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**KEYNOTE ADDRESS: COLLECTIVE SECURITY AND THE  
UNITED NATIONS, UNIVERSITY OF DENVER COLLEGE OF LAW,  
FEBRUARY 28, 2004**

U.S. REP. MARK UDALL\*

Thank you. I'm so pleased to be part of today's important program. I'd like to thank the University of Denver and Ved Nanda for inviting me to join you this morning. I'm especially honored to be delivering the keynote address this morning. I hope my comments will contribute to your broader discussion on the topic of collective security and the United Nations.

The last time I spoke here at the University of Denver on foreign affairs was nearly four years ago—and it feels as though it was another age entirely. So much has happened to change our perceptions of the world. Instead of living in hope—working together with countries around the globe to shape the post-Cold War “new world order”—we are living in fear and are faced with seemingly stark choices—to be multilateral or unilateral, preemptive or reactive, on the side of evil or on the side of good.

I don't mean to imply that the role of the United States in the “new world order” was ever particularly clear. We were not able to reach a consensus on how to define the new threats to security and what constitutes our “national interest.” For decades our resistance to Communism had been the organizing principle of American political life and foreign policy. But once the “evil empire” collapsed, with it collapsed the cold war paradigm.

Then came the collapse of the Twin Towers—at a time when this country was debating its role in the post-Cold War world. After 9-11, we were given a new organizing principle—fighting terrorism. The impact of the terrorist attacks on our nation's psyche changed our entire worldview overnight. As President Bush so memorably put it, “you're either with us or you're against us.”<sup>1</sup>

The historical connotations of that phrase are alarming. Former National Security Advisor Zbigniew Brzezinski pointed out in a recent speech that “he who is not with us is against us” was popularized by Lenin when he attacked the Social Democrats for being anti-Bolshevik.<sup>2</sup>

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\* U.S. House of Representatives (D-CO-2); member of the House Armed Services Committee, the House Science Committee, and the House Resources Committee; ranking member on the Committee on Science Space and Aeronautics Subcommittee; co-chair of the House Renewable Energy and Energy Efficiency Caucus; member of the NATO Parliamentary Assembly.

1. See Michael J. Jordan, *'With or Against Us' War Irks Many UN Nations*, CHRISTIAN SCI. MONITOR, Nov. 14, 2001, at 7.

2. See, e.g., Zbigniew Brzezinski, *Another American Casualty: Credibility*, WASH. POST, Nov. 9, 2003, at B1.

Unfortunately, it appears that decision makers in the Bush Administration see this as the new basis for our policy. They see the world through the prism of the "war on terrorism," which is understandable after 9-11, but we need to consider how this new organizing principle constricts our foreign policy vision and potentially blinds us to realities on the ground. Bumper sticker slogans are no substitute for careful policy.

In the run-up to the U.S. invasion of Iraq, this "blindness" caused the Bush Administration to rush the diplomatic process at the United Nations, and dismiss a strategy of "coercive inspections"<sup>3</sup> that might have improved our intelligence about WMD and served as a foundation for a stronger coalition in the region.

The "blindness" of Pentagon leaders caused them to exaggerate intelligence claims<sup>4</sup> and mangle the planning for the post-war occupation and rebuilding of Iraq—and ignore in-depth analyses compiled by State Department experts that would have assisted them in this task.<sup>5</sup>

After 9-11, President Bush had no choice but to take an aggressive stance against terrorism and to reorganize his thinking and the thinking of his Administration on how to counter its threat. The "democratization of technology"<sup>6</sup> has made tools of terror readily available to people around the world. It is clear that we can no longer focus on states as the main sponsors of terrorism.

And waiting for these increasingly dangerous threats to materialize is much riskier than it used to be. I believe there is a growing awareness on both sides of the aisle in Congress that excessive caution, passivity, and diplomatic paralysis are not viable options to any threat—imminent or otherwise.

Yet it would not have been excessively cautious or passive for the Bush Administration to have waited a few more months in the spring and summer of 2003 to attempt to gain broader international backing for the war against Saddam Hussein's regime. The "broad coalition"<sup>7</sup> President Bush fashioned to carry out our war in Iraq was no substitute for what could have been a United Nations mandate.

And the fact is, by going in without support and without a post-war plan, we made long-term success much more difficult to achieve.

I think we can all agree that winning the war isn't enough unless we can also win the peace. One of the reasons I voted against the resolution to go to war—and even went through the effort of drafting my own resolution<sup>8</sup>—was my concern that the Bush Administration had no plans for managing post-war Iraq. In the debate

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3. See, e.g., *The Case for Coercive Inspections*, Now with Bill Moyers, Mar. 14, 2003, at <http://www.pbs.org/now/politics/inspections.html>.

4. David Johnston, *Policy, Politics And Pressure*, N.Y. TIMES, July 9, 2004, at A1.

5. See Walter Pincus, *Spy Agencies Warned of Iraq Resistance*, Wash. Post, Sept. 9, 2003, at A1.

6. See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (Anchor Books 2000).

7. See Secretary of Defense Donald Rumsfeld, U.K. Defense Minister See Broad Coalition on Iraq, Press Conference (Feb. 12, 2003) (transcript available at <http://israel.usembassy.gov/publish/press/2003/february/021305.html>).

8. Preliminary Authorization for the Use of Force Against Iraq Resolution of 2002, H.R.J. Res. 118, 107th Cong. (2002).

before the war, many of us argued that while America can go it alone, and should go it alone when we believe an attack is imminent, Iraq presented no such imminent threat. We said that we needed the United Nations with us—not so much to win the war and topple Saddam Hussein, but to secure the peace and take responsibility for the costly and difficult nation-building to follow. We feared that a preemptive, go-it-alone attack could seriously compromise our efforts to combat global terrorism, particularly in the Islamic world.

But these concerns were largely obscured by the “with us or against us” rallying cry. After 9-11 the word “multilateral” came to be associated with weakness, vacillation, lack of conviction, and courage. In the minds of the unilateralists, to defend one’s country is to act—not to “seek a permission slip to defend the security of our country,” as President Bush pointed out in this year’s State of the Union address.<sup>9</sup>

But it shouldn’t have to be a choice. Few thoughtful observers of foreign affairs advocate using exclusively multilateral or unilateral approaches. Yet the “new” unilateralists have done just that, arguing that the nature of today’s threat is so dire that we need to extricate ourselves from constraining multilateral institutions.<sup>10</sup> Defense Secretary Rumsfeld said that issues should determine the coalition, not vice versa.<sup>11</sup> I couldn’t disagree more.

Multilateral institutions like the United Nations provide the framework for enduring alliances and ties based on common values and interests. Working within these institutions, countries can sustain and build on key relationships even as they debate and disagree on specific policies.

Multilateral institutions like the United Nations legitimize our power. Other countries are more likely to help us if we work with them through multilateral organizations. But if they believe we only call on these institutions for help when it suits us, they may be less willing to help—either as part of the institution or in an American-led coalition.

We can’t conquer terrorism with military power alone. I agree with Thomas Friedman and others who have said that to get at the root of terrorism, we need to win the war of ideas in the Muslim world.<sup>12</sup> Terrorists everywhere believe that hope is in short supply and that the “haves” are denying them opportunities. And there are fewer opportunities to be found, with the youth population exploding in developing countries—which in turn increases the vulnerability of these countries to instability and civil conflict.

There are other threats that feed into terrorism and whose conquest could take

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9. President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html>.

10. Joseph S. Nye, *U.S. Power and Strategy After Iraq*, FOREIGN AFF. 60 (2003).

11. See Joseph S. Nye, Jr., *Lonely at the Top: America’s Popularity Abroad Continues to Slide. When Will the Bush Administration Realize That It Matters?*, BOSTON GLOBE, Mar. 28, 2004, at C1.

12. Thomas Friedman, *Brave, Young and Muslim*, N.Y. TIMES, Mar. 3, 2005, at 31; see also Robert Spencer, *Losing the War of Ideas*, FrontPageMagazine.com, Feb. 5, 2004, at <http://www.frontpagemagazine.com/Articles/Printable/asp?ID=12037>.

us a long way toward turning the tide. Extreme poverty, income disparity, environmental degradation, and infectious disease—these are all threats that make the ground more fertile for terrorist roots to grow. As U.N. Secretary General Kofi Annan noted in an important speech last year: “We now see, with chilling clarity, that a world where many millions of people endure brutal oppression and extreme misery will never be fully secure, even for its most privileged inhabitants.”<sup>13</sup>

Whether in peacekeeping, distributing humanitarian aid, monitoring human rights, or designing development assistance strategies, managing transnational problems requires multilateral and multi-dimensional solutions. Precisely because there isn't a military solution to every problem, more than ever we need institutions like the United Nations to help us navigate through these difficult waters.

Of course, the United Nations is not perfect. There is widespread agreement on the need for institutional reform to increase its effectiveness and relevance to our post-9-11 world.

One positive outcome of U.S. action in Iraq was that it hastened an overdue debate on the future role of the United Nations and on the U.S.-UN relationship.

In the run-up to the war, critics disparaged the United Nations' institutional weaknesses, the United Nations' failed role in past crises in Somalia, Bosnia, Rwanda, and its inability to deal with Saddam Hussein's obstructionism.<sup>14</sup> Bush adviser Richard Perle perhaps put it most bluntly when he stated that “coalitions of the willing . . . are, by default, the best hope for a [new world] order, and the true alternative to the anarchy of the abject failure of the United Nations.”<sup>15</sup>

But multilateralists and U.N. supporters argued in turn that for all its flaws, the United Nations remains an important source of legitimacy in the world. Among its achievements, the U.N. Security Council can boast of numerous peacekeeping operations that helped to end conflict, of nation-building activities that have helped to rebuild countries such as Afghanistan and Cambodia that were devastated by war, of economic sanctions that contributed to Libya's decision to account for the bombing of Pan Am 103, of working with the United States and other U.N. members to liberate Kuwait.<sup>16</sup>

And there are also the successes of the more than two dozen organizations that make up the U.N. system, such as the World Health Organization, the World Food Programme, the U.N. High Commissioner for Refugees, and the Joint U.N.

13. Secretary General Kofi Annan, Secretary-General's Address to the General Assembly, New York, (Sept. 23, 2003), available at <http://www.un.org/News/press/docs/2003/sg23sept.htm>.

14. See, e.g., Human Rights Watch, Kosovo: Failure of NATO, U.N. to Protect Minorities (July 26, 2004), available at [http://hrw.org/english/docs/2004/07/27/serbia9136\\_txt.htm](http://hrw.org/english/docs/2004/07/27/serbia9136_txt.htm).

15. Richard Perle, *Coalitions of the Willing are Our Best Hope*, NAT'L POST (CAN.), Mar. 21, 2003, available at [http://www.aei.org/include/news\\_print.asp?newsID=16666&url=http://www.aei.org/news/newsID.16666/news\\_detail.asp](http://www.aei.org/include/news_print.asp?newsID=16666&url=http://www.aei.org/news/newsID.16666/news_detail.asp).

16. E.g., S.C. Res. 686, U.N. SCOR, 2978th mtg., U.N. Doc. S/RES/0686 (1991) (noting the multilateral cooperation in the 1991 Iraq-Kuwait conflict).

Programme on HIV/AIDS. Amazingly, the United Nations performs its core functions on a budget of \$1.25 billion<sup>17</sup>—about what the Pentagon spends every 32 hours.<sup>18</sup>

No matter what its detractors say, it is clear that the United Nations is becoming an indispensable force in post-war Iraq. The Pentagon hawks still chafe at the thought of giving the United Nations too much control, but others concede that we need the United Nations' legitimacy to help extricate us from what some are beginning to call a quagmire.<sup>19</sup>

For those of us who remember the 1970s, the word "quagmire" is a charged term. But I can understand why some are starting to apply it in Iraq.

Those observers point out that the violence against American and other coalition forces, and against Iraqis themselves, continues unabated and threatens stability.<sup>20</sup> Unemployment and disillusionment are growing. Iraq's ethnic and religious groups have become more entrenched in their positions regarding an interim constitution and the transfer of power and more inclined to reject American proposals that they don't believe will adequately protect their groups' political viability.<sup>21</sup> Three critical deadlines in the Bush Administration's November "roadmap" to Iraq's sovereignty have not been or will not be met—including this weekend's deadline for an interim constitution, regional caucuses to choose a transitional assembly, and a formal agreement on maintaining U.S. troops in Iraq. And nothing can move forward unless the security situation improves.

So the Bush mantra that you're with us or you're against us—embodied in his approach to Iraq—has become not an organizing principle, but a *disorganizing* principle. It is this approach that has contributed to the very troublesome situation in Iraq. So I find it ironic that President Bush is now seeking the United Nations' help in meeting the June 30<sup>th</sup> deadline for the U.S. transfer of power to an Iraqi caretaker government.<sup>22</sup>

But I am also encouraged that the Administration is finally turning to the United Nations for assistance. In order for the June 30<sup>th</sup> deadline to have any chance of sticking, the president knows he needs the United Nations' help to forge a consensus on a path forward. The recent U.N. fact-finding report has bought some time for the Bush Administration in its recommendation that elections be pushed back to year's end at the earliest.<sup>23</sup> But how to transfer power on June 30<sup>th</sup>

17. See e.g., William M. Evan, *To Help the UN, A Tax on Trade*, Global Policy Forum, July 6, 1997, at <http://www.globalpolicy.org/finance/docs/tradetax.htm>.

18. See e.g., News Release, Department of Defense, Fiscal 2005 Department of Defense Budget Release (Feb. 2, 2004) (available at [http://www.defenselink.mil/releases/2004/nr20040202-0301.html](http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040202-0301.html)).

19. See Jim Spencer, *U.S. Troops, Delusions Dying in Iraq Quagmire*, DENVER POST, Aug. 31, 2003, at A29.

20. *Id.*

21. See Juan Cole, *Iraq Elections a Disaster in the Making*, antiwar.com, Sept. 25, 2004, at <http://www.antiwar.com/cole/?articleid=3647> (noting the heightened pre-election tension in Iraq).

22. Matthew Cooper, *Bush Beats His Iraq Handover Deadline*, TIME, June 28, 2004, at 64.

23. See Susannah Price, *UN Cautious Over Iraq Elections*, BBC New, Feb. 23, 2004, at

remains the key issue. Unless Iraq's Shiites, Sunnis, and Kurds can agree on a method for choosing the interim government, internal tensions could rise.

A critical test of the Bush Administration's capacity for multilateral engagement will be in the coming debate on a U.N. Security Council resolution spelling out the United Nations' new role in Iraq. A resolution agreed to by the United States and by governments that opposed the war would be a strong international endorsement of a path forward and could help convince Iraq's various groups to commit to that same course.

If we can work with the United Nations in Iraq, just think of what else is possible in other dangerous parts of the world. The Bush Administration's recent diplomatic engagement<sup>24</sup> on problems of proliferation in Iran, Libya, and North Korea is encouraging. We can hope that the president will work closely with the United Nations and other countries as it continues down these diplomatic roads.

To sum up, I believe we need to return to the fundamentals of American foreign policy, based on moderation and bipartisan cooperation, an appreciation for the importance of our alliances, and an understanding of the complexity of the human condition.

Ultimately the United States alone must decide how to protect America's vital interests. But I am convinced it is in our best interest to preserve and strengthen our decades-old leadership role in core international alliances.

America is strong not only because of our military superiority, but also because of our economic and political leadership, our values of democracy, and our moral strength in the world. Our power is unmatched—but the challenge we face now is whether we use it in ways that divide us from those we would lead or in ways that will advance the greater goal of peace and security—including security against terrorism—for all.

Franklin Roosevelt said in the year of his death that "we must live as men, and not as ostriches, nor as dogs in the manger. We have learned to be citizens of the world, members of the human community."<sup>25</sup> This notion that security cannot be achieved in isolation was embodied in the U.N. Charter.<sup>26</sup> And today, more than ever, we need to realize that the security of one state and its citizens depends on the security of others.

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[http://news.bbc.co.uk/1/hi/world/middle\\_east/3515073.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3515073.stm).

24. E.g., Patrick E. Tyler & James Risen, *Secret Diplomacy Won Libyan Pledge on Arms*, N.Y. TIMES, Dec. 21, 2003, at 1.

25. Bonnie Goodman, *How Have Wartime Inaugurations Been Handled in the Past?*, History News Network, Jan. 17, 2005, at <http://hnn.us/articles/printfriendly/9642.html> (quoting President Roosevelt).

26. See, e.g., U.N. CHARTER, preamble ("to practice tolerance and live together in peace with one another as good neighbours") (emphasis added).

# PREEMPTIVE AND PREVENTIVE USE OF FORCE, COLLECTIVE SECURITY, AND HUMAN SECURITY

VED P. NANDA\*

## I.

Legal norms on the use of force remain imprecise. It is axiomatic that the international community is not yet ready to accept strict constraints on the use of force. After all, until recently, war was a legitimate instrument of national policy, and hence states routinely settled international disputes by military means. Devastation caused by the two world wars, however, resulted in a broad consensus on the need for legitimizing the use of force under certain circumstances and for a more precise formulation of the criteria by which to judge the validity of military action. Consequently, it was deemed necessary to establish institutions, norms, and procedures to accomplish these goals. The main instrument was the U.N. Charter, especially its articles 2(4), 2(7), 51, and Chapter VII, which embody the pertinent norms, and the structure and mandate of the U.N. Security Council under the Charter with its primary responsibility to maintain international peace and security. The collective security concept was the touchstone of the new emerging world order.

This edifice created after World War II by the founders of the United Nations was rudely shaken after the onslaught of the Cold War. However, after the collapse of the Soviet Union and the fall of the Berlin Wall, there was renewed hope that perhaps under the changed circumstances collective security could become a reality, and that meaningful and principled constraints on the use of force might become acceptable in state practice. The hope has not been realized, even though under U.N. authorization the first Gulf War brought together a coalition of forces to compel the aggressor state Iraq to retreat from Kuwait. In a similar vein, U.N. and regional bodies have used collective intervention, *inter alia*,—in Bosnia, Haiti, Kosovo, and Afghanistan, in furtherance of the twin Charter objectives—for the maintenance of international peace and security and protection of human rights. For in numerous intrastate conflicts massive violations of human rights have often occurred without effective U.N. action. Rwanda, Liberia, Sierra Leone, Ivory Coast, the Congo, and now Darfur, are prime examples. And in March 2003, in the absence of a Security Council resolution, a U.S.-led coalition invaded Iraq.

It was in the light of these events that U.N. Secretary-General Kofi Annan addressed the General Assembly on September 23, 2003, stating that the United Nations had come “to a fork in the road.”<sup>1</sup> He said that some states are now

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1. Secretary-General, Address to the General Assembly, New York (Sept. 23, 2003), *available at*



challenging the established U.N. Charter system of collective security, under which states address threats to the peace "through containment and deterrence." Beyond this prescription and states' reliance on Article 51, which acknowledges the inherent right of states to use force in individual and collective self-defense, there is the need for "the unique legitimacy provided by the United Nations when states [address] the issue of broader threats to international peace and security."<sup>2</sup> Their challenge, he said, was based on the argument that since they could face an "armed attack" with weapons of mass destruction without warning or from a clandestine group, they "have the right and obligation to use force pre-emptively, even on the territory of other States and even while weapons systems that might be used to attack them are still being developed," so that they need not wait until the Security Council has acted, thus reserving the right to act unilaterally or in ad hoc coalitions.<sup>3</sup>

The major challenge, of course, came from the United States. Prior to the U.S.-led invasion of Iraq, President George W. Bush had clearly stated the U.S. resolve to take preemptive and even preventive action, if necessary. In his June 2002 address at the U.S. Military Academy he stated what eventually came to be known as the "Bush doctrine." He said:

If we wait for threats to fully materialize, we will have waited too long. . . . In the world we have entered, the only path to safety is the path of action. And this nation will act. . . . And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.<sup>4</sup>

President Bush used the term "preemptive," but the essence of the address was that the United States would be ready to take preventive action, if necessary. This message, using both the terms "preemption" and "prevention," was explicitly delivered subsequently in the National Security Strategy of the United States of America, unveiled in September 2002. The pertinent statement is:

The United States has long maintained the option of prevention actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>5</sup>

The Secretary-General appointed a high level panel, comprising a sixteen-member team of eminent people, to respond the formidable challenges to peace

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<http://www.un.org/apps/sg/printsgstats.asp?nid=517> [hereinafter Secretary-General's 2003 address].

