TIAS 7762 (1972).
26. 28 UST 695, TIAS 8480, 1023 UNTS 15 (1975).
27. Outer Space Treaty, Art. 1.
28. Outer Space Treaty, Art. IX.
29. The Liability Convention, in Articles Ia, II, III, and VI, elaborates the general principle of international liability for damage set forth in Article VII of the Outer Space Treaty. Articles IV and V of the Liability Convention address joint and several liability.
30. See U.S. Navy Dept., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (Washington, D.C.: 1995), p. 2-38.

31. General Counsel, "An Assessment," p. 22.

32. The requirements were stated previously in the 1973 International Telecommunications Convention, Malaga-Torremolinos, 28 UST 2495, TIAS 8572. The Malaga-Torremolinos Convention was replaced by the 1982 International Telecommunications Convention, Nairobi, 6 November 1982, 32 UST 3821; TIAS 9920 (entered into force for the United States 10 January 1986).

33. See discussion in General Counsel, "An Assessment," pp. 36–37.

34. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at the Hague, 18 October 1907, 36 *U.S. Statutes at Large* 2310–31; 1 BEVANS 654–68; *American Journal of International Law* 2 (1908), supp., pp. 117–27.

35. Where this provision is violated, however, and a satellite node is used for aggression, the inviolability of the system from attack would arguably cease.

36. 47 USC 502 provides: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act [47 USC 151, et seq.], or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

37. See discussion in Defense Department General Counsel, "An Assessment," p. 38.

Observations and Conclusions

This review of post–World War II conflict resolution has examined the differences between the interpretive approaches taken by states in their respective claims and counterclaims during international crises. The great importance of examining the facts and rationale of post–World War II coercion resides in the significance that nations place in the role of law as a necessary element in gaining political support, both national and international, for their policies. As is evident, nation-states, including the United States, have adopted and espoused customary and conventional international principles that served their desired policy aims. The international legal mechanisms developed to memorialize and preserve these policy goals have been developed historically through multilateral efforts to establish binding international regimes, such as the Hague and Geneva Conventions, the initiatives leading to the League of Nations after World War I, and the United Nations Charter.

The fulcrum of this effort has been the contributions to coercion control and collective security of the Charter of the United Nations. Through the establishment of an effective Security Council, collective security could, for the first time, be meaningfully substituted for unilateral action. As part of this process, the establishment of an International Court of Justice, to which disputes between states could be referred, is equally significant. Despite the inadequacies in Charter operation reflected in the case studies in the preceding chapters, the advance in conflict management represented in the United Nations system is significant.

Critical to this study has been the explication of the right of self-defense. The right of self-defense was codified in Article 51 of the Charter. Although the drafters of that article may not have anticipated its use in protecting states from the effects of such terrorist violence as the United States experienced in September 2001, international law has always recognized the need for flexible application. Important in this flexibility is the recognition of the right to counter the imminent threat of unlawful coercion as well as actual attack. This comprehensive conception of permissible or defensive coercion, honoring

appropriate response to threats of an imminent nature, *is merely reflective of customary international law.* It is precisely this anticipatory element of lawful self-defense that has proven critical to an effective policy to counter terrorist violence under the UN Charter.

Customary international law has long recognized that no requirement exists for states to "absorb the first hit." The doctrine of anticipatory or preemptive self-defense, as developed historically, is applicable only where there is a clear and imminent danger of attack. The means used for preemptive response must be strictly limited to that required for the elimination of the danger, and they must be reasonably proportional to that objective. The authorities now available to American leaders, at a time when terrorist violence has already proven more deadly than major conflict, were developed in the course of the historical incidents addressed. As we have seen, the threat today has been recharacterized in terms of deliberate aggression against the United States by nontraditional actors willing to take suicidal risks to inflict premeditated, brutal savagery on innocent civilians in a manner designed less to force regime change directly as to induce policy changes.

The commitment to national security, then, must address threats represented by social and religious systems that foster or at least condone aggressive responses to differing religious and social values. This has never been more true than in Afghanistan and in Iraq, following Operation IRAQI FREEDOM. Security means more than simply protecting the land on which we live. It embraces a comprehensive understanding of the appropriate response to human aspirations for improved conditions of life, for equality of opportunity, and for justice and freedom. Where these interests are thwarted for peoples or groups by armed protagonists representing narrow, restrictive interests, our response must be one measured by the effective institutionalization of order.

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