2. *Id.*

3. *Id.*

4. George W. Bush, Graduation Speech at the 2002 Graduation Exercise of the U.S. Military Academy (June 1, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/06/print/20020601-3.html#>.

5. National Security Council, *The National Security Strategy of the United States of America*, Sept. 2002, *at* <http://www.whitehouse.gov/nsc/print/nssall.html>.

and security caused by first, the “hard” and “real” threats, such as terrorism and weapons of mass destruction; second, states’ claim to use force preemptively and preventively; and third, the inability of the international community to take effective action even in the face of severe and persistent violations of human rights.<sup>6</sup> He charged them to explore whether radical changes are warranted.

A year later, in the fall of 2004, the sixteen-member High-level Panel on Threats, Challenges and Change presented its report<sup>7</sup> with recommendations to strengthen collective security. The High-level Panel report responded to the controversy caused by the U.S. invasion of Iraq and the states’ differing views on the Security Council’s role.<sup>8</sup> In its view, “the United States decision to bring the question of force to the Security Council reaffirmed not just the relevance but the centrality of the Charter of the United Nations.”<sup>9</sup>

The Panel concluded that rewriting or reinterpreting of Article 51 was not warranted, that Chapter VII fully empowers the Security Council to effectively deal with every kind of threat that states may confront, and that the “task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.”<sup>10</sup> The report explained that “[t]he principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing . . . .”<sup>11</sup> It enumerated five basic criteria of legitimacy for the Security Council to address in its decision on whether to authorize or endorse the use of military force: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.<sup>12</sup>

After receiving the Panel’s study, the Secretary-General deliberated on its recommendations on the use of force and, in his March 2005 Report to the General Assembly<sup>13</sup> he accepted those recommendations. Recognizing the disagreement among states on whether they have the right to use military force preemptively in order to defend themselves against imminent threats, whether they have the right to use it preemptively against latent or non-imminent threats, and whether they have the right or even the obligation “to use it protectively to rescue the citizens of other States from genocide or comparable crimes,”<sup>14</sup> he called for a consensus on “when and how force can be used to defend international peace and security.”<sup>15</sup>

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6. Secretary-General’s 2003 address, *supra* note 1.

7. *Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004) [hereinafter *Our Shared Responsibility*].

8. *Id.* para. 83.

9. *Id.*

10. *Id.* at 61.

11. *Id.* para. 200.

12. *Id.* para. 207.

13. *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. GAOR, 59th Sess., Agenda Items 45 and 55, U.N. Doc. A/59/2005 (2005).

14. *Id.* para. 122.

15. *Id.*

He reiterated that U.N. Charter Article 51, on self-defense, fully covers the issue of imminent attacks and threats, as well as those that might have already happened. However, he added that the Security Council is fully authorized "to use military force, including preventively, to preserve international peace and security" if threats are not imminent but latent.<sup>16</sup> And he rhetorically asked whether genocide, ethnic cleansing, and crimes against humanity are not also threats to international peace and security, a response to which is the potential Security Council action to protect against such acts under Chapter VII. Annan's unqualified response was:

The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.<sup>17</sup>

He recommended for the Security Council to adopt a resolution incorporating these principles and expressing an intention to be guided by them in its decision authorizing or mandating the use of force.<sup>18</sup>

## II.

Over the years, the concept of security—traditionally viewed as state security—has expanded to include human security as well as state security. As the Commission on Human Security articulated in 2003, the international community "urgently needs a new paradigm of security."<sup>19</sup> The reason given by the Commission is that:

[T]he security debate has changed dramatically since the inception of state security advocated in the 17th century. According to that traditional idea, the state would monopolize the rights and means to protect its citizens. . . . But in the 21st century, both the challenges to security and its protectors have become more complex. The state remains the fundamental purveyor of security. Yet it often fails to fulfill its security obligations—and at times has even become a source of threat to its own people. That is why attention must now shift from the security of the state to the security of the people—to human security.<sup>20</sup>

The Commission recommended the protection and empowerment of people as the foundations of the necessary framework to realize human security.<sup>21</sup> For

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16. *Id.* para. 125.

17. *Id.* para. 126.

18. *Id.*

19. COMMISSION ON HUMAN SECURITY, HUMAN SECURITY NOW 2 (2003) [hereinafter HUMAN SECURITY NOW] (Sadako Ogata, former UN High Commissioner for Refugees, and Amritya Sen, Nobel Laureate in economics, co-chaired the independent Commission on Human Security on the initiative of the Government of Japan.).

20. *Id.*

21. *Id.* at 10.

protection, the Commission said that people's "basic rights and freedoms must be upheld," which requires the development of national and international norms, processes, and institutions to ward off major threats.<sup>22</sup> Subsequently commenting on this element of the framework, Co-chair Sadako Ogata noted that it "implies a 'top-down' approach, such as establishing the rule of law, institutional accountability and transparency, and democratic governance structures. States have the primary responsibility to implement such a protective infrastructure."<sup>23</sup> She elaborated on the importance of empowerment, stating that it "emphasizes people as actors and participants in defining and implementing their vital freedoms. This implies a 'bottom-up' approach. People protected can exercise choices and people empowered can make better choices and actively prevent or mitigate the impact of threats and insecurities."<sup>24</sup>

Definitions of human security vary. But there is a common theme—that human security enhances human rights and facilitates human development. Secretary-General Kofi Annan recognizes a growing consensus on no longer narrowly defining collective security as the absence of armed conflict, stating that in its broadest sense, human security "encompasses human rights, good governance, access to education and health care, and ensuring that each individual has opportunities and choices to fulfill his or her potential."<sup>25</sup> The Commission on Human Security's definition is:

[T]o protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms. . . . It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.<sup>26</sup>

The U.N. Development Program popularized the concept of human security in its reports starting in 1993.<sup>27</sup> In 1994 it focused its definition on freedom from fear and freedom from want,<sup>28</sup> enumerating seven values of human security: economic, food, health, environmental, personal, community, and political.<sup>29</sup> A widespread consensus exists today that among the major threats faced by the world community, poverty, disease, and environmental issues must be included.

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22. *Id.* at 11.

23. Sadako Ogata, *Human Security as Framework for Post-Conflict Nation-Building: Lessons from Iraq and Afghanistan*, in HUMAN SECURITY FOR ALL: A TRIBUTE TO SERGIO VIEIRA DE MELLO 10 (Kevin M. Cahill, M.D. ed., 2004).

24. *Id.*

25. Kofi Annan, *Secretary-General Salutes International Workshop on Human Security in Mongolia*, Two-Day session in Ulaanbataar, May 8-10, 2000, Press Release SG/SM/7382, available at <http://www.un.org/News/Press/docs/2000/20000508.sgs7382.doc.html>.

26. HUMAN SECURITY NOW, *supra* note 19, at 4.

27. U.N. DEVELOPMENT PROGRAMME, 1993 HUMAN DEVELOPMENT REPORT 2 (1993).

28. U.N. DEVELOPMENT PROGRAMME, 1994 HUMAN DEVELOPMENT REPORT 3 (1994).

29. *Id.* at 23.

The 2003 Report of the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"),<sup>30</sup> established by the U.S. Congress and the President,<sup>31</sup> and directed to investigate "facts and circumstances relating to the terrorist attacks of September 11, 2001,"<sup>32</sup> described the changing nature of threats to national security in the post-9/11 world in these words: "From terrorism to global disease or environmental degradation, the challenges have become transnational rather than international,"<sup>33</sup> and are "defined more by the fault lines within societies than by the territorial boundaries between them."<sup>34</sup> The Commission recommended a global strategy to meet these threats, a strategy that includes emphasizing educational and economic opportunities.<sup>35</sup>

The Secretary-General's High-level Panel, which was charged with examining the concept of collective security, provided a thorough analysis:

Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security. So defined, there are six clusters of threats with which the world must be concerned now and in the decades ahead: [the first is] [e]conomic and social threats, including poverty, infectious disease and environmental degradation . . . .<sup>36</sup>

The other five clusters of threats are the traditional threats to state security: interstate conflict, internal conflict, weapons of mass destruction, terrorism, and transnational organized crime.<sup>37</sup> The Report considers all these threats to be interconnected and a challenge that states must meet with a concerted and comprehensive strategic effort, with effective leadership both at national and international levels.<sup>38</sup>

In partial response to the High-level Panel Report, the Secretary-General's 2005 Report to the General Assembly is entitled, "In Larger Freedom." In his words the title "also encapsulates the idea that development, security and human rights go hand in hand,"<sup>39</sup> reinforcing each other.<sup>40</sup> He explained:

Larger freedom implies that men and women everywhere have the right to be governed by their own consent, under law, in a society where all individuals can, without discrimination or retribution, speak, worship and associate freely. They must also be free from want—so that the death sentences of extreme poverty and

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30. THE 9/11 COMMISSION REPORT (FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 2003) [hereinafter THE 9/11 REPORT].

31. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306.

32. THE 9/11 REPORT, *supra* note 30, at xv.

33. *Id.* at 361-62.

34. *Id.* at 361.

35. *Id.* at 377-78. See generally *id.* at 361-98.

36. *Collective Security and the Challenge of Prevention*, synopsis, Part 2, *Our Shared Responsibility*, *supra* note 7, at 23.

37. *Id.*

38. *Id.* paras. 44-182.

39. *Id.* para. 14.

40. *Id.* para. 16.

infectious disease are lifted from their lives—and free from fear—so that their lives and livelihoods are not ripped apart by violence and war . . . .<sup>41</sup>

. . . .

. . . While poverty and denial of human rights may not be said to “cause” civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development.<sup>42</sup>

The human security concept is increasingly capturing the world’s attention. The key obviously is in ensuring that states, international organizations, and civil society act in cooperation and collaboration to bring it about.<sup>43</sup>

### III.

The essays that follow examine several of the issues discussed above. In his essay, “The Preventive/Preemptive War Doctrine Cannot Justify the Iraq War,”<sup>44</sup> Robert M. Lawrence, a political science professor who has written extensively on nuclear issues, insightfully analyzes the nuclear deterrence and containment policies in a historical context and argues that the preventive/preemptive war doctrine has replaced those policies. After providing the rationale for the latter policies advanced by President Bush, Lawrence tests that doctrine against a hypothetical scenario in which Pakistani President Pervez Musharraf is assassinated, the most radicalized Muslim faction in Pakistan takes control of the government and proclaims the country’s policy toward the United States to be patterned after Osama bin Laden’s philosophy, and reinstates A.Q. Khan, who announces that his nuclear weapons laboratory will disseminate designs for nuclear weapons and enriched uranium to Islamic nations and Islamic terrorist groups.

Professor Lawrence contends that under this scenario the U.S. President would be fully justified in destroying Pakistan’s nuclear weapons, fissionable materials, and nuclear weapons facilities, and removing Pakistan’s government from power. He considers the use of force to be an appropriate response if directed at terrorists under the circumstances assumed in his scenario, but posits that in the case of Iraq the use of force was unjustified.

Stephen J. Barela discusses legal and moral standards in analyzing preemptive or preventive war.<sup>45</sup> After providing a historical treatment of anticipatory self-defense, he analyzes the Bush doctrine on preemption/prevention in the context of the U.N. Charter and emerging international law norms. He clarifies the distinction between preemption and preventive war, which in his words would “perhaps pave the way for reasonable people to agree or disagree on the

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41. *Id.* para. 15.

42. *Id.* para. 16.

43. See V. Nanda, *Pre-Emptive Danger*, NAT’L L.J., Oct. 21, 2002, at A21.

44. Robert M. Lawrence, *The Preventive/Preemptive War Doctrine Cannot Justify the Iraq War*, 33 DENV. J. INT’L L. & POL’Y 19 (2005).

45. Stephen J. Barela, *Preemptive or Preventive War: A Discussion of Legal and Moral Standards*, 33 DENV. J. INT’L L. & POL’Y 36 (2005).

philosophical tenets of these terms and not be distracted or confused by their ambiguity.”<sup>46</sup>

Professor Jennifer Moore, an international law scholar, provides an international law framework for the alleviation of violence and poverty,<sup>47</sup> which she considers to be essential elements for establishing collective security with a human face. Professor Moore’s article studies major theoretical roots of the human security concept, especially in the context of the U.N. Charter, and explores the impact of the concept in world affairs in the post-U.N. era. After examining how the war against terrorism has impacted the war against poverty, she argues that there is a legal obligation to promote human security under various international law instruments.

Professor Priyanka Upadhyaya, who writes on third world development issues, traces the shift from state security to people’s security.<sup>48</sup> He describes how human security is interpreted to correspond closely to peace-building, analyzes humanitarian assistance and humanitarian intervention, and argues that military options for protecting people in risk should be the last resort. He suggests that we should be equally concerned with both poverty and global disparities. Professor Upadhyaya concludes that a balance needs to be struck “among humanitarian, political, military interest, and development strategies.”<sup>49</sup> As he considers concerted efforts to promote sustainable human development to be essential for protecting human security, he argues for the reform of the international system on the basis of multilateralism and humanitarian law.

Professor John F. Jones, who has written extensively on development, also studies human rights and human security issues.<sup>50</sup> After a succinct analysis of the continuing debate on the various approaches to economic reform in the current era of globalization and relating poverty, disease, hunger, unemployment, and environmental hazards to human security, he redefines the concept, concluding that “[t]here are considerable links and overlaps among the various threats to human security, and a weakness in one category inevitably affects all the other forms of human security.”<sup>51</sup>

Professor Robert Hardaway, a widely published legal scholar, examines the role of war coverage in the U.S. media, and both domestic and international aspects of the measures taken by the United States in its response to terrorism, especially after 9/11.<sup>52</sup> He is critical of the U.S. media, arguing that they did not

46. *Id.* at 48.

47. Jennifer Moore, *Collective Security with a Human Face: An International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 DENV. J. INT'L L. & POL'Y 50 (2005).

48. Priyanka Upadhyaya, *Human Security, Humanitarian Intervention and Third World Concerns*, 33 DENV. J. INT'L L. & POL'Y 81 (2005).

49. *Id.* at 103.

50. John F. Jones, *Human Security and Social Development*, 33 DENV. J. INT'L L. & POL'Y 105 (2005).

51. *Id.* at 118.

52. Robert Hardaway, *The Role of the Media, Law, and National Resolve in the War on Terror*, 33 DENV. J. INT'L L. & POL'Y 119 (2005).

do justice to the executive or legislative intents, initiatives, or actions. In analyzing the legal aspects, he concludes that U.N. Resolution 1441 provides a "firm foundation for the prosecution of the allied war on terror in Iraq,"<sup>53</sup> and while domestic terrorism laws have "yet to be fully tested in the courts, [they] have their foundation in investigative procedures already tested by the courts."<sup>54</sup>

#### IV.

Undoubtedly, the events of September 11 have compelled a great deal of reflection, reevaluation, and soul-searching in the United States on how to prevent such events and how to effectively respond to threats to our national security. Debate continues over the U.S. executive, legislative, and judicial responses to the terrorist attacks of 9/11, and the U.S.-led military action in Afghanistan and then in Iraq. So too does the criticism of the treatment of detainees in Guantanamo Bay and the Abu Ghraib prison, the use of interrogation techniques, and the U.S. ambivalence regarding the application of international humanitarian law, especially the Geneva Conventions, and of international human rights law to those detained pursuant to the war on terror. The examination here of selected legal and policy issues does not purport to provide a comprehensive treatment of these questions. It is hoped, however, that the essays that follow will clarify some ambiguities and enhance our understanding of the preemption/prevention controversy and the emerging framework to realize human security.

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53. *Id.* at 148.

54. *Id.*



# THE PREVENTIVE/PREEMPTIVE WAR DOCTRINE CANNOT JUSTIFY THE IRAQ WAR.

ROBERT M. LAWRENCE\*

## I. INTRODUCTION

More than two years after the U.S. invasion of Iraq, the debate continues about whether the threat from Baghdad warranted abandoning the traditional American national security Nuclear Deterrence and Containment policies in favor of President Bush's new Preventive/Preemptive War doctrine. This essay compares the logic informing the Nuclear Deterrence and Containment policies with the arguments supporting the President's Preventive/Preemptive War doctrine, and concludes that the former should not have been replaced by the latter. This essay then compares what happened in Iraq with a hypothetical scenario wherein Pakistan is a candidate for a Preventive/Preemptive War attack. This hypothetical demonstrates the extent to which the attack on Iraq cannot be justified by the announced parameters of President Bush's Preventive/Preemptive War doctrine.

## II. NUCLEAR DETERRENCE AND CONTAINMENT POLICIES AND THE PREVENTIVE/PREEMPTIVE WAR DOCTRINE

Has the world changed so much that President George W. Bush's Preventive/Preemptive War doctrine should replace the Nuclear Deterrence and Containment policies first adopted by President Truman in the 1940s and modified by President Eisenhower in the 1950s? More than two years after the U.S. invasion of Iraq, arguments persist whether that war in Iraq can be justified in terms of President Bush's Preventive War/Preemptive War doctrine. Should that doctrine become the model for other twenty-first century conflicts? The *Department of Defense Dictionary of Military and Associated Terms* defines "Preventive War" as: "A war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk."<sup>1</sup> The same

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\* Robert M. Lawrence is a professor of political science at Colorado State University. He formerly taught at Texas Tech University, the University of Arizona, and as a visiting professor at the University of Colorado. In 1968 he, together with William Van Cleave, advocated that the national security community consider a concept which remains a debated issue in 2005: Would U.S. interests, and those of the larger international community, be advanced by the forceful removal of the nuclear facilities which are possessed by nations that do not adhere to the Treaty on the Non-Proliferation of Nuclear Weapons? His major books are *NUCLEAR PROLIFERATION: PHASE II* (Robert M. Lawrence & Joel Larus eds., 1974); *ROBERT M. LAWRENCE, STRATEGIC DEFENSE INITIATIVE: BIBLIOGRAPHY AND RESEARCH GUIDE* (1987); *ROBERT M. LAWRENCE, ARMS CONTROL AND DISARMAMENT: PRACTICE AND PROMISE* (1973).

1. U.S. DEP'T OF DEFENSE, JOINT PUB. NO. 1-02, *DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 421 (amended through Oct. 2004), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf).

source defines "Preemptive Attack" as: "An attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent."<sup>2</sup>

To answer these questions, it will be necessary to recall the logic which gave rise to the Nuclear Deterrence and Containment policy, and to compare that long-ago thinking with the rationale set forth by President George W. Bush in statements made prior to the March 2003 invasion of Iraq.

*A. The Logic Supporting U.S. Nuclear Deterrence and Containment Policies.*

1. Nuclear Deterrence.

Among the first to envision, although dimly, the deterrent value inherent in nuclear weapons were three Hungarian physicists who fled to America in the late 1930s to escape the Nazi persecution of the Jews.<sup>3</sup> They were Leo Szilard, Edward Teller, and Eugene Wigner.<sup>4</sup> This trio urged Albert Einstein to send his famous October 11, 1939 letter to President Franklin D. Roosevelt suggesting the United States investigate the possibility of making an atomic bomb before Hitler's scientists achieved that feat.<sup>5</sup>

Concerning the Hungarian scientists, Richard Rhodes wrote: "From the horrible weapon which they were about to urge the United States to develop, Szilard, Teller and Wigner . . . hoped for more than deterrence against German aggression. They also hoped for world government and world peace, conditions they imagined bombs made of uranium might enforce."<sup>6</sup>

Before the United States dropped two atomic bombs on the Japanese cities of Hiroshima and Nagasaki, the Scientific Director of the American atomic bomb project, J. Robert Oppenheimer; the Danish Nobel Laureate in Physics, Niels Bohr; and the American Secretary of War, Henry L. Stimson; also expressed their hope, in differing ways, that nuclear weapons could prevent large scale war in the future. Of course, if a large scale war had occurred, it would have probably been called World War III.

According to Oppenheimer: "[T]he atomic bomb had to be used on a Japanese city, not in another test, because the world needed to know with graphic evidence that warfare had fundamentally changed in such a way as to require international participation in the quest for peace."<sup>7</sup>

Stimson was ambivalent about the atomic bomb. Several months before the bombing of the Japanese cities, he wrote that such weapons "[m]ay destroy or perfect International Civilization" and that atomic bombs might be either a

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2. *Id.* at 417.

3. RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 308 (1986).

4. *Id.*

5. *Id.* at 306-08.

6. *Id.* at 308.

7. Interview by David Hawkins with J. Robert Oppenheimer, Los Alamos, N.M. (relayed to the author July 1999); see also David Hawkins, *In the Shadow of the Bomb: Robert Oppenheimer and Niels Bohr*, Address at Lebanon Valley College (Apr. 1999). David Hawkins was the historian who worked with Oppenheimer at Los Alamos.

"Frankenstein or means for World Peace."<sup>8</sup>

Bohr was more direct. During World War II (WWII), he arrived at the Los Alamos laboratory where the final work on both the uranium and plutonium bombs was proceeding.<sup>9</sup> According to Rhodes, Bohr asked the assembled scientists: "Is it big enough?" What he meant was: "Is it 'big enough' to force a change in the way the world deals with conflict, 'big enough' to force an end to war?"<sup>10</sup>

History did not quite evolve as the three Hungarian physicists, Oppenheimer, Bohr, or Stimson, had predicted. However, it did not take long for strategic thinkers to comprehend the potential utility nuclear weapons offered. Less than one year after the atomic bombing of Japan, a group of scholars at Yale University's Institute of International Studies published the first book dedicated exclusively to analyzing the impact of atomic weapons upon world politics.<sup>11</sup>

One of the authors, political science professor Bernard Brodie, captured the essence of what deterrence in the nuclear age would become when he wrote: "Thus, the first and most vital step in any American security program for the age of atomic bombs is to take measures to guarantee to ourselves in case of attack the possibility of retaliation in kind."<sup>12</sup> Then Brodie elaborated upon survival in the nuclear age:

Reducing vulnerability is at least one way of reducing temptation to potential aggressors. And if the technological realities make reduction of vulnerability largely synonymous with preservation of striking power, that is a fact which must be faced. Under those circumstances any domestic measures which effectively guaranteed such preservation of striking power under attack would contribute to a more solid basis for the operation of an international security system.<sup>13</sup>

Brodie anticipated the policies both the United States and the Union of Soviet Socialist Republics (U.S.S.R.) would adopt to ensure that an opponent's initial strike could not prevent a nation-shattering retaliatory blow. All subsequent deterrence thinking has been built upon this proposition.

Over the four decades of their Cold War competition, the United States and the U.S.S.R. developed a mix of weapons deployments, which collectively provided for the pre- and post-launch invulnerability of their strategic nuclear forces. The mix was called the TRIAD; each country developed and deployed three separate strategic nuclear delivery systems: (1) long-range bombers; (2) land-based Intercontinental Range Ballistic Missiles (ICBMs); and (3) nuclear powered submarines carrying Submarine Launched Ballistic Missiles (SLBMs).

As early as 1959, Oskar Morgenstern, Princeton professor of political

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8. RHODES, *supra* note 2, at 642.

9. *Id.*

10. *Id.*

11. See FREDERICK S. DUNN ET AL., *THE ABSOLUTE WEAPON: ATOMIC POWER AND WORLD ORDER* (Bernard Brodie ed., 1946).

12. *Id.* at 76.

13. *Id.* at 77.

economy, wrote that the bombers and the land-based ICBMs would gradually lose some of their pre-launch invulnerability to the increasing accuracy of enemy missiles, but that the submarines would retain that most important characteristic into the foreseeable future.<sup>14</sup> Until the oceans become transparent, and that is not the case in 2005, it appears that Morgenstern was correct when he wrote: "Holding our main retaliatory force at sea makes the greatest immediate contribution to the defense of the country: it protects the force proper and it frees the country thereby from direct and indirect effects of a possible attack on this force itself."<sup>15</sup>

Today, ICBM launch sites are in fact gradually losing their pre-launch invulnerability due to the increasing accuracies of Russian, and presumably later, Chinese, ICBMs and SLBMs. The fact that the B-2 bomber has a skin that absorbs radar beams, giving it post-launch invulnerability, does not protect the planes from being destroyed by a missile attack before take-off.

Because the bombers and ICBMs have begun to lose their invulnerability, an American nuclear-powered submarine is the most pre-launch invulnerable component of the U.S. strategic nuclear forces. A single nuclear-powered submarine can threaten to destroy 192 enemy cities in a retaliatory attack should the United States be struck first; that is, twenty-four SLBMs multiplied by eight thermonuclear warheads each equals 192.<sup>16</sup> The United States currently operates eighteen of these submarines.<sup>17</sup>

Pre-launch invulnerability of a nation's nuclear retaliatory force counts for nothing unless the force also possesses post-launch invulnerability. The United States addressed this problem when it added multiple independently-targeted reentry vehicles (MIRVs) and penetration aids to its ICBM and SLBM missiles.<sup>18</sup> The U.S.S.R., now Russia, followed with the same course of action.<sup>19</sup> Thus, a stable relationship between Washington and Moscow that came to be called Mutual Assured Destruction (MAD) was created over time.<sup>20</sup> In this fashion, deterring an attack upon the two nuclear superpowers' homelands became enshrined in both nations' national security policies.<sup>21</sup> Putting it another way, both competitors developed and deployed strategic nuclear forces capable of surviving a first strike; forces surviving the first strike could then be used in a retaliatory second strike. Thus, Brodie's call for invulnerable forces, before and after launch, was implemented. The emphasis upon invulnerability remains today. The most recent example is President Putin's June 2004 announcement that Russia would add maneuverable warheads to its long range missiles in order to maintain post-

14. OSKAR MORGENSTERN, *THE QUESTION OF NATIONAL DEFENSE* 86-87 (1959).

15. *Id.* at 87.

16. See Table of U.S. Strategic Nuclear Forces, 2002, available at <http://www.nrdc.org/nuclear/nudb/datab11.asp>.

17. JAN LODAL, *THE PRICE OF DOMINANCE: THE NEW WEAPONS OF MASS DESTRUCTION AND THEIR CHALLENGE TO AMERICAN LEADERSHIP* 15 (2001).

18. LAWRENCE FREEDMAN, *THE EVOLUTION OF NUCLEAR STRATEGY* 345-46 (1981).

19. *Id.*

20. DONALD SNOW, *NATIONAL SECURITY FOR A NEW ERA: GLOBALIZATION AND GEOPOLITICS* 107 (2004).

21. *Id.*

launch invulnerability in response to President Bush's decision to deploy an initial anti-ballistic missile defense in the fall of 2004.<sup>22</sup>

As long as the United States retains pre- and post-launch invulnerability of its strategic nuclear forces, a nation that attacks America must assume that a devastating retaliatory strike will be quick; that is, an attack is: (1) twelve hours away with the bombers; (2) thirty minutes away with the ICBMs; and (3) ten to twenty minutes away with SLBM submarines, depending on where they are cruising. Because of invulnerability considerations, and on-going disarmament negotiations with the Russians, the United States is gradually shifting its emphasis from bombers and ICBMs to SLBMs.<sup>23</sup>

It should be noted that from the time the United States tested its first atomic bomb on July 16, 1945, to when the Soviets tested a similar weapon in the fall of 1949; the United States was in a position never occupied by a nation before, and not likely to be duplicated in the near future. With a handful of nuclear weapons, and with the bombers to deliver them, the United States could have dominated the world. That President Harry S. Truman and his advisers did not act upon this unprecedented possession of power is a testament to the capacity of the United States to follow morality guidelines (at least at that point in time).

## 2. Containment.

In 1946, George F. Kennan, a Foreign Service Officer stationed in the U.S. Embassy in Moscow, first suggested the other pillar of U.S. security policy since the end of WWII. In what has become known as the *Long Telegram*, Kennan suggested to the U.S. Department of State that Soviet expansionism, a combination of Communist ideology and Russian nationalism, posed a new threat to the United States.<sup>24</sup>

The next year, Kennan expanded his analysis of the Soviet threat, and how the United States should respond, in an article published in the influential journal, *Foreign Affairs*.<sup>25</sup> Because the government did not yet want to be associated with the new policy, Kennan was not listed as the author.<sup>26</sup> Instead, there was an "X" where the author's name should have been.<sup>27</sup> The crux of Kennan's writing was that the United States faced an implacable foe in the U.S.S.R., which would continuously expand unless stopped by a superior force; he urged that the force be American. Kennan's theme is best discerned in the following two quotations:

Soviet pressure against the free institutions of the western world is something that can be contained by the adroit and vigilant application of counter-force at a series of constantly shifting geographical and political points, corresponding to

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22. Scott Peterson, *Back to the Future: New US-Russia Arms Race*, CHRISTIAN SCI. MONITOR, June 16, 2004, available at 2004 WL 58695138.

23. LODAL, *supra* note 17, at 15.

24. See X, *The Sources of Soviet Conduct*, FOREIGN AFFAIRS (1947).

25. *Id.*

26. *Id.*

27. *Id.* at 566.

the shifts and maneuvers of Soviet policy . . . .<sup>28</sup>

[T]he United States has it in its power to increase enormously the strains under which Soviet policy must operate, to force upon the Kremlin a far greater degree of moderation and circumspection than it has had to observe in recent years, and in this way to promote tendencies which must eventually find their outlet in either the break-up or the gradual mellowing of Soviet Power.<sup>29</sup>

The Truman Administration speedily implemented this containment policy. Primary examples include: (1) the 1947 Truman Doctrine giving assistance to Greece and Turkey in resisting Communist guerrilla warfare and political intimidation; (2) the 1947 Marshall Plan providing economic assistance to the war damaged nations of Western Europe to aid them in resisting the blandishments of communism; (3) the 1948 Berlin Airlift breaking the Soviet-backed blockade of West Berlin; and (4) the 1949 formation of the North Atlantic Treaty Organization (NATO), which eventually became a major anti-Soviet military alliance with the United States and Canada on one side of the Atlantic and Great Britain and most Western European nations on the other.<sup>30</sup>

In the early to mid-1950s, President Eisenhower's Secretary of State, John Foster Dulles, added new alliances to the containment wall being forged around the Communist world.<sup>31</sup> He believed that nuclear weapons could be used to deter Communist infringements upon the "Free World" in ways that would be less expensive than building a 20,000 mile-long Maginot Line or maintaining a standing army capable of matching the Red armies "man for man, gun for gun, and tank for tank at any particular time or place their general staff selects."<sup>32</sup> Such matching, Dulles warned, would "mean real strength nowhere and bankruptcy everywhere."<sup>33</sup> The policy was called "Massive Deterrence" because it threatened "the means to retaliate instantly against open aggression by Red armies, so that, if it occurred anywhere, we could and would strike back where it hurts, by means of our choosing."<sup>34</sup> Dulles explained his solution to the Communist conventional threat by using an analogy:

The principle involved is as simple as that of our municipal police forces. We do not station armed guards at every house to stop aggressors—that would be economic suicide—but we deter potential aggressors by making it probable that if they aggress, they will lose in punishment more than they can gain by

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28. *Id.* at 576.

29. *Id.* at 582.

30. See Truman Doctrine, President's Address to Congress, Mar. 12, 1947, available at [http://www.ourdocuments.gov/doc\\_large\\_image.php?doc=81](http://www.ourdocuments.gov/doc_large_image.php?doc=81); Marshall Plan, Economic Cooperation Act of 1948, Apr. 3, 1948, available at [http://www.ourdocuments.gov/doc\\_large\\_image.php?flash=true&doc=82](http://www.ourdocuments.gov/doc_large_image.php?flash=true&doc=82); see Berlin Airlift, June 1948 to Sept. 1949, at <http://www.state.gov/t/pa/ho/time/cwr/17378pf.htm>; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at <http://www.nato.int/docu/basic/txt/treaty.htm>.

31. John Foster Dulles, *A Policy of Boldness*, LIFE, May 19, 1952, at 148.

32. *Id.* at 151.

33. *Id.*

34. *Id.*

aggression.<sup>35</sup>

Later, as the U.S.S.R. developed a large nuclear arsenal, "Massive Retaliation" morphed into "Flexible Response," which combined conventional forces with smaller, tactical nuclear weapons designed for battlefield use.<sup>36</sup>

### 3. The Preventive/Preemptive War Doctrine Has Replaced the Nuclear Deterrence and Containment Policies.

Since the days of the Truman Administration, all succeeding American presidents have practiced Nuclear Deterrence and Containment in varying ways. Although disarmament has substantially reduced the number of U.S. nuclear weapons, a remaining formidable U.S. nuclear capacity could deter any weapons of mass destruction attack from Russia, China, or any other nation.<sup>37</sup> While it is not likely that Russia will return any time soon to the expansionist policies of the U.S.S.R., Containment would be resurrected if Moscow appeared aggressive.<sup>38</sup> Containment still applies to the People's Republic of China, particularly with regard to a potential invasion of Taiwan.<sup>39</sup>

For nearly fifty-five years, strategic analysts in and out of government and high level government officials responsible for the implementation of official policy have examined and reexamined nuclear deterrence theories.<sup>40</sup> At the same time nuclear deterrence theories were evolving, a series of strategic nuclear forces consistent therewith were developed and deployed.<sup>41</sup> A set of benchmarks can be derived from this enormous volume of thought and action which, if they ever became reality, predict the failure of nuclear deterrence strategies to protect the United States, and presumably create the need to replace such strategies with new ones. These benchmarks are:

A. Nation X must have developed and deployed weapons of mass destruction, most importantly nuclear weapons;

B. Nation X must have developed and deployed the means to deliver the weapons of mass destruction, most importantly nuclear weapons;

C. The leaders of Nation X must be willing to suffer unimaginable damage to themselves, their families, and their nation's populace and productive capacity as the consequence of attacking the United States, thus triggering a horrific American nuclear retaliation; or,

D. In lieu of C. above, the leaders of Nation X must believe their scientists have developed and deployed anti-aircraft and anti-ballistic missile defenses of

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35. *Id.*

36. FREEDMAN, *supra* note 18, at 285.

37. See Strategic Offensive Reductions Treaty, May 24, 2002, U.S.-Russ., 41 I.L.M. 799 (both parties will reduce the number of their strategic nuclear warheads, but only down to between 1,700 and 2,200 by Dec. 31, 2012), available at <http://www.whitehouse.gov/news/releases/2002/05/20020524-3.html>.

38. LODAL, *supra* note 17, at 28-29.

39. SNOW, *supra* note 20, at 71.

40. *Id.* at 219-33.

41. *Id.*

such capability the U.S. retaliatory strikes would utterly fail; or,

E. In lieu of C. above, the leaders of Nation X must believe their scientists have developed and deployed a nuclear first strike system of such capability that, if used, would prevent the United States from launching a second strike retaliatory response; or

F. The leaders of Nation X must be so mentally deranged that they are incapable of comprehending point C. above, or they believe that points A., B., D., and E. actually exist when in fact they do not.

So far, the Bush Administration has failed to produce evidence that any benchmarks were present in March 2003 to justify undercutting the American Nuclear Deterrence policy's validity.<sup>42</sup> Therefore, President Bush's replacement of the Nuclear Deterrence policy with his new Preventive/Preemptive War doctrine appears suspect.

As has been the case with Nuclear Deterrence theories, the Containment policy evolved over time and was concurrently paired with the development and deployment of correlative weapons. The defeat of Saddam Hussein's military in the first Gulf War left Iraq without the capability to re-invade Kuwait, Iran, or any of its other neighbors.<sup>43</sup> Because the Bush Administration has produced no evidence to the contrary, it must be accepted that Containment successfully kept Saddam Hussein bottled up within Iraq, or as the saying in Washington had it, he was kept "in a box."<sup>44</sup> To be sure, British and American implementation of the Northern and Southern No Fly Zones over Iraq also helped keep Hussein in that box.<sup>45</sup>

In reviewing the successful policies of Nuclear Deterrence and Containment, it should be remembered that they protected against potential threats from nation states—states that had enormously valuable national assets which would have been destroyed had they attacked the United States. A second basic point is that those against whom Nuclear Deterrence was practiced were sane. They were undoubtedly evil in terms of how they treated their own citizens, but they were sane. That is, they were sane enough not to risk losing their lives and their nation's population and industrial capacity by attacking the United States.

This essay's focus now turns to the justification offered by President George W. Bush since the 9/11 attacks for replacing Nuclear Deterrence and Containment with the doctrine of Preventive/Preemptive War.

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42. See David Kay, Address on the Interim Progress Report on the Activities of the Iraq Survey Group (ISG) before the House Permanent Select Committee on Intelligence (Oct. 2, 2003), available at [http://www.cia.gov/cia/public\\_affairs/speeches/2003/david\\_kay\\_10022003.html](http://www.cia.gov/cia/public_affairs/speeches/2003/david_kay_10022003.html).

43. SNOW, *supra* note 20, at 252.

44. John J. Mearsheimer & Stephen M. Walt, *Keeping Saddam in a Box*, N.Y. TIMES, Feb. 2, 2003, at 15.

45. See Secretary of Defense William J. Perry, Department of Defense News Briefing, Sept. 3, 1996, available at [http://www.dod.gov/transcripts/1996/t090396\\_t0903dst.html](http://www.dod.gov/transcripts/1996/t090396_t0903dst.html).



*B. The Rationale Supporting President Bush's Preventive/Preemptive War Doctrine.*

In his first State of the Union speech after the 9/11 terrorist attacks—delivered on January 29, 2002—President Bush commenced laying out the logic for what would become a marked departure from the national security doctrines of all his predecessors since Harry S. Truman.<sup>46</sup> The President announced:

We'll be deliberate; yet, time is not on our side. I will not wait on events while dangers gather. I will not stand by as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.<sup>47</sup>

While he did not use the terms "Preventive War" or "Preemptive War," the policy direction in which President Bush was taking the nation was clear.

On June 1, 2002, President Bush addressed the graduating class of the U.S. Military Academy at West Point, New York.<sup>48</sup> In this speech, nearly nine months after the 9/11 attacks, the President still did not use the term Preventive/Preemptive War.<sup>49</sup> However, he directly spoke of the necessity of augmenting the Nuclear Deterrence and Containment policies with new policies constituting appropriate responses to the threat of terrorists armed with chemical, biological, or worst of all, nuclear weapons.<sup>50</sup> President Bush explained the need for a new policy in this fashion: "For much of the last century, America's defense relied on the cold war doctrines of deterrence and containment. In some cases [presumably a reference to China and Russia], those strategies still apply, but new threats also require new thinking."<sup>51</sup>

According to the President: "Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies."<sup>52</sup>

He continued:

We cannot defend America and our friends by hoping for the best. We cannot

46. See BOB WOODWARD, *PLAN OF ATTACK* 34 (2004) (the first use of the term "preempt" by an official directly advising the President in the context of Iraq occurred in an interview with Secretary of Defense Donald Rumsfeld four months after the 9/11 attacks. Woodward quotes Rumsfeld as saying this about terrorism: "You can't defend at every place at every time against every technique. You just can't do it, because they just keep changing techniques, time, and you have to go after them. And you have to take it to them, and that means you have to preempt them").

47. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

48. President George W. Bush, Commencement Address at the United States Military Academy, West Point, N.Y. (June 1, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

put our faith in the word of tyrants who solemnly sign nonproliferation treaties and then systematically break them. If we wait for threats to fully materialize, we will have waited too long.

Homeland defense and missile defense are part of a stronger security; they're essential priorities for America. Yet, the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action, and this Nation will act.<sup>53</sup>

In September of 2002, an analysis detailing the need to add a new strategy to the nation's panoply of national security policies was set forth in a document titled, *The National Security Strategy of the United States of America*.<sup>54</sup> The themes appearing in the President's January 2002 State of the Union address and in his West Point commencement address were substantially expanded.<sup>55</sup> Regarding war, the terms "prevent," "preemption," and "preemptively" are found in this document.<sup>56</sup>

Again the President reminded his audience that the policy of Nuclear Deterrence associated with the Cold War would not address some of the threats found in the post-9/11 terrorist environment. For example:

The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy's use of force, producing a grim strategy of mutual assured destruction. With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation.<sup>57</sup>

President Bush explained that terrorists could not amass the amount of destructive capacity possessed by the Soviets, but the likelihood they would be deterred from using that capacity would be less than with the Soviets.<sup>58</sup> He described the U.S.S.R. after the Cuban missile crisis as a "risk-averse adversary" which was effectively deterred by the threat of massive nuclear retaliation.<sup>59</sup> Then he added: "But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations."<sup>60</sup>

The President then pointed out that terrorists, who are willing to lose their lives for their cause in order to achieve martyrdom, could not be deterred.<sup>61</sup> As he put it: "Traditional concepts of deterrence will not work against a terrorist enemy

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53. *Id.*

54. NAT'L SEC. COUNCIL, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (Sept. 2002).

55. See State of the Union Address, *supra* note 47; Commencement Address at the United States Military Academy, *supra* note 48.

56. NAT'L SEC. COUNCIL, *supra* note 54, at 15.

57. *Id.* at 13.

58. *Id.* at 15.

59. *Id.*

60. *Id.*

61. *Id.*

whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness.”<sup>62</sup>

With the case made that the changing threat matrix warranted a changed national security policy, the President referred to preemption frequently in order to introduce the legitimacy of the first strike doctrine:

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

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. . . .

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>63</sup>

President Bush reiterated the theme that Nuclear Deterrence and Containment would be ineffective with regard to threats from Iraq in his January 28, 2003, State of the Union address:

Before September the 11th, many in the world believed that Saddam Hussein could be easily contained. But chemical agents, lethal viruses and shadowy terrorist networks are not easily contained. Imagine those 19 hijackers with other weapons and other plans—this time armed by Saddam Hussein. It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known. We will do everything to make sure that that day never comes.<sup>64</sup>

The President referred to Saddam Hussein’s mental condition to make the point that to be effective, deterrence depends upon the rationality of those being deterred:

Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an

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62. *Id.*

63. *Id.*

64. President George W. Bush, State of the Union Address (Jan. 28, 2003), in PUB. PAPERS, Feb. 3, 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

option.<sup>65</sup>

On March 17, 2003, the eve of the American invasion of Iraq, President Bush addressed the nation to explain the reasons for war.<sup>66</sup> Although the words “preventive” and “preemptive war” did not appear in the speech, the rationale given that night was an extension of the Preventive/Preemptive War doctrine the President had been developing since the 9/11 attacks:

We are now acting because the risks of inaction would be far greater. In one year or five years the power of Iraq to inflict harm on all free nations would be multiplied many times over. With these capabilities, Saddam Hussein and his terrorist allies could choose the moment of deadly conflict when they are strongest. We choose to meet that threat now where it arises before it can appear suddenly in our skies and cities.<sup>67</sup>

In an obvious comparison with the times leading up to WWII, President Bush noted that the twenty-first century required the recognition of “new and undeniable realities. . . . In this century when evil men plot chemical, biological and nuclear terror, a policy of appeasement could bring destruction of a kind never before seen on this earth.”<sup>68</sup>

The President warned that Saddam Hussein and “his terrorist allies” could select the moment of attack without warning because terrorists and the states that harbor them “do not reveal these threats with fair notice in formal declarations.”<sup>69</sup> Then, the President referred to Article 51 of the U.N. Charter, which affirms the traditional right of nations to defend themselves if attacked, but moved beyond the U.N. Charter when he delivered his punch line: “And responding to such enemies only after they have struck first is not self-defense, it is suicide. The security of the world requires disarming Saddam Hussein now.”<sup>70</sup>

In his cited statements, President Bush described a terrorist threat for which Nuclear Deterrence and Containment were not suitable responses. Juxtaposed against the President’s view is the fact there is little to no evidence Iraq was a threat for which Preventive/Preemptive War was a response.<sup>71</sup> Thus, the question is: Are there any circumstances wherein the threats and responses herein discussed are congruent? Certainly, and it is the one bright policy spot for the President in the War on Terrorism context. The reference is to contemporary police actions around the world, often taken in concert with other nations, involving the aggressive apprehension of suspected terrorists. According to the President’s definition, and

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65. *Id.*

66. See *Bush’s Speech on Iraq: ‘Saddam Hussein and His Sons Must Leave,’* N.Y. TIMES, Mar. 18, 2003, at A14.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. So far, a diverse set of persons who should know if Saddam Hussein had weapons of mass destruction, particularly nuclear ones, have not come forward with hard evidence to that effect. These include Hans Blix, head of the U.N. Monitoring, Verification, and Inspection Commission; David Kay, head of the U.S. Iraqi Survey Group, Secretary of State Colin Powell; and the 9/11 Commission.

the analysis of how Nuclear Deterrence and Containment operate, terrorists cannot be deterred or contained; they must be preemptively captured before they can strike.

While it is too early to make definitive statements, Americans may be seeing President Bush back-pedal away from the Preventive/Preemptive War doctrine; these policies likely will not be used again soon against a nation state. If true, this turn-about would again give currency to the grammatically incorrect, but often historically correct adage: "[I]f it ain't broke, don't fix it." For example, two years after the U.S. invasion of Iraq, the Preventive/Preemptive War doctrine is not being applied elsewhere. Some evidence to that effect can be found in President Bush's January 20, 2004, State of the Union address.<sup>72</sup> In that speech, the President did not apply the Preventive/Preemptive War doctrine to Iran and North Korea, nations more likely to obtain nuclear weapons than Iraq.<sup>73</sup> According to the President:

Different threats require different strategies. Along with nations in the region, we're insisting that North Korea eliminate its nuclear program. America and the international community are demanding that Iran meet its commitments and not develop nuclear weapons. America is committed to keeping the world's most dangerous weapons out of the hands of the most dangerous regimes.<sup>74</sup>

Further, in late June 2004, the United States officially offered an impressive "carrot" to North Korea, with no mention about the Preventive/Preemptive War "stick."<sup>75</sup> The carrot consisted of Washington trading economic aid and a guarantee to refrain from attacking in exchange for the transparent dismantling of North Korea's nuclear weapons program.<sup>76</sup> Given the past difficulties of dealing with Kim Jong Il's government, many expect nothing to come of the American offer.<sup>77</sup> If their premonitions are correct, the United States will have three options in dealing with North Korea: (1) threatening Preventive/Preemptive War; (2) returning to the previous Nuclear Deterrence and Containment doctrines; and (3) "sweetening" the proposed nuclear weapons disarmament deal.

### III. TESTING THE PREVENTIVE/PREEMPTIVE WAR DOCTRINE

Because it has been suggested that President Bush's Preventive/Preemptive War doctrine did not apply to Iraq, can a scenario be devised in which his new theory would be appropriate? Yes, such a scenario can be devised. And furthermore, spelling out this scenario may present a more persuasive case that Iraq did not present a suitable situation for the application of the

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72. See President George W. Bush, State of the Union Address (Jan. 20, 2004), in PUB. PAPERS, Jan. 26, 2004, available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

73. See *id.*

74. *Id.*

75. See Kristina Nwazota, *U.S., North Korea Open Third Round of Nuclear Talks*, ONLINE NEWS HOUR (June 23, 2004), at [http://www.pbs.org/newshour/updates/nkorea\\_06-23-04.html](http://www.pbs.org/newshour/updates/nkorea_06-23-04.html).

76. *Id.*

77. *Id.*

Preventive/Preemptive War doctrine rather than the nuclear deterrence and containment analysis, which constitutes the bulk of this essay.

Assume that the President of Pakistan, Pervez Musharraf, is assassinated. Many in his country dislike him to the point of wanting to kill him.<sup>78</sup> The reasons include: (1) what some claim is his reluctance to more forcefully confront India regarding the ownership of Kashmir; and (2) his collaboration with the United States in the latter's efforts to locate Al Qaeda fighters who have infiltrated Pakistan from Afghanistan following the American operations in Afghanistan after the 9/11 attacks.<sup>79</sup> During the Christmas season last year, Musharraf survived two nearly successful assassination attempts.<sup>80</sup>

Assume further that after President Musharraf's death, the most radicalized Muslim faction in the nation takes control of the government and proclaims that its policy toward the United States is patterned after Osama bin Laden's philosophy. Assume also that the new Islamic government plans to reinstate Professor A. Q. Khan, the "father" of Pakistan's nuclear weapons program and the admitted purveyor of centrifuge technology to other nations.<sup>81</sup> Finally, assume that Professor Khan announces it will be his nuclear weapons laboratory's policy to disseminate designs for nuclear weapons, and the enriched uranium necessary to make them, to other Islamic nations and Islamic terrorist groups such as Al Qaeda, Hamas, and Islamic Jihad.

In stark contrast with Iraq circa 2003, it is an uncontested fact that Pakistan has an arsenal of nuclear weapons: in 1998, three weeks after India conducted five nuclear weapons tests, Pakistan conducted six test detonations.<sup>82</sup> Although the range of Pakistan's nuclear-tipped missiles is currently limited to India,<sup>83</sup> there is no technical reason why a Pakistani nuclear weapon could not be placed in an American port like New York or San Francisco, in one of the thousands of containers arriving yearly by ship from Asia, or by other low tech means such as a truck delivering tomatoes from Mexico. The bad joke about the latter possibility is that if a terrorist group wants to bring a nuclear weapon into the United States, all that must be done is to pack it into a bale of marijuana destined for the California market.

Should the above scenario ever become reality, the American president at that time would be fully justified in using all means available to destroy Pakistan's nuclear weapons, nuclear production facilities, fissionable materials, and to remove its government from power. To do otherwise could legitimately subject the president to impeachment charges for failing to protect the United States from an

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78. See Paul Haven, *Bomb Attack on Pakistani Leader Fails*, DENV. POST, Dec. 26, 2003, at A1.

79. See *id.*

80. See *id.*

81. See William J. Broad et al., *A Tale of Nuclear Proliferation: How a Pakistani Built His Network*, N.Y. TIMES, Feb. 12, 2004, at A1.

82. M.V. Ramana & A. H. Nayyar, *India, Pakistan, and the Bomb*, SCI. AM., Dec. 1, 2001, at 80.

83. *Id.*

imminent threat. This type of situation would demand implementation of President Bush's Preventive/Preemptive War doctrine; however, this situation did not prevail in Iraq in 2003.

#### IV. CONCLUSION

Recalling and comparing the logic that led to the adoption of the Nuclear Deterrence and Containment policies with President Bush's arguments for the Preventive/Preemptive War doctrine suggests the conclusion that the latter should not have been used to justify the Iraq War. On the other hand, the President's new Preventive/Preemptive War policy is the appropriate response to the new problem of terrorism when directed at terrorists instead of states. While good reasons for the Iraq War may exist, such as being able to influence the world price of oil, helping the Shiites and Kurds achieve independence from the Sunni, and removing an evil dictator, Preventive/Preemptive War is not one of them.

## PREEMPTIVE OR PREVENTIVE WAR: A DISCUSSION OF LEGAL AND MORAL STANDARDS

Steven J. Barela\*

Common in today's discourse about U.S. foreign policy are the terms *preemptive* and *preventive war*. An enormous problem with the use of these terms is that there has been little attempt to clarify their specific meanings, much less initiate a discussion over their ethical and legal implications. This problem has resulted in an environment of ambiguity for determining and discussing a standard for when the United States is to engage in war. The objective of this essay is to raise the level of understanding of the important distinctions between these two terms by examining their legal, moral, and current uses. Through this investigation, I hope to achieve a clearer understanding of the war-making policies of our nation and all others.

First, it is necessary to discuss the significant intersection between the concepts of ethics and international law. At this point in history, one might describe international law as a system of largely unenforceable norms that nations share to better predict and evaluate behavior between states. What comprises these customs tends to emerge out of a concerted effort to search through historical precedent to find—and, when possible, to codify—normative interaction. There is no official body entrusted with this task, and it therefore might be explained as an accepted inter-subjectivity. One might even say that, often times, these norms or laws arise from each state's choice to refrain from a particular behavior since it would not like to see this specific action visited upon itself. I suggest that this is the same process that allows one to arrive at similar ethical determinations. Inter-subjectivity, or understanding of a shared reality, seems to be the critical building block for establishing a code of ethics or norms for a law of nations.

This is not to be confused with the concept of *legal moralism*, which contends that it is possible and necessary to codify a prohibition of behavior based on the shared morality of the majority in a society, even when the behavior does not endanger others physically or psychologically.<sup>1</sup> International law might instead be generally understood as seeking to protect members of international society without imposing cultural or religious biases or morals.

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1. 4 JOEL FIENBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW : HARMLESS WRONGDOING* (1990), <http://www.oxfordscholarship.com/oso/public/content/philosophy/0195064704/toc.html>.



There is an essential distinction between personal moral behavior and the moral behavior of states. Individuals who negotiate for state governments might often be purely self-interested and oblivious to the common good of their people and, thus, sign unethical treaties that are advantageous only for the elite. Therefore, it is erroneous to assume that, unless a state truly represents the interests of its people, it is the single unitary actor in international affairs and is fully capable of acting morally. This circumstance is certainly problematic, but in the current global structure of nation-states there does not appear to be an obvious solution other than advocating for ethical arguments in the legal forum and criticizing those treaties that might undermine the common good. Hence, I intend to approach the topic of preemptive and preventive war with an ethical analysis aimed at optimistically creating the conditions for an inter-subjective legal consensus based on the stark difference between these two terms, in both their meaning and moral implications.

### U.S. Department of Defense Dictionary

To begin, we will turn to the dictionary created by the U.S. Department of Defense (DOD) to reach for clarity on the distinction between the two terms in question. It would perhaps be overreaching to take these definitions as definitive, since they are but one linguistic clarification, and would thus fail the litmus test of a global inter-subjectivity. However, considering that the U.S. government produced this dictionary, the same government that brought the issue of preemptive and preventive war to the forefront of world politics, it does provide a substantive starting point. "Preemptive attack: An attack initiated on the basis of *incontrovertible* evidence that an enemy attack is *imminent*."<sup>2</sup> "Preventive war: A war initiated in the *belief* that military conflict, while not imminent, is inevitable, and that to delay would involve greater *risk*."<sup>3</sup> The first feature in these definitions worth noting is that the DOD actually recognizes that there are, in fact, two different levels of anticipatory self-defense. In addition, there is a marked difference in tone between the two definitions. Leaving no room for doubt about the burden of proof for the cases in which it is applied, the language used to define preemption is particularly commanding. On the other hand, prevention is based on certain subjectivity that allows for interpretation in each case in which it is applied. Additionally, there is a stark contrast in linguistic strength, and hence, moral tone, between the words *incontrovertible* and *imminent* when compared with the terms *belief* and *risk*. This author suggests that many would not argue with the notion that, by these descriptions, preemption would appear to be a moral act of self-

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2. UNITED STATES JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY TERMS (1988), <http://www.dtic.mil/doctrine/jel/doddic/data/p/04142.html> (Nov. 30, 2004) (emphasis added).

3. UNITED STATES JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY TERMS (1988), <http://www.dtic.mil/doctrine/jel/doddic/data/p/04178.html> (Nov. 30, 2004) (emphasis added)..

defense, while preventive war would regularly raise doubts because of its inherent subjectivity. With these two apt and functioning definitions established by the DOD, it is necessary to see whether the same distinctions and clarity will hold up when investigated historically.

### Historical Treatment of Anticipatory Self-Defense

No matter how we define and distinguish the terms *preemptive* and *preventive war*, they will no doubt fall into the same category of a perceived defensive maneuver before an attack has occurred and, hence, be considered some type of anticipatory self-defense. Therefore, it is necessary to first establish that the concept of anticipatory self-defense actually exists in customary international law. I first turn to the often accepted father of codified international law, Hugo Grotius, and his work, *On The Law of War and Peace*.<sup>4</sup> First published in 1625, this voluminous work of three books treats the subject of anticipatory self-defense in Book II, Chapter I:

The danger must be immediate, which is one necessary point. Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger. For in the moral as well as the natural system of things, there is no point without some breadth. But they are themselves much mistaken, and mislead others, who maintain that any degree of fear ought, to be a ground for killing another, to prevent his SUPPOSED intention.<sup>5</sup>

Here, Grotius indeed recognizes a right to anticipatory self-defense if the threat reaches a level of certainty and proximity in time. However, this right is clearly not proclaimed to exist without any constraint. Although there are moments in which one can act before injury occurs, there is evidently a line that, if crossed, changes a self-defensive action's moral character and legality.

In a subsequent section of the same Book II, Grotius addresses the notion that a state might claim the right to use force to disarm another state if the other state is acquiring weapons and power that will come to imperil itself and others:<sup>6</sup>

Some writers have advanced a doctrine which can never be admitted, maintaining that the law of nations authorises one power to commence hostilities against another, whose increasing greatness awakens her alarms. As a matter of expediency such a measure may be adopted, but the principles of justice can never be advanced in its favour. The causes which entitle a war to the denomination of just are somewhat different from those of expediency alone. But to maintain that the bare probability of some remote, or future annoyance from a neighbouring state affords a just ground of hostile aggression, is a doctrine repugnant to every principle of equity. Such however is the condition of

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4. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., Legal Classics Library 1984) (1625), <http://www.geocities.com/Athens/Thebes/8098/> (last visited Feb. 2, 2005).

5. *Id.* at 173.

6. *Id.* at 184.

human life, that no full security can be enjoyed. The only protection against uncertain fears must be sought, not from violence, but from the divine providence, and defensive precaution.<sup>7</sup>

Once again, Grotius is explicit and direct in his assessment. I suggest that Grotius depicts what might be construed as a definition of preemption with caveats. The latter quote could also fit the description of preventive war. In fact, with the inclusion of some strong moral judgments, Grotius' quotes fit nicely with the DOD presentations.

A century after the publication of Grotius' work, the Swiss author of *Law of Nations*, Emmerich de Vattel, also wrote of anticipatory self-defense, again with a caution against imprudence:

It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.<sup>8</sup>

Both de Vattel and Grotius recognize the fact that it is not necessary to await the first blow of an attack before a nation can justly use force. It is also noteworthy that a strong cautionary note is traditionally sounded to guide this anticipatory principle. Finally, the solemn warning by de Vattel seems explicit in how one can, in turn, commit the crime of aggression if indiscriminate action is taken.

In the nineteenth century, echoing Grotius, the U.S. Secretary of State, Daniel Webster set forth a precise definition for the term *preemption*.<sup>9</sup> In what is now commonly known as the Caroline incident, Webster asserted that the necessity for preemptive self-defense must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>10</sup> This strict and precise definition, fitting the widely accepted meaning of *imminent*, was reaffirmed in the Nuremberg Trials which, for the first time, held government officials responsible for state actions.<sup>11</sup>

### United Nations Charter

Today, one customarily turns to the U.N. Charter to settle questions of legality under international law.<sup>12</sup> Unfortunately, the Charter appears to be unable to bring clarity to either the legality or morality of preemptive or preventive war.

7. *Id.* at 184.

8. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, Book II, Chapter IV (1758), <http://www.lonang.com/exlibris/vattel/vatt-204.htm> (last visited Feb. 2, 2005).

9. Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, AM. SOC'Y INT'L L INSIGHT (June 2002), at <http://www.asil.org/insights/insigh88.htm>.

10. *Id.*

11. *Id.*

12. Legal Information Institute, *International Law: An Overview*, at <http://www.law.cornell.edu/topics/international.html> (last visited Feb. 2, 2005).

However, considering that the first words of the Charter preamble begin, “[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,” it is evident that the intention was to limit the use of force in the international arena.<sup>13</sup> Additionally, Article 2(4) of the Charter explicitly requires that “[a]ll 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 other manner inconsistent with the Purposes of the United Nations.”<sup>14</sup> The only other place in the Charter in which the possibility of unilateral force is considered is in Article 51, in which the “inherent right of individual or collective self-defence if an armed attack occurs” is enshrined.<sup>15</sup> However, it is also explicitly stated in the same article that final authority lies with the Security Council, even in extreme circumstances when force is deemed necessary and legal.<sup>16</sup>

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter . . .<sup>17</sup>

Although there are no descriptive definitions of *preemption* and *preventive war*, the Charter contains explicit restrictions on states’ use of force even in cases of self-defense. It is difficult to say whether a literal reading of these statutes, in which all anticipatory self-defense would be ruled out, would be acceptable to the entire international community. Undoubtedly, however, the overall intention of the Charter was to limit unilateral military action. Therefore, when looking to see whether either of these terms meets the spirit and letter of the Charter, it seems necessary to look for guiding principles that are restrictive rather than expansive.

In the evidence presented above, we see that the assertion of the National Security Strategy released by the White House in October 2002 is in fact correct when it asserts that “[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”<sup>18</sup> However, along with this right, come clear requirements of prudence, lest the state initiating the use of force commit crimes against the peace, as was charged against Germany and its officials in the Nuremberg Trials following World War II.<sup>19</sup>

More importantly, though, we have also found a salient distinction for characterizing the different types of anticipatory self-defense. As described above, *Preemption* is a lawful and moral use of force, as long as tremendous discretion

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13. U.N. CHARTER pmbi., <http://www.un.org/aboutun/charter/> (last visited Feb. 2, 2005).

14. U.N. CHARTER art. 2, para. 4, <http://www.un.org/aboutun/charter/> (last visited Feb. 2, 2005).

15. U.N. CHARTER art. 51, <http://www.un.org/aboutun/charter/> (last visited Feb. 2, 2005).

16. *Id.*

17. *Id.*

18. The National Security Strategy of the United States of America, <http://www.whitehouse.gov/nsc/print/nssall.html> (last visited Nov. 10, 2004).

19. Kirgis, *supra* note 9.

accompanies preemptive action to ensure that the threat is both certain and imminent. Yet after, looking at the previous documents, *preventive war* does not seem to merit the same endorsement. I suggest that the primary reason for this apprehension is that preventive war, by its nature, is based on speculation of intent and capabilities. It is quite problematic to assert that any type of conjecture on future events could be construed as an act of self-defense. Once we have removed the certitude that accompanies the concept of preemption, one begins to deal with worst case scenarios and decisions driven by Hobbesian diffidence.<sup>20</sup> Few would assert that fear brings clarity and prudence in decision-making. Therefore, I suggest that the real distinction between preemptive and preventive war is based on an essential moral divergence. Ethical behavior is often simplified into the "golden rule" found in all of the world's major religions: do unto others as you would have them do unto you.<sup>21</sup> It is unlikely that any nation would characterize a preventive war against itself as defensible, since preventive war is, by definition, based on unsubstantiated and unverifiable claims. Yet a nation about to attack another would not like to meet preemptive resistance; it seems highly unlikely that the nation initiating the attack would accuse the defender of acting unjustly. The question remains whether the policy advocated by the George W. Bush administration is in fact preemption or preventive war.

### **The Bush Doctrine: Preemption or Preventive War?**

The opening salvo in the current debate was launched on June 1, 2002, in a graduation speech at the U.S. Military Academy at West Point by President George W. Bush.<sup>22</sup> The United States had recently won an initial military victory in Afghanistan, and President Bush had alluded in his State of the Union speech to the existence of an "Axis of Evil" that included Iraq, Iran, and North Korea.<sup>23</sup> The tension from the terrorist attacks of September 11, 2001 still gripped the nation and President Bush appeared intent on setting the tone for a response beyond Afghanistan. It is in this speech that President Bush first referred to preemption.<sup>24</sup> However, if we look at the language used in this speech, as well as other references, we will in fact see that the President seems to be describing preventive war, not preemption.<sup>25</sup>

When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups *could* attain a catastrophic power to strike great nations . . . But new threats also require new thinking . . . In the world we have entered, the only path

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20. The History Guide: Lectures on Modern European Intellectual History, Thomas Hobbes: 1588 – 1679, at <http://www.historyguide.org/intellect/hobbes.html> (last visited Feb. 2, 2005).

21. Karen Armstrong, *Fresh Air with WHYY* (National Public Radio broadcast, Mar. 8, 2004), <http://www.npr.org/templates/story/story.php?storyId=1751746>.

22. President George W. Bush, Address at the Graduation Exercise of the United States Military Academy (June 1, 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

23. President George W. Bush, The State of the Union Address (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

24. President George W. Bush, *supra* note 22.

25. *Id.*

to safety is the path of action. And this nation will act . . . And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.<sup>26</sup>

At the beginning of this quote, President Bush recognizes that the proposal is novel, and is therefore a departure from previous doctrines or approaches in foreign policy. Perhaps the Bush administration believed it was actually staying within traditional domestic and international norms of preemption, yet decided to present its tactics as innovative to garner domestic support in a time of crisis and uncertainty. However, looking further into what later became referred to as the “Bush Doctrine,” it appears that this proposed policy was in fact novel for the United States, and was a departure from previous standards for a preemptive military attack.

Additionally, the assertion that the “only path to safety is the path of action,” seems to be based on the notion that there are only two options available: military action or insecurity. Grotius cited the Roman historian Titus Livy on this subject: “In the effort to guard against fear, men cause themselves to be feared, and we inflict upon others the injury which has been warded off from ourselves, as if it were necessary either to do or to suffer wrong.”<sup>27</sup> It appears problematic to suggest that, at any given time, there are no more than two alternatives. It is peculiar to frame the circumstances to indicate that only one decision can lead to security. More importantly, however, the notion that the unknown should move us to military action is no longer premised on incontrovertible evidence of an impending attack.<sup>28</sup> This notion is based on the “belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk,” or *preventive war* as defined by the DOD.<sup>29</sup>

Next, Bush asserted:

We cannot defend America and our friends by *hoping for the best*. We cannot put *our faith* in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. *If we wait for threats to fully materialize*, we will have waited too long . . . Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats *before they emerge*.<sup>30</sup>

Looking closely at this excerpt, we see that the selected language does not advocate a method of arriving at irrefutable evidence of danger to justify action. Instead, the argument here rests on the severity of the threat and the imprudence of hesitation. The line of reasoning is that the potential for mass casualties is so great because of the threat of weapons of mass destruction that “hoping for the best” or

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26. *Id.* (emphasis added).

27. GROTIUS, *supra* note 4, at Book II, Chapter V.

28. President George W. Bush, *supra* note 22.

29. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.

30. President George W. Bush, *supra* note 22 (emphasis added).

putting "our faith in the word of tyrants" no longer makes sense.<sup>31</sup> This terminology seems to point to the need for a foreign policy based on worst case scenarios, since such scenarios cannot be ruled out. As discussed earlier, assuming the worst and then acting upon this postulation does not fit into the definitions of preemption that have been discussed in the first part of this paper.

Arguing against waiting "for threats to fully materialize" and confronting them before they become apparent also seems to indicate an approach that is not based on full knowledge, but one that proactively engages potential enemies before attacks reach our homeland. Lastly, President Bush asserted that the struggle against terrorism "will not be won on the defensive," raising serious doubts about whether the actions encouraged here could still be defined as *self-defense*.<sup>32</sup>

To further investigate the exact type of policy advocated by the Bush administration, we turn to the October 2002 National Security Strategy penned by the White House.<sup>33</sup> This was the first document of its kind released after the terrorist attacks of September 11, 2001. President Bush decided to outline his overall strategy in combating terrorism in this document, which has given rise to the term "Bush Doctrine."<sup>34</sup> It is here that we find the first formal document detailing the framework of President Bush's vision of what he refers to as *preemption*:

Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must *adapt the concept of imminent threat* to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, *potentially*, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principle norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses *would be* exponentially more severe *if* terrorists acquired and used weapons of mass destruction.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, *the greater the risk of inaction*—and the more compelling the case for taking

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31. *Id.*

32. *Id.*

33. The National Security Strategy of the United States of America, *supra* note 18

34. Frontline, Chronology: The Evolution of the Bush Doctrine <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html> (last visited Feb. 2, 2005).

anticipatory action to defend ourselves, *even if uncertainty remains* as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>35</sup>

Notably, the threat being presented here is one of conjecture. Even a cursory analysis will reveal that the attacks of September 11<sup>th</sup> did not entail terrorists obtaining any type of weapons of mass destruction. This does not mean that the threat described above does not exist or is irrelevant. However, in the context of preemption, I believe that this danger must be categorized as hypothetical and, therefore, a *risk* of severe destruction, not an imminent threat. To deal with this menace militarily would thus be a preventive war, not preemption.

There is certainly recognition of the fact that the White House's proposal is a departure from the traditional view of preemptive self-defense, which is evident in the phrase, "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."<sup>36</sup> It seems that this is a common theme in the argument for preemption by the Bush administration. The line of reasoning is that the destructive power of today's weapons warrants an immediate response, lest we suffer a terrible fate at the hands of weapons the world has not previously known. However, it should be remembered that every preceding generation has not known the destructive power of today's weaponry. Due to humanity's proclivity for creating ever more devastating armaments, throughout the course of history each generation has introduced death and destruction on a level that has never before been seen. We are always at the apex of our potential for destruction. Therefore, to assert that we are living in a new world describes the circumstances with which every generation has had to struggle. This is not to minimize the prospective devastation that might come from potential terrorists if they obtain weapons of mass destruction and are able to elude our homeland defenses. The question remains, however, to what point are we willing to extend our speculation once we have dropped the standard of incontrovertible evidence of an imminent attack?

At this point, it is important to note that the means for evaluating threats to the United States are under close scrutiny after the failure to find weapons of mass destruction in Iraq, the discovery of an elaborate black-market nuclear weapons proliferation program in Pakistan, the discovery that the nuclear weapons programs of Iran and Libya were much more advanced than originally supposed, and the inability to foresee or forestall the attacks of September 11<sup>th</sup>. It seems that these revelations raise serious doubts about our capacity for reliable and accurate conjecture. The concepts of both preemption and preventive war presuppose a capability to produce correct assessments of imminent and looming dangers. The ethical ramifications of advocating actions based upon less than perfect intelligence seem quite problematic.

The question that follows these disclosures is whether the Bush administration continues to advocate the same type of anticipatory self-defense policy that it

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35. The National Security Strategy of the United States of America, *supra* note 18 (emphasis added)

36. *Id.*



presented in October 2002. The answer appears to be yes. In an interview with Tim Russert of Meet the Press on February 8, 2004, President Bush discussed this issue.<sup>37</sup> In light of the absence of weapons stockpiles that were alleged to exist in Iraq, Russert asked about the concept of "preemption war," and whether a preemptive war can be launched without ironclad evidence.<sup>38</sup> In this discussion, President Bush responded:

The fundamental question is: Do you deal with the threat once you see it? What—in the war on terror, how do you deal with threats? I dealt with a threat by taking the case to the world and said, "Let's deal with this. We must deal with it now."

I repeat to you what I strongly *believe*, that inaction in Iraq would have emboldened Saddam Hussein. He *could have* developed a nuclear weapon over time—I'm not saying immediately, but over time—which would have then put us in what position? We would have been in a position of blackmail.

In other words, you can't rely upon a madman, and he was a madman. You can't rely upon him making rational decisions when it comes to war and peace, and it's too late, *in my judgment*, when a madman who has got terrorist connections is able to act.<sup>39</sup>

By the definitions articulated in the beginning of this paper,<sup>40</sup> it appears that the President was speaking of preventive war, since the justification for acting, before the dangerous weapons were produced and for waging war on another country, is the risk of not acting. President Bush asserted that the danger comes from hesitation, not from existing circumstances and capabilities.<sup>41</sup>

In a February 23, 2004 article, "The Right War for the Right Reasons," printed in *The Weekly Standard*, Robert Kagan and William Kristol, self described neo-conservatives and members of the Project for the New American Century, argue the same point:<sup>42</sup>

Did the administration claim the Iraqi threat was imminent, in the sense that Iraq possessed weapons that were about to be used against the United States? That is the big charge leveled by the Bush administration's critics these days. It is rather surprising, given the certainty with which this charge is thrown around, how little the critics have in the way of quotations from administration officials to back it up. Saying that action is urgent is not the same thing as saying the threat is imminent. In fact, the president said the threat was not imminent, and that we

37. *Meet the Press* (NBC television broadcast, Feb. 8, 2004).

38. *Id.*

39. *Id.*

40. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 2; UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.

41. President George W. Bush, *supra* note 22.

42. Robert Kagan and William Kristol, *The Right War for the Right Reasons*, 9 THE WKLY STANDARD 23 (Feb. 23, 2004), <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/735tahyk.asp>.

had to act (urgently) before the threat became imminent.<sup>43</sup>

What we see here is an even more explicit argument against the standard of preemption with the rejection of an imminent attack as the proper standard. It seems too restrictive to wait for a threat to become immediate, and hence, preventive war would be necessary and just. In fact, the argument here seems to imply that anything less would be imprudent and irresponsible.

### Implications and Conclusions

If we have in fact established that, due to its vague and speculative criteria, preventive war is a more tenuous prospect than that of preemptive action, then there would certainly be legal and ethical implications. As mentioned earlier, this author believes that moral behavior and international law are often based on the notion that the norms we choose are largely crafted by the actions we would not like to see visited upon us. Consequently, the question must be raised as to whether preventive war is the type of normative behavior one would like to see operating freely in the international sphere, or, more specifically, waged against one's own nation. It certainly seems to be the case that law loses its meaning if all are not bound by it. That which is deemed legal for one nation should be applied to all. Given the unrivaled and unprecedented military power of the United States, the criteria of possessing the capability for mounting an attack will always be met, leaving open only the question of intent. Since the interpretation of U.S. intentions by a potential adversary is a purely subjective exercise, one might be wary of such a low standard for waging war.

It should be noted that this type of subjective and speculative standard for war seems to contradict every intention of the U.N. Charter. One reason for this omission might be that it would be nearly impossible to write a statute that legalizes certain types of unverifiable military action while outlawing others. Hence, all preventive war in which the "belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk," would need to be deemed legal.<sup>44</sup> As we have seen, it is quite possible, and perhaps sometimes reasonable, to make the case in certain circumstances that a particular nation represents a real threat to another nation's security. However, ethical and legal codes are more appropriately constructed under a "veil of ignorance" in which we are oblivious to our own capabilities and circumstances so that we can achieve true equity.<sup>45</sup> If such determinations of law and ethics are made while primarily considering our own self-interest, they no longer can be deemed ethical, nor can they achieve the equity that just law promises.

In addition, it should be noted that although it is usually the activity of international jurists and political scientists to discuss the justness of a particular war, I believe that these determinations have real repercussions and are in fact more importantly decided on the ground in today's world. Even if there were a

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43. *Id.*

44. UNITED STATES JOINT CHIEFS OF STAFF, *supra* note 3.

45. This model and phrase comes from JOHN RAWLS, A THEORY OF JUSTICE (1971), in which he describes the "original position" that allows us to understand his theory of "justice as fairness."

broad consensus of the legality of a particular military action, and a U.N. Security Council resolution were passed to codify this conclusion, it would ultimately still be up to the people of the invaded nation to decide upon the legitimacy of that invasion. It also seems that the development of non-violent action and guerilla warfare throughout the twentieth century have given rise to tactics that people have learned and implemented to resist perceived injustice even in the face of the most powerful militaries of the world. For this reason, it is imperative that we understand that the standards discussed here are for our own benefit and not simply constraints on one's action. The norm suggested here is also a guideline for how others will interpret military actions that are not based on incontrovertible evidence of imminent attack, even if they are justified at home.

The intent of this paper is to clarify the distinction of the terms *preemption* and *preventive war*, and hopefully, the examination of legal and historical citations has brought some clarity to the current discourse. I also hoped to highlight the important difference between the two terms and to further elucidate each of their implications in international law and moral theory. As stated earlier, both ethics and international law are based on an inter-subjectivity that this author alone cannot accomplish. Therefore, it falls upon the reader to determine whether the legal distinctions drawn and the claims of morality presented have been persuasive. If in fact this lofty goal is accomplished, then it is hoped and encouraged that these terms will be used in their proper context in the future so that the ambiguity that has clouded the national debate can be lifted and an open and honest discourse may ensue. This would perhaps pave the way for reasonable people to agree or disagree on the philosophical tenets of these terms and not to be distracted or confused by their ambiguity.

To conclude, I return to Grotius, whose nearly four-hundred-year-old words continue to embody meaning and salience:

Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way, or that he is making ready a false accusation and a false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot otherwise be avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences; as the proverb runs, 'There's many a slip 'twixt cup and lip.' There are, it is true, theologians and jurists who would extend their indulgence somewhat further; but the opinion stated, which is better and safer, does not lack the support of authorities.<sup>46</sup>

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46. GROTIUS, *supra* note 4, at 184.

# **COLLECTIVE SECURITY WITH A HUMAN FACE: AN INTERNATIONAL LEGAL FRAMEWORK FOR COORDINATED ACTION TO ALLEVIATE VIOLENCE AND POVERTY**

JENNIFER MOORE\*

## **INTRODUCTION**

The inter-dependence of strategic security, human rights, and social security has been recognized on a theoretical or rhetorical level since the founding of the United Nations. Nevertheless, in the current counter-insurgency campaigns being waged in Iraq, Afghanistan, and elsewhere, the potentially negative impacts of armed intervention on socio-economic stability and human security are often obscured by popular perceptions and rationalizations of the so-called “War against Terrorism.” In fact, current military interventions are compounding recent setbacks in the global struggle against poverty and underdevelopment. Moreover, disproportionate reliance on military force to combat terrorism potentially feeds ongoing conflicts rather than repressing them. This article suggests an integrated vision for fighting terrorism and poverty, by exploring the theoretical, historical, and legal relationships between strategic and human security, with a particular focus on recent developments in Western Asia and Central Africa.

Part I of this article will explore some of the diverse theoretical and cultural roots of the human security concept set forth in the U.N. Charter, as well as the limited historical impact of the human security concept in global affairs since the United Nation’s birth. Part II confronts the negative impact of the “War against Terrorism” on the war against poverty by linking recent developments in Iraq and the Great Lakes Region of Africa. Finally, Part III analyzes the international law arguments supporting a legal obligation to promote human security in the U.N. Charter, various human rights instruments, and the Geneva Conventions of 1949.

The article ends with the conclusion that a commitment to human security is not merely linked philosophically and pragmatically to a strategic vision of peace and security; rather, an obligation to promote human security can be legally derived from the texts of international instruments themselves. In the final analysis, knitting aspirational, practical, and legal arguments together demonstrates

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most powerfully that establishing security in strategic terms is dependent upon protecting civil and political liberties and satisfying basic social and economic needs.

## I. HUMAN SECURITY IN A COMPARATIVE AND HISTORICAL CONTEXT

### *A. Theoretical and Multicultural Roots of Human Security*

The symbiosis between security defined in Machiavellian or strategic terms, and security defined in Ghandian or humanistic terms is enshrined in the provisions of the U.N. Charter. President Roosevelt's close advisor Harry Hopkins and Soviet Foreign Minister V.M. Molotov no doubt practiced the fine art of *realpolitik* as well as friendly persuasion in negotiating the final text of that treaty with their fellow drafters.<sup>1</sup> The fruit of their labors, Article 1, articulates the ambitious mandate of the organization, by integrating the maintenance of peace and security with both the promotion of human rights and the resolution of global economic and social problems.<sup>2</sup>

While progressive for its time, the Charter's integrated vision for the United Nations' work resonates with both previous and subsequent political and social movements around the world. Indeed, politicians, social activists and philosophers from Lao Tzu in the sixth century B.C. to Dorothy Day in the twentieth century, and from John F. Kennedy in the United States to Nelson Mandela in South Africa, have recognized the connections between respecting human rights, alleviating poverty, and attaining enduring peace.

The political philosopher Lao Tzu, writing in China during the sixth century B.C., suggested that government repression and corruption were principal causes of hunger among the masses, and that such poverty unavoidably led to civil strife.<sup>3</sup> For her part, social philosopher Dorothy Day, founder of the Catholic Worker Movement in New York City in 1932, integrated her faith-based social activism with her conscientious objection to war, as well as her commitment to racial and economic justice.<sup>4</sup>

1. See STANLEY MEISLER, *THE UNITED NATIONS: THE FIRST FIFTY YEARS* 13-14, 17-19 (1995).

2. "The Purposes of the United Nations are: 1. To maintain international peace and security . . . 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights . . . " U.N. CHARTER art. 1, signed June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1969), available at <http://www.un.org/aboutun/charter/index.html>.

3. "Why are the people starving?

Because the rulers eat up the money in taxes.

Therefore the people are starving.

Why are the people rebellious?

Because the rulers interfere too much.

Therefore they are rebellious . . . . "

LAO TSU, TAO TE CHING ch. 75 (Gia-fu Feng & Jane English trans., Vintage Books 1972) (n.p., n.d.).

4. See generally DOROTHY DAY, *THE LONG LONELINESS* 263-73 (Harper, San Francisco 1997) (1952). In her autobiography, Day explains that her pacifism never entailed silence, even during World War II, when conscientious objectors "suffer[ed] grave criticism." Day believed in wealth redistribution as a better weapon against injustice than war: "in spite of my pacifism, it is natural for me to stand my ground, to continue in what actually amounts to a class war, using such weapons as the

President Kennedy, in founding the U.S. Peace Corps in 1961, stressed that satisfying the basic socio-economic needs of the world's people was a precondition to enduring peace.<sup>5</sup> In a kindred vein, President Mandela, upon his 1994 inauguration as the first democratically elected leader of post-apartheid South Africa, heralded the end of institutionalized racial discrimination in his country as the birth of a peaceful and just social order founded on human dignity.<sup>6</sup>

Viewed within this comparative and historical global perspective, President Roosevelt's 1944 "Four Freedoms Speech" resonates powerfully.<sup>7</sup> In fact, it is not accidental that the President's address linking the freedoms of speech and religion with the freedoms from fear and want occurred during the years immediately preceding the Universal Declaration of Human Rights (UDHR) draft.<sup>8</sup> Almost twenty years later, two international human rights treaties followed the U.N. General Assembly's unanimous adoption of the UDHR.<sup>9</sup> However, these two treaties separated civil and political rights on the one hand, from economic, social, and cultural rights on the other. Contrastingly, the UDHR is notable for linking civil and socio-economic rights in one instrument. Articles 3 through 21 of the UDHR deal with civil and political rights, including prohibitions against slavery and torture, and rights to freedom of expression, assembly, and participation in government.<sup>10</sup> Articles 22 through 29, on the other hand, involve economic, social,

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works of mercy for immediate means to show our love and to alleviate suffering." *Id.* at 180-81.

Paul Hendrickson of *The Washington Post*, in writing about the Catholic Worker movement and its founder, described Day's "social philosophy" as rooted in "her utter devotion to and belief in the dignity of the individual soul." Paul Hendrickson, *Sinner and Reluctant Saint: A Century After Dorothy Day's Birth, Her Work Still Helps the Helpless*, WASH. POST, Nov. 12, 1997, at D01. Hendrickson characterized Day as "theologically and liturgically traditional, but radical in about everything else: social justice, racial relations, pacifism, conscientious objection." *Id.*

5. President John F. Kennedy famously queried: "Is not peace, in the last analysis, basically a matter of human rights?" Richard B. Bilder, "Rethinking International Human Rights: Some Basic Questions," 1969 WIS. L. REV. 171, 187, excerpted in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 79 (Richard B. Lillich & Hurst Hannum, eds., 3d ed. 1995).

6. In his inauguration speech on May 10, 1994, Nelson Mandela celebrated the end of apartheid in South Africa: "Out of experience of an extraordinary human disaster that lasted too long, must be born a society of which all humanity will be proud . . . . We thank all of our . . . guests for having come to take possession with the people of our country of what is, after all, a common victory for justice, for peace, for human dignity." NELSON MANDELA, LONG WALK TO FREEDOM 620-21 (1995).

7. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 445-46 (2002).

8. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

9. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, art. 2, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; see also International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

10. See UDHR, *supra* note 8, arts. 3-21. *Inter alia*, Article 3 proclaims "the right to life, liberty and the security of person;" Article 4 bans slavery; Article 5 prohibits torture; Article 6 guarantees basic legal personality; Article 9 prohibits arbitrary detention; Article 10 guarantees a fair trial; Article 11 proclaims the presumption of innocence; Article 12 guarantees privacy; Article 13 guarantees freedom of movement; Article 14 provides for the right to asylum; Article 15 protects the right to nationality; Article 16 provides the right to marry; Article 17 protects property ownership; Article 18 guarantees the

and cultural rights, including basic needs like social security, food, and education.<sup>11</sup> The extent to which the UDHR, the two human rights covenants and humanitarian treaties together recognize an obligation upon states to promote human security will be further explored in section III of this article.

### *B. Recent Historical Impact of Human Security in U.N. Practice*

Despite the early recognition that strategic and material security are two faces of the human condition, rarely during the United Nations' first sixty years has history shown a positive correlation between military intervention and poverty alleviation around the world. This lack of significant progress in the socio-economic realm is demonstrated by countries still emerging from conflicts initiated during the Cold War, during which the Security Council had difficulty acting as a result of ideological differences between the United States and the Soviet Union and China.<sup>12</sup> However, the same lack of a strong correlation between military intervention and social progress can be seen in the 1990s, when the break-up of the Soviet Union heralded a New World Order<sup>13</sup> of global cooperation and collective action. The year 2000 inspired the U.N. Millennium Goals, which include dramatic reductions in levels of poverty and hunger around the world. Nevertheless, hunger rates have increased and continue to grow in the first decade of the new millennium, and United States led military interventions of the past three years appear only likely to exacerbate this trend.<sup>14</sup> This section will examine each of these three periods in closer detail.

#### 1. The Cold War

The so-called Cold War decades were marked not only by the Security Council's pronounced failure to lead in the realm of collective security, but also by proxy military interventions, regional conflicts, and civil wars that have only recently given way to all too modest progress on the human security front. Three countries that experienced protracted civil wars with U.S. and Soviet military assistance on either side were Vietnam,<sup>15</sup> El Salvador<sup>16</sup> and Angola.<sup>17</sup> All three

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right to freedom of conscience; and Article 19 guarantees free expression. *Id.* arts. 3-19.

11. See UDHR, *supra* note 8, arts. 21-29. Article 21 sets forth the right to social security; Article 22 the right to work under fair labor conditions; Article 23 the right to a living wage; Article 24 the right to rest and leisure; Article 25 the right to an adequate standard of living, including food; Article 26 the right to education; and Article 27 the right to participation in cultural life. *Id.* arts. 21-27.

12. See Information Please: Online Dictionary, Internet Encyclopedia, Atlas, & Almanac, available at <http://www.infospace.com/ce6/history/A0861704.html> (last visited Sept. 15, 2004); see also MEISLER, *supra* note 1, at 23-26, 35.

13. See *infra* notes 24 and 25, and related text.

14. *Id.*

15. In Vietnam, the civil war between the U.S.-backed South Vietnamese Army and the Soviet-backed North Vietnamese troops lasted from 1965 to 1975, with the fall of Saigon to the North Vietnamese. As many as 170,000 Vietnamese people died during the war. See Matthew White, *Historical Atlas of the Twentieth Century*, at <http://users.erols.com/mwhite28/warstat2.htm#Vietnam> (last modified Feb. 2004).

16. In El Salvador, the civil war between rebel groups and the U.S.-backed Salvadoran Armed Forces lasted from 1980 to 1992, when a peace accord was negotiated between the government and the Farabundo Marti National Liberation Front (FMLN). Upwards of 75,000 Salvadoran people died in the

have achieved final peace settlements, and Angola and Vietnam have resumed normal diplomatic relations with the United States.<sup>18</sup> Nevertheless, despite important political and economic reforms in all three countries, nearly half the citizens in all three countries continue to subsist on one or two dollars per day,<sup>19</sup> and the figures for gross domestic product (GDP) per capita for each country are a fraction of those for neighboring countries in each respective region.<sup>20</sup> Despite low GDP per capita rates in all three countries, between the early and late 1990s, the percentage of under-nourished people decreased in Vietnam and in Angola.<sup>21</sup> Contrastingly, the level of hunger in El Salvador increased in the 1990s.<sup>22</sup>

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war. See generally ELISABETH JEAN WOOD, *INSURGENT COLLECTIVE ACTION AND CIVIL WAR IN EL SALVADOR* (2003).

17. In Angola, the civil war between the Soviet-backed government and the UNITA guerrilla movement under Jonas Savimbi was waged from 1975, when Angola achieved its independence from Portugal, until Savimbi's death in 2002. While the Lusaka Peace Accords were formally implemented in 1994, effective disarmament was not feasible until the UNITA leader's death. See *Angola Rebel Leader's Death Confirmed*, BBC NEWS (Feb. 24, 2002), at <http://news.bbc.co.uk/1/hi/world/africa/1837565.stm> (last visited Sept. 9, 2004). UNITA is now a political party, and is preparing to participate in national elections scheduled for 2006.

18. The United States and Vietnam restored full diplomatic relations in 1995. See Edward Walsh, *Vietnam War, Peace Pivotal in Kerry's Life*, WASHINGTON POST, Jan. 3, 2004, Section A1. Full diplomatic relations between Angola and the United States were established in June, 1993. See also Embassy of the United States of America: Luanda, Angola, at <http://luanda.usembassy.gov> (last visited Oct. 31, 2004).

19. According to statistics compiled by the World Bank and the U.N., and published by the U.N. Development Program, from 1990 to 2001, 63.7% of the population of Vietnam was living on \$2 per day or less (17.7% on \$1 per day or less) and the probability at birth of not surviving to age 40 was 10.7% between 2000 and 2005. In El Salvador in the 1990s, 45% of the population subsisted on \$2 per day or less (21.4% on \$1 a day or less), and the probability of not reaching age 40 was 9.9% from 2000 to 2005. In Angola during this same time period, there are no available statistics for the national poverty line, but U.N. statistics indicate that the probability at birth of not surviving to age 40 for Angolans was 49.2% from 2000 to 2005. See UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2003, 245-47 (2003) (displaying chart 3, regarding "Human and income poverty" for developing countries) [hereinafter UNDP REPORT]; see also Table A, *infra*.

20. GDP per capita in Vietnam in 2001 was \$2,070, in contrast to \$6,400 for Thailand (and \$2,840 for India). See UNDP REPORT, *supra* note 19, at 237-40 (displaying chart 1 regarding "Human development index"). In El Salvador, GDP per capita in 2001 was \$5,260, in contrast to \$8,430 for Mexico and \$9,460 for Costa Rica (the 2001 GDP per capita was \$1,860 for Haiti). *Id.* Finally, in Angola, GDP per capita in 2001 was \$2,040, in contrast to \$7,120 for Namibia, and \$11,290 for South Africa. *Id.* While total GDP figures reflect the relative strength of a nation's economy, GDP per capita is perhaps a better indicator of human security because it reflects how income would be shared over a nation's population if it were distributed equally. See also Table A *infra*.

21. In Vietnam, the average percentage of undernourished people between 1990 and 1992 was 27%, whereas between 1998 and 2000 it was 18%. In Angola, over the same two periods, the rate dropped from 61% undernourished to 50%.

22. In El Salvador, the percentage of undernourished climbed from 12% to 14% over the same period. See UNDP REPORT, *supra* note 19, at 198-200 (displaying chart regarding "Millennium Development Goal 1: Eradicate extreme poverty and hunger"); see also Table A, *infra*. The U.N.'s Food and Agriculture Organization (FAO) tracks hunger in terms of its undernourishment measure. Those individuals who consume less than 1,800 calories per day are defined as undernourished. The FAO's undernourishment measure takes into account the amount of available food in a particular country and the ability of individuals to get access to that food. See BREAD FOR THE



**Table A: Poverty, Income and Hunger Indicators for  
Angola, El Salvador and Vietnam, with Regional Comparisons**

(data drawn from World Bank and United Nations sources, compiled in UNDP *Human Development Report 2003*, chart 3 and chart re MDG 1)

	Population living on ≤\$1/day	Population living on ≤\$2/day	Gross dom. product per capita	Poverty gap ratio *	Under- nourished 1990-1992	Under- nourished 1998-2000
<i>Angola</i>	N/A	N/A	\$2,040	N/A	61%	50%
Namibia	35%	56%	\$7,120	14%; 86 c.	15%	9%
South Afr.	<2%	15%	\$11,290	<.5%; 99 c.	N/A	N/A
<i>El Salvador</i>	21%	45%	\$5,260	8%; 92 c.	12%	14%
Mexico	8%	24%	\$8,430	2%; 98 c.	5%	5%
Costa Rica	7%	14%	\$9,460	3%; 97 c.	6%	5%
<i>Vietnam</i>	18%	64%	\$2,070	3%; 97 c.	27%	18%
Thailand	<2%	32%	\$6,400	<.5%; 99 c.	28%	18%

## 2. Post Cold War

The 1990s brought the renewed hope of Security Council collective action. U.S. Secretary of State James Baker, presiding over the Security Council on November 29, 1990, heralded the end of the Cold War and the “chance to build the world which was envisioned . . . by the founders of the United Nations . . . [as well as] the chance to make the Security Council and this United Nations true instruments for peace and for justice across the globe.”<sup>23</sup> Both Baker’s and the senior President Bush’s proclamations of a “New World Order” in the early 1990s were criticized by some as overly ambitious or inappropriately linked to U.S. military intervention in Iraq during the first Persian Gulf War.<sup>24</sup>

Despite skepticism, the early 1990s were indeed marked by the Security Council’s increased capacity and willingness to pass resolutions under its Chapter VII mandate.<sup>25</sup> Not coincidentally, early initiatives responding to genocide in Northern Iraq,<sup>26</sup> the former Yugoslavia,<sup>27</sup> and Rwanda<sup>28</sup> explicitly defined massive

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WORD INSTITUTE, HUNGER 2004: ARE WE ON TRACK TO END HUNGER? 18 (2004) [hereinafter HUNGER 2004].

\* The poverty gap ratio refers to the mean distance below the [1993] \$1 poverty line, expressed as a percentage of the poverty line. See UNDP REPORT, *supra* note 20, at 198-202 (displaying a chart regarding “Millennium Development Goal 1: Eradicate extreme poverty and hunger”) and 356 (defining of statistical terms). For example, if the poverty gap ratio is 25%, this means that on average those people living below the poverty line subsist on .75 cents per day. *Id.*

23. See MEISLER, *supra* note 1, at 264-65.

24. See *id.* at 265 (Iraqi Ambassador Al-Anbar expressed incredulity that a “new world order” could possibly be furthered by “the massing of American forces and their deployment in the Gulf region . . . [or] the threats of the invasion and destruction of Iraq”); see also *id.* at 276, 334 (former U.N. undersecretary-general Brian Urquhart referred to the 1990s as a “false renaissance” for the U.N., marked by unfulfilled promises for the Organization and the international community).

25. See U.N. CHARTER arts. 39-43.

26. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg. at 31 (1991) (demanding end to Iraqi

human rights emergencies as threats to international peace and security.<sup>29</sup> Nevertheless, deep-rooted structural changes in these countries have yet to instill long-term socioeconomic gains. Notably, GDP per capita rates are low in Bosnia and very low in Rwanda, in comparison to other countries in their respective regions. Furthermore, while the Bosnian undernourishment rate is relatively low, 85 percent of the Rwandan population lives on two dollars a day or less, and the undernourishment rate is approaching 50 percent.<sup>30</sup>

**Table B: Poverty, Income and Hunger Indicators  
For Rwanda and Bosnia, with Regional Comparisons**

(data drawn from World Bank and U.N. sources, compiled in UNDP *Human Development Report 2003*, charts 1, 3 & 4 and chart re MDG 1)

	Population living on ≤\$1/day	Population living on ≤\$2/day	Gross dom. product per capita	Poverty gap ratio*	Under-nourished, 1990-1992	Under-nourished, 1998-2000
<i>Rwanda</i>	36%	85%	\$1,250	8%; 92 c.	34%	40%
Uganda	82%	96%	\$1,490	40%; 60 c.	23%	21%
Egypt	3%	44%	\$3,520	<.5%; 99 c.	5%	4%
<i>Bosnia</i>	N/A	N/A	\$5,970	N/A	N/A	6%
Croatia	N/A	N/A	\$9,170	<.5%; 99 c.	N/A	18%
Slovenia	N/A	N/A	\$17,130	<.5%; 99 c.	N/A	N/A

repression of Kurds and Shi'ites under Chapter VII powers).

27. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia).

28. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) (establishing the International Criminal Tribunal for Rwanda).

29. See U.N. CHARTER arts. 39, 41-43 (regarding enforcement powers of U.N. Security Council in responding to threats to international peace and security).

30. According to statistics compiled by the World Bank and the U.N., and published by the U.N. Development Program, from 1990 to 2001, 84.6% of the population of Rwanda was living on \$2 per day or less (35.7% on \$1 per day or less) and the probability at birth of not surviving to age 40 was 54.3% between 2000 and 2005. See UNDP REPORT, *supra* note 19. Contrastingly, Bosnia's overall human and income poverty indicators are stronger, putting it in the category of a developed, rather than a developing, country. See *id.* at 248-49 (displaying chart 4 regarding "Human and income poverty" for OECD, Central & Eastern Europe & CIS). Comparable data is not available for Iraq. See *supra* note 22 for a definition of undernourishment.

As for GDP per capita, the figure for 2001 in Rwanda was \$1,250, in contrast to \$1,490 for Uganda and \$3,520 for Egypt during the same year. While GDP per capita figures for Bosnia are nearly five times higher than for Rwanda, relative to other former Yugoslavian republics, the regional differential is similar for both countries. The GDP per capita for Bosnia in 2001 was \$5,970, in contrast to \$9,170 for Croatia and \$17,130 for Slovenia (and \$35,320 for the United States). There is no comparable data available for Iraq. See UNDP REPORT, *supra* note 19, at 237-40 (displaying chart 1 regarding the "Human development index"); see also Table B *infra*.

\* The poverty gap ratio refers to the mean distance below the [1993] \$1 poverty line, expressed as a percentage of the poverty line. See UNDP REPORT, *supra* note 20, at 198-202, 356.

### 3. The Twenty-first Century and the Doctrine of Preemption

Since March 2003 and the unauthorized use of force by the United States and the United Kingdom against Saddam Hussein's Iraqi regime,<sup>31</sup> some observers have heralded the death of an international commitment to collective decision making governing the use of force under the U.N. rubric.<sup>32</sup> Neoconservative thinkers refer more affirmatively to the advent of a "New American Century."<sup>33</sup> In the face of increasing opposition to the ascending preemptive use of force doctrine,

31. While the U.S. and the United Kingdom purported to justify the invasion of Iraq in March of 2003 on the basis of previous U.N. Security Council resolutions (including Resolution 678, which permitted use of military force against Iraq in 1991), this rationale has not been widely accepted. See Frederic L. Kirgis, *ASIL Insights: Security Council Resolution 1483 on the Rebuilding of Iraq*, NEWSL. OF THE AM. SOC. OF INT'L LAW, May/June 2003, at 3.

Professor Jordan Paust explains that given the U.N. Charter's Article 2(4) prohibition on the use of force, the right to self-defense under Article 51 is limited in scope to responsive actions to "armed attacks," whether by state or non-state actors. Jordan Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. 533, 534 (2002); see also U.N. CHARTER arts. 2(4), 51. Therefore, according to Professor Paust, the U.S. was justified under Article 51 in striking against al Qaeda for the World Trade attacks of September 11, 2001. See Paust, *supra*, at 533. However, the same cannot be said for U.S. attacks against Taliban armed forces in 2001, since there is insufficient evidence that the Taliban directed bin Laden's attacks on the U.S., and given that support or even sponsorship of a military attack is insufficient to justify retaliation against the sponsor under Article 51. See *id.* at 541-43.

Finally, Professor Paust asserts that "preemptive self-defense is not permissible under the United Nations Charter absent Security Council or appropriate regional authorization to use armed force." *Id.* at 557. "Permissible use of military force against Iraq rests ultimately on authorization from the Security Council." *Id.*; see also Richard Falk, *Why International Law Matters: Pre-Emptive War Flagrantly Contradicts the U.N.'s Legal Framework*, THE NATION, Mar. 10, 2003, at 19.

32. As a former Chief Counsel of the Senate Foreign Relations Committee has commented, the war in Iraq must be seen as response to "the dramatic power shift . . . that leaves the U.S. in such a commanding military position (combined with our economic and commercial-cultural dominance)." *Readers' Exchange: A Letter to the President From Frederick S. Tipson*, NEWSL. OF THE AMER. SOC. OF INT'L LAW, Mar./Apr. 2003, at 1. Not only did the U.S. and the U.K. "bypass" the Security Council in invading Iraq in March of 2003, "the United States has stepped outside . . . the Charter framework. It has, in effect, staked a claim to defining a new set of international norms regarding the use of force more appropriate to these new security realities." *Id.* at 4.

Jonathan Schell wrote, just after the start of the second Iraq war, that "[t]he decision to go to war to overthrow the government of Iraq . . . marks a culmination in the rise within the United States of unaccountable power that . . . threatens to push the world into a new era of rivalry, confrontation and war." See Jonathan Schell, *Comment: American Tragedy*, THE NATION, Apr. 7, 2003, at 4.

33. The Project for the New American Century (PNAC) is a research foundation created in 1997 with the support of such prominent conservative political and business figures as Elliott Abrams, Gary Bauer, William J. Bennett, Jeb Bush, Dick Cheney, Steve Forbes, Lewis Libby and Dan Quayle. PROJECT FOR THE NEW AMERICAN CENTURY, STATEMENT OF PRINCIPLES (June 3, 1997), at <http://www.newamericancentury.org> (last visited Sept. 15, 2004). According to William Kristol, its Chairman, PNAC "is a non-profit educational organization dedicated to a few fundamental propositions, that American leadership is both good for America and for the world, that such leadership requires military strength, diplomatic energy and commitment to moral principle and that too few political leaders are making the case for global leadership." *Id.* In its statement of principles, PNAC's sponsors pose a central question and challenge that frames the organization's defining vision: "Does the United States have the resolve to shape a new century favorable to American principles and interests?" *Id.*

an equally sobering reality is that in terms of both military and human security, Iraq remains a deeply conflicted and vulnerable society. Indeed, the reality of ongoing political, ethnic, and religious strife in Iraq, as well as the loss of human life to guerrilla raids, suicide bombings, and Coalition attacks, has not yet been alleviated by the removal of the Baathist regime, the institution of the interim Governing Council under the auspices of the Coalition Provisional Authority, and national elections held on January 30, 2005.<sup>34</sup> Similar observations could be made about the fragility of Afghan society since the removal of the Taliban.<sup>35</sup>

#### *D. Prospects for a Renewed Commitment to Multilateralism*

During three overarching periods in the United Nations' life—colloquially termed the Cold War, the New World Order, and the New American Century—the failure of military interventions to effectively address structural societal problems has been constant. As the international community seeks either a recommitment to principled multilateralism, or the development of new rules for responding to threats of the use of force, our renewed consensus will be an empty one if we do not address the more essential links between global peace and the strength of the social fabric of our human communities. To restore, or establish for the first time, a two-pronged vision of collective security with both strategic and material components, the world community will need to reform the U.N. Economic and Social Council as well as the Security Council, so that they constitute revitalized and interdependent international institutions.<sup>36</sup>

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34. Major General Martin E. Dempsey is commander of the First Armored Division of the U.S. Army, which has operational responsibility for Baghdad under the auspices of the Coalition Authority in Iraq. John F. Burns, *Hotel Attacks Linked to War Anniversary*, N.Y. TIMES, Mar. 19, 2004, at A11. He believes that “we are winning” the war in Iraq, but cautions that defeating Islamic militants is more difficult than removing Saddam Hussein: “It is far easier to fight an enemy that fights you conventionally and who fights you in some similar fashion that you fight him than it is to fight an enemy who uses the tools of terror. . . .” *Id.* Asked for a timeline in the struggle against terrorists, the general responded. “How long? I have no idea. I’m leaving in 30 days, so let me promise you this: It’s not going to be done by the time I leave.” *Id.*

35. On March 21, 2004, Mir Wais Sadeq, Afghanistan’s Minister for Civil Aviation, was killed in Herat in a rocket attack on his convoy that likely also killed officials responsible for the local police, security and counter-narcotics units in Herat. Amy Waldman, *Official Killed As Strife Grows in Afghanistan*, N.Y. TIMES, Mar. 22, 2004, at A15. Mr. Sadeq is the son of Ismail Khan, the Tajik former warlord who is currently the provincial governor of Herat. *Id.* Located near the Iranian border in northern Afghanistan, Herat is located in a region of tension between national officials and local Tajik leaders, including Mr. Khan, reluctant to give up power to a centralized, multi-ethnic government in Kabul. *Id.* Mr. Khan was governor of Herat before the majority Pashtun Taliban took the city in 1995, at which time he was imprisoned, escaped and fled into exile in Iran. *Id.* Mr. Khan returned to Afghanistan in 2001 with the fall of the Taliban, at which time he briefly appointed himself emir of Herat. *Id.*

According to a local official, Mr. Sadeq’s convoy was attacked as his vehicle led an advance on the headquarters of a government commander he believed responsible for a failed attempt to assassinate his father. *Id.* The U.S. Embassy in Kabul responded to the deaths with an official statement that: “Afghans must not let the success of the last two years be put in jeopardy by this incident.” *Id.* Mr. Sadeq is the third Afghan government minister to be killed since the start of President Hamid Karzai’s interim administration in December 2001. *Id.*

36. Anne-Marie Slaughter, President of the American Society of International Law, reminds

## II. NEGATIVE IMPLICATIONS OF THE WAR AGAINST TERRORISM ON THE WAR AGAINST POVERTY: LINKING RECENT DEVELOPMENTS IN IRAQ AND THE GREAT LAKES REGION OF AFRICA

### A. *The War against Poverty*

In 1963, at the first World Food Congress, President Kennedy issued a call to action: "[W]e have the means, we have the capacity to eliminate hunger from the face of the earth in our lifetime. We need only the will."<sup>37</sup> At the 1974 World Food Summit, delegates from U.N. member states committed to end hunger by 1984.<sup>38</sup> Even though the rolls of hungry people worldwide decreased by thirty-seven million during the early 1990s,<sup>39</sup> the total increased again by eighteen million in the latter half of the decade.<sup>40</sup> Reflecting this development, in 1996 the commitment to combat hunger was scaled back to the more modest goal of reducing hunger by 50 percent by the year 2015.<sup>41</sup>

Unfortunately, from 1995-2001, instead of decreasing, the number of hungry people in the developing world increased by 4.5 million people per year, such that half the modest gains in the war against hunger have been lost over the past ten years.<sup>42</sup> As of 2004, there are 842 million people living in hunger throughout the world, of which 798 million—nearly 95 percent—live in developing countries.<sup>43</sup> The U.N. Food and Agricultural Organization projects that given current global trends and current spending on food aid and socio-economic development, it will be 2050, not 2015, before global hunger is halved.<sup>44</sup> Hunger rates are particularly high in the developing world, and even higher in the least developed countries of the world, which are concentrated in Sub-Saharan Africa.<sup>45</sup>

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international law scholars and practitioners that alongside the Security Council, the Economic and Social Council is a principal organ of the United Nations: "There were to be two great Councils at the U.N., one to address immediate and violent disruptions of international peace and security and the other to address the longer term causes of both disorder and injustice: poverty, disease, illiteracy and inequality. Today many of us would no longer distinguish between 'security' and economic and social issues, arguing that human security is as critical as state security and that the two are inextricably intertwined." Anne-Marie Slaughter, *The Value of Spirited Debate*, NEWSL. OF THE AMER. SOC. OF INT'L L. LAW, Jan./Feb. 2004, at 8.

37. President John F. Kennedy, Remarks at the Opening Session of the World Food Congress (June 4, 1963), *available at* <http://www.presidency.ucsb.edu/site/docs/pppus.php?admin=035&year=1963&id=217> (last visited Sept. 9, 2004).

38. HUNGER 2004, *supra* note 22, at 3.

39. *Id.* at 3.

40. *Id.* at 39.

41. *Id.* at 5, 6.

42. *Id.* at 3, 42.

43. *Id.* at 3, 42; *see also* Richard Falk, *Human Rights*, FOREIGN POL'Y, Mar./Apr. 2004, at 22. Even in the U.S., while in 2001 there were 33.6 million people unable to meet their basic food needs, there were 34.9 million in similar straits in 2002. *Id.* at 22. GDP per capita in the United States in 2001 was \$34,320. *See* UNDP REPORT, *supra* note 19, at 237 (displaying chart 1 regarding the "Human development index").

44. HUNGER 2004, *supra* note 22, at 39.

45. In the 124 nations of the developing world, where GDP per capita rates for 2001 ranged from

It is in this context of global hunger trends that military campaigns carried out under the rubric of the "War against Terrorism" must be examined. The analysis will focus on the ongoing war in Iraq and juxtapose that military intervention with ongoing humanitarian operations in the Great Lakes Region of Africa.

### B. *The U.S.-led Military Intervention in Iraq*

Present-day Iraq is teaching us that whatever gains may have been secured by military intervention and regime change have been threatened by an initial failure of basic public and social services; a dearth of trained police officers, judges, and civil servants; a delay in the institution of representational governing bodies; and an increase in Iraqi opposition to the occupation.<sup>46</sup> The war in Iraq continues, despite President Bush's declaration of an end to major combat operations on May 1, 2003,<sup>47</sup> the U.S. transfer of power to the interim Iraqi government on June 30, 2004,<sup>48</sup> and national elections in January 2005. On February 28, 2005, at least 122 Iraqis, many police and army recruits, were killed by a car bomb in the town of Hilla, sixty miles south of Baghdad.<sup>49</sup> Moreover, neither the Coalition forces nor the interim Iraqi government have begun to fulfill Iraqi expectations and needs for nation building. This failure to deliver on the human security side is likely fueling the ongoing conflict.<sup>50</sup>

What is perhaps even more troubling is that raids and suicide attacks by anti-Coalition forces, as well the Coalition's ongoing military operations, are occurring against a backdrop of continued and strengthening disapproval of U.S. motivations

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\$15,091 (the Republic of Korea) to \$470 (Sierra Leone), the overall percentage of undernourished people in the 1990 to 1992 period was 21%, but dropped slightly to 18% during the 1998 to 2000 period. Contrastingly, in those 34 countries falling within the bottom of the three tiers of developing countries, the "least developed countries," 2001 GDP per capita rates ranged from \$2,370 (Djibouti) to \$470 (Sierra Leone), and the corresponding ratio of undernourished people increased, from 37% in 1990 to 1992, to 38% in 1998 to 2000. See UNDP REPORT, *supra* note 19, at 200-02, 237-40; see also Table C *infra*.

46. The decision of U.S. Administrator for Iraq L. Paul Bremer III "to disband Saddam Hussein's Army preceded a wave of instability that caused much resentment of the Americans for occupying Iraq without protecting the population. At the same time, Mr. Bremer has had to content with religious and ethnic passions that have thwarted much of the Americans' original timetable." See Dexter Filkins, *Bremer Pushes Iraq on Difficult Path to Self-Rule*, N.Y. TIMES, Mar. 21, 2004, at A1. "American officials say that many of [the] former [Iraqi Army] soldiers later formed the backbone of the guerrilla resistance to the American occupation." See *id.* at A9.

47. See Eric Schmitt, *U.S. Declares Major Combat in Afghanistan to Be Over*, N.Y. TIMES, May 2, 2003, at A18.

48. See Filkins, *supra* note 46, at A9.

49. See Warzer Joff and Robert F. Worth, *Blast Kills 122 at Iraqi Clinic In Attack on Security Recruits*, N.Y. TIMES, March 1, 2005, at A1. The deaths from the explosion constitute the largest number of casualties caused by a single bombing since the U.S. invasion of Iraq in March of 2003. *Id.* Jordanian militant Abu Musab al-Zarquari has claimed responsibility for the Hilla bombing. See Robert F. Worth, *Two Members of Hussein Tribunal Are Assassinated in Baghdad*, N.Y. TIMES, March 2, 2005, at A 1.

On March 2, 2005, Parwiz al-Merani, a judge with the Iraqi Special Tribunal convened to try Saddam Hussein was shot and killed along with his son, Aryan al-Merani, a lawyer with the tribunal. See *id.*

50. See Matthew Kaminski, *Anti-Terrorism Requires Nation Building*, WALL ST. J., Mar. 15, 2002, at A10.

for military intervention in Iraq in the first place. In March 2004, one year after the start of the war on March 20, 2003, a majority of French, German, Turkish, Pakistani, Jordanian and Moroccan nationals polled disagreed with the position that "the U.S.-led war on terrorism is a sincere effort to reduce international terrorism."<sup>51</sup> Particularly in France and Germany, as compared with similar polling in May 2003, "more people . . . believed their countries had made the right decision in not supporting the war."<sup>52</sup>

Most significantly, the March 2004 poll reflects a widespread perception that the military intervention in Iraq has proven counterproductive, irrespective of the sincerity of its cause. A majority of French and German nations interviewed "believed that the Iraq war had undermined the struggle against terrorists."<sup>53</sup> Even in the United Kingdom, where a majority believes in the sincerity of the American-led campaign against terrorism, "half of the Britons surveyed said the Iraq war hurt efforts to combat global terrorism."<sup>54</sup>

Rising public disapproval of the U.S.-led military campaign in Iraq is increasingly paralleled by the views of public officials within the United Nations and its member states. In April 2004, the killing and mutilation of four U.S. private security personnel in Falluja, Iraq and the concurrent Shiia uprising led by Moktada al Sadr resulted in a concerted Coalition military response in Falluja and parts of south-central Iraq. Lakhdar Brahimi, the Secretary General's special envoy to Iraq, commented when visiting Iraq during the April 2004 Coalition siege of Falluja that "there is no military solution to the problems [in Iraq], and that the use of force, especially the excessive use of force, makes matters worse . . ."<sup>55</sup> Similarly, Kenneth Pollack, a Brookings Institution scholar and former Iraq-Iran CIA analyst, has criticized the U.S. and Coalition forces for failing to provide effective security and sufficient training for the newly constituted Iraqi police and military forces.<sup>56</sup>

The U.S. government spent approximately eighty billion dollars prosecuting the first six weeks of the Iraqi war.<sup>57</sup> During the same period, nearly 150 U.S. soldiers and untold thousands of Iraqis lost their lives.<sup>58</sup> In the entire twenty-four

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51. See Susan Sachs, *Poll Finds Hospitality Hardening Toward U.S. Policies*, N.Y. TIMES, Mar. 17, 2004, at A3

52. *Id.* The nonpartisan Pew Center conducted the poll. *Id.*

53. *Id.*

54. *Id.*

55. John Burns, *Iranians in Iraq to Help in Talks on Rebel Cleric*, N.Y. TIMES, Apr. 15, 2004, at A1, A8.

56. See Traci Hukill, *U.N. Scholars Drill Washington on Iraq, Afghanistan*, U.N. WIRE, Apr. 14, 2004, at [http://unwire.org/News/328\\_426\\_22804.asp](http://unwire.org/News/328_426_22804.asp) (last visited Sept. 13, 2004) (Pollack was speaking at a conference at John Hopkins University School for Advanced International Studies in Washington, D.C. held on April 13, 2004).

57. Bob Burnett, *What is the War Going to Cost Us?*, May 2, 2003, available at <http://www.alternet.org/story/15807> (last visited Oct. 2, 2004).

58. Kevin Johnson and Sabah al-Anbaki, *Iraqis Revel in U.S. Deaths*, USA TODAY, Apr. 1, 2004, at A1, 10. The Defense Department officially reports 115 combat deaths and 23 non-combat deaths during this period, or a total of 138 U.S. deaths. *Fact Sheet: Iraqi War*, Sept. 16, 2004, at

months between March 2003 and March 2005, the United States has spent \$157 billion in the ongoing Iraqi war and occupation.<sup>59</sup> During the same period, as many as 1486 American service members and anywhere from 18,000 to 100,000 Iraqis have died.<sup>60</sup>

In February 2003, economic forecasters projected upwards of \$105 billion as the price tag for Iraqi recovery and reconstruction, on top of the \$105 billion estimated for the cost of the military invasion and occupation, and as much as \$300 billion more for war reparations, assistance to fellow Coalition members, and debt relief.<sup>61</sup> Given a potential \$500 billion price tag, the \$166 billion authorized by U.S. Congress in two emergency spending bills passed in 2003 would appear well below the mark, especially given that these funds were needed to cover operations in both Iraq and Afghanistan.<sup>62</sup> Predictions of supplemental requests were fulfilled on February 14, 2005 when the Bush administration proposed an additional \$82 billion for military operation in Iraq and Afghanistan.<sup>63</sup>

### *C. Linkages between Iraq and other Humanitarian Emergencies*

A decision to remove a government by force, whether unilaterally or

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<http://www.infoplease.com/ipa/A0908900.html> (last visited Sept. 16, 2004).

59. See National Priorities Project, *The War in Iraq Cost the United States*, at <http://www.costofwar.com> (last visited March 2, 2005).

60. The U.S. Department of Defense has been criticized for its failure to compile statistics on Iraqi civilian deaths. The smaller figure of 18,000 Iraqis killed is based on data compiled by a non-profit organization called Iraq Body Count, which operates a website to provide ranges of civilian deaths in Iraq. The range posted on February 27, 2005 was between 16,123 and 18,395 individuals killed. *The Iraq Body Count Database*, available at <http://www.iraqbodycount.net/bodycount.htm> (last visited March 2, 2005).

The much higher figure of 100,000 civilian deaths was published by the British medical journal *The Lancet* on October 29, 2004, based on a representative sample of family interviews conducted across Iraq. Dr. Gilbert Burham, one of the members of the Johns Hopkins medical research team, reported, "[w]e were shocked at the magnitude but we're quite certain that the estimate of 100,000 is a conservative estimate." Dr. Burham also explained that deaths in Falluja had been excluded, given the higher level of violence in that city compared with other parts of Iraq. See Elizabeth Rosenthal, *Study puts civilian toll in Iraq at over 100,000*, INT'L HERALD TRIBUNE, October 30, 2004, at <http://www.ihf.com/articles/2004/10/29/news/toll.html>.

The 1486 figure for U.S. lives lost in Iraq since March 2003 comes from U.S. Department of Defense statistics published in *The New York Times* on Tuesday, March 1, 2005. *Names of the Dead*, N.Y. TIMES, May 23, 2004, at A16. In the first two weeks of April 2004 alone, the U.N. reported that 880 Iraqis and 87 U.S. soldiers died. See Hukill, *supra* note 55.

61. See Gordon Adams & Steve Kosiak, *The Price We Pay*, N.Y. TIMES, Feb. 15, 2003, at A25 (Adams, White House senior defense budget analyst from 1993 to 1997, is George Washington University Professor of International Affairs. Kosiak is Director of Budget Studies at the Center for Strategic and Budgetary Assessments). Adams and Kosiak hesitated to assign a specific projected total cost for the Iraq war and reconstruction, but sketched a range of possible figures, the upper end of which was \$682 billion. See *id.*

62. Eric Schmitt & Robert Pear, *The President's Budget Proposal: Plan Omits Costs in Iraq and Afghanistan*, N.Y. TIMES, Feb. 3, 2004, at A15. In fact, Bush administration officials suggested in early 2004 that the funds would run out by September 2004, such that a supplemental request was likely.. *Id.*

63. See *supra* n. 60; see also *Bush asks Congress for \$82 billion for wars* (AP), February 14, 2005, at <http://www.cnn.com/2005/ALLPOLITICS/02/14/bush.iraqappropriation.ap/>.



multilaterally, must clearly be followed by a commitment to help its society rebuild itself. This requirement is especially the case when military intervention results in military occupation. The occupying power has obligations under international law to ensure that the territory's civil infrastructure adequately meets the people's basic needs.<sup>64</sup> Yet in Iraq's case, the world community is effectively attempting to partially finance its expensive reconstruction commitment by diverting funds from other brewing or enduring crises around the world. Iraq may be but the most celebrated international crisis point at the current time. Nations in every region of the world are engaged in civil strife, difficult peace negotiations, or post-conflict reconstruction. In countries such as Burundi, Sudan, Sierra Leone, Kosovo, and East Timor, the international community has expended significant resources for emergency relief and national reconstruction, but the ongoing need for financial assistance is great.<sup>65</sup> The following section will examine Burundi as a case study in the indirect impacts the "War against Terrorism" may have on ongoing humanitarian relief and development programs throughout the world.

#### *D. The Great Lakes Region of Africa*

Burundi has experienced cataclysms of violence—related to the civil conflicts in its Central African neighbors Rwanda<sup>66</sup> and the Democratic Republic of the Congo<sup>67</sup>—from which it struggles to emerge. Like Rwanda, Burundi has perched

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64. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, arts. 55 and 56, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter *Fourth Geneva Convention*].

65. See UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (1997), at 43. From 1983 to 1995, the number of individuals dependent upon humanitarian assistance globally increased from nearly 15 million to over 40 million and spending on humanitarian assistance increased five-fold among governmental aid agencies. *Id.* at 41, 42 fig. 1.6 Nevertheless, as emergency aid expenditures by states have increased over the past two decades, spending on long-term reconstruction and development has steadily decreased. *Id.* at 41-42. Thus state spending on well-publicized humanitarian disasters has the potential to pull development resources from low-income countries like Namibia and Tanzania that border on conflict regions but are not at war themselves. *Id.* at 16, 43. Non-governmental organizations have only partially picked up the slack in basic support for socio-economic programs in such developing countries, whether for public utilities, road maintenance or education. *Id.* at 43; see also UNHCR, *The State of the World's Refugees: Fifty Years of Humanitarian Action*. (2000), at 236-37 (displaying Box 9.2 "East Timor: the cost of independence"), 239-41 (discussing "Rebuilding Kosovo").

66. In the 1994 Rwandan genocide, between 500,000 and one million ethnic Tutsis and moderate ethnic Hutus were massacred by ultra-nationalist Hutus over a three-month period. See generally Philip Gourevitch, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998). In response to the genocide, the Rwandan Patriotic Front invaded from Uganda and began taking control of Rwandan territory in the late spring, ultimately seizing the national reins of power in Kigali by the end of the summer of 1994. *Id.* at 163-68. In advance of the RPF offensive, a large movement of mostly Hutu refugees fled into Eastern Zaire, finally numbering some two million refugees. *Id.* Included among them were extremist Hutu paramilitary and former Rwandan Army forces that had orchestrated the massacres. *Id.* Leaders of the Interahamwe paramilitary forces and their political affiliates used the refugee camps as bases for cross-border attacks into Rwanda, and sought to propagandize their fellow Rwandans against the prospect of reconciliation with the new RPF-led government in Kigali. *Id.*

67. In the current civil war in the Democratic Republic of the Congo, ongoing since 1998, as many as two million people have died in the conflict or from war-related disease and starvation. See

along a political-ethnic fault line of violence and counter-violence perpetrated by extremist Hutu and Tutsi forces for the past four decades.<sup>68</sup> Since the 1993 assassination of Melchior Ndadaye, the first democratically elected president of Burundi and the majority Hutu electorate's choice, rebel Hutu forces initially fought Pierre Buyoya's coup-installed government, and subsequently fought the national unity interim government.<sup>69</sup> Escaping widespread conflict and related human rights abuses, Burundian refugees fled across their eastern border into neighboring Tanzania. Since 1994, with a population of nearly 35 million, Tanzania has hosted nearly half a million Burundian refugees in its western regions of Kagera and Kigoma.<sup>70</sup>

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generally, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, *Democratic Republic of the Congo*, Appeal No. 01.43/2004 (Aug. 18, 2004), available at [http://www.ifrc.org/cgi/pdf\\_appeals.pl?annual04/01430402.pdf](http://www.ifrc.org/cgi/pdf_appeals.pl?annual04/01430402.pdf). One major cause of ongoing conflict in the DRC has been Ugandan and Rwandan support for individual Congolese rebel movements.

Both Uganda and Rwanda initially supported Laurent Kabila when his rebel movement sought to overthrow the former Zaire's president Mobutu Sese Seko. See James C. McKinley Jr., *Taking Office, Congo's Ruler Promises Vote*, N.Y. TIMES, May 30, 1997, at A1. Kabila was ultimately successful, and was sworn in as president on May 28, 1997, at which time he renamed his country the Democratic Republic of the Congo. *Id.* However, both Rwanda and Uganda had relied upon Kabila to suppress cross-border attacks by the extremist Interahamwe forces, mounted from the Rwandan refugee camps in the Congolese Lake Kivu region, along the Rwandan and Ugandan borders. See Norimitsu Onishi, *The Guns of Africa*, N.Y. TIMES, July 9, 1999, at A8; see also Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of the Congo*, HUM. RTS BR 23 (2004). When Kabila failed to deliver, and was perceived to have moved to the side of the Rwandan extremists, the governments of Uganda and Rwanda began supporting various Congolese rebel movements fighting to overthrow him. Onishi, *supra*. Graff's article exposes the involvement of multinational mining corporations and government entities in the illegal arms for minerals trade in the DRC. Graff, *supra*, at 23. She explores the legal basis for potential International Criminal Court prosecutions of corporate entities implicated in war crimes occurring in the Congo. *Id.*

Laurent Kabila was assassinated in early 2001, after which time his son Joseph Kabila assumed the presidency. See Norimitsu Onishi, *Political Fever Wanes in Congo, but Patient is Still Sick*, N.Y. TIMES, Apr. 11, 2001, at A3. Peace talks initiated in 1999 have resulted in peace accords – the most recent signed by Joseph Kabila in April 2003 – for the disarming of the rebel factions, the removal of all foreign troops and the reconstitution of the Congolese Army with participation by all former Congolese factions. See Somini Sengupta, *Attack in Congo Capital Mars Peace Transition*, N.Y. TIMES, Mar. 29, 2004, at A4.

68. See ROBERT M. PRESS, *THE NEW AFRICA: DISPATCHES FROM A CHANGING CONTINENT* 280-85 (1999).

69. Unlike Rwanda, where individuals of Hutu ethnicity dominated the government from independence in the late 1950's until the post-genocide RPF-led government of 1994, in Burundi, ethnic Tutsis have predominated in both the civilian government and the Army since independence. See PRESS, *supra* note 66, at 280. In Rwanda, the Tutsi-led RPA had challenged both the dominance of ethnic Hutu in government, as well as Hutu extremism and violence against Tutsi and Hutu moderates. Contrastingly, in Burundi, Hutu militants have challenged Tutsi domination, and the rebel movements fighting the government continue to have a predominant Hutu affiliation. See *id.* at 280-81.

70. See UNHCR, *Population Statistics (Provisional) 2002*, at 3 tbl. 3, available at [http://www.unhcr.ch/static/statistics\\_2002/asr02-dr2-Table3.pdf](http://www.unhcr.ch/static/statistics_2002/asr02-dr2-Table3.pdf) [hereinafter *Population Statistics*]. As of February 2004, there were officially 370,000 Burundian refugees in Tanzania. John Nduna, *ACT Appeal Burundi* (Feb. 26, 2004), at 1, available at [http://www.act-intl.org/appeals/appeals\\_2004/AFB141.pdf](http://www.act-intl.org/appeals/appeals_2004/AFB141.pdf) (last visited Sept. 15, 2004). Approximately 70,000 Burundians returned from Tanzania to Burundi in 2003, either spontaneously, or facilitated by UNHCR.

Despite peace talks, power sharing agreements and ceasefires between the government and rebel forces in both 2002 and 2003, fighting has continued in Burundi, partially because not all rebel factions signed the various accords.<sup>71</sup> After mediation by then-president Julius Nyerere of Tanzania, the warring factions signed the Arusha Agreement on August 28, 2000, and later signed another accord on October 7, 2002 in Dar es Salaam.<sup>72</sup> On April 30, 2003, President Buyoya handed his vice president Domitien Ndayizeye power, pursuant to the October 2002 Dar es Salaam agreement.<sup>73</sup> Both the Forces for the Defense of Democracy (CNDD-FDD) and the National Liberation Forces (FNL) had signed the Dar es Salaam agreement.<sup>74</sup> Nevertheless, the subsequent power-sharing agreement, signed by newly installed President Ndayizeye on October 8, 2003 in Pretoria, South Africa, favored one wing of the larger CNDD-FDD rebel group at the expense of another FDD faction, and also excluded a dissident arm of the FNL.<sup>75</sup> A comprehensive ceasefire agreement followed in November 2003, which again included the CNDD-FDD, but not the FNL.<sup>76</sup>

In perhaps the most favorable political development to date, Ndayizeye's government and the FNL initiated peace talks for the first time in December

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*Id.* at 4.

71. The representatives of the government and two rebel factions signed the Arusha Peace and Reconciliation Agreement in August 2000 in Arusha, Tanzania. Integrated Regional Information Networks (IRIN), *Burundi: Focus on the Way forward after Pretoria Agreement* (Oct. 13, 2003), at <http://www.irinnews.org> (last visited Sept. 9, 2004) [hereinafter *Burundi: Focus*]. The same parties signed a subsequent agreement in October 2002 in Dar es Salaam, Tanzania. *Id.* A third power-sharing agreement, signed in Pretoria in October 2003, favored a rebel faction that had not signed the Arusha or the Dar es Salaam agreements. *Id.*

72. *Tanzania, Malawi, Zambia Sign Agreement to Increases Trade*, XINHUA NEWS AGENCY, Oct. 7, 2003.

73. See U.N. Foundation, *Power Transferred Peacefully; Annan Warns of Instability*, U.N. WIRE, May 1, 2003, available at [http://www.unwire.org/UNWire?20030501/33507\\_story.asp](http://www.unwire.org/UNWire?20030501/33507_story.asp) (last visited Sept. 9, 2004).

74. See *Burundi: Focus*, *supra* note 69.

75. The full name of the larger rebel group is the Conseil National Pour la Defense de la Democratie – Forces de Defense de la Democratie (the CNDD-FDD). See *Burundi: Focus*, *supra* note 69. However, the CNDD-FDD itself has two branches, one led by Jean Bosco Ndayikengurukiye and the other by Pierre Nkurunziza. *Id.* The other principal rebel group is the Forces National de la Liberation (FNL), which also has two branches, one led by Alain Mugabarabona and the other by Agathon Rwasa. *Id.*

To complicate matters, it was Jean Bosco Ndayikengurukiye's CNDD-FDD faction that signed the 2002 Arusha Accords and the 2003 Dar es Salaam accords, along with Alain Mugabarabona's FNL faction and the Burundian government of Buyoya. *Id.* Once Buyoya transferred power to Vice President Ndayizeye, the power sharing agreement that Ndayizeye signed in Pretoria in October 2003 gave the majority of rebel positions in the government of national unity to a different faction of the CNDD-FDD (that of Pierre Nkurunziza) and neglected members of both Ndayikengurukiye's CNDD-FDD faction and Mugabarabona's FNL faction (both of which had signed the October 2002 accord). *Id.* As for Agathon Rwasa, the leader of the other FNL faction, he had not been involved in any of the 2000-2003 peace talks or accords, nor were his forces included in the power-sharing agreement concluded in Pretoria in October of 2003. *Id.*

76. *Id.*

2003.<sup>77</sup> Nevertheless, in early 2004, tens of thousands of Burundians were newly displaced by ongoing fighting between the FNL and the Burundian Army, as well as factional fighting between the FNL and the CNDD-FDD.<sup>78</sup> Throughout 2004, the conflict in Burundi continued, such that on December 1, 2004, the U.N. Security Council extended the mandate of the United Nations Operation in Burundi for an additional six months, until June 1, 2005.<sup>79</sup>

The half million Burundian refugees who reside in Western Tanzanian refugee camps rely on international assistance for food, shelter, health care, and education.<sup>80</sup> These camps are also home to opposition political activists committed to participation in a reformed political process in their home country.<sup>81</sup> Yet these camps remain weapons marketplaces that help fuel continued fighting in Burundi, and also serve as incubators of hopelessness for the next generation, which has only known life in exile.<sup>82</sup>

In February 2003, two factors cut Burundi refugee camp food rations in half: first, local and international markets suffered from a lack of grain, and second, donor pledges dried up in anticipation of the Iraqi war.<sup>83</sup> Since the 2003 fall of Hussein's government in Iraq, humanitarian assistance funds for food and other aid in Tanzania and many other countries around the world have not rebounded.<sup>84</sup>

77. U.N. Foundation, *Burundi Rebels Hold First Talks with Government*, U.N. WIRE, Dec. 1, 2003, available at [http://www.unwire.org/UNWire/20031201/499\\_10885.asp](http://www.unwire.org/UNWire/20031201/499_10885.asp) (last visited Sept. 9, 2004). In January 2004, President Ndayizeye reportedly began face-to-face talks with Rwasa's arm of the FDD in a secret location in the Netherlands. Agence France-Presse, *Burundi President Holds Talks With Last Active Rebel Group*, Jan. 19, 2004, at <http://www.reliefweb.int>.

78. See Norwegian Refugee Council (NRC), *Burundi: With Peace at Hand, the Displaced Need Support to Return Home*, Mar. 26, 2004, at <http://www.idpproject.org/Sites/idpSurvey.nsf/wCountries/Burundi>. The NRC stresses that despite progress toward peace, those Burundians returning from Tanzania at this time face the prospect of becoming internally displaced by ongoing and widespread violence in Burundi, a risk substantiated by the fact that civil conflict occurred in sixteen of Burundi's seventeen provinces in 2003. *Id.*

79. *Security Council Extends UN Operation in Burundi until 1 June 2005 by Unanimously Adopting Resolution 1577 (2004)*, United Nations Information Service, December 1, 2004, at <http://www.unis.unvienna.org/unis/pressrels/2004/sc8258.html>.

80. *Id.*

81. See International Crisis Group, *Burundian Refugees in Tanzania: The Key Factor in the Burundi Peace Process*, Africa Report No. 12, 30 November 1999. See <http://www.crisisweb.org/home/index.cfm?id=1661&l=1>.

82. See generally LIISA H. MALKKI, *PURITY AND EXILE: VIOLENCE, MEMORY, AND NATIONAL COSMOLOGY AMONG HUTU REFUGEES IN TANZANIA* (1995).

83. See *U.N. Agencies Worry Over Refugee Food Supply*, THE GUARDIAN (Dar es Salaam), Feb. 20, 2003. While refugee food rations were restored to 72% of normal rations in April 2003, UNHCR and other agencies were concerned that limited food rations may have been responsible for the "spontaneous" returns of around 5000 Burundians from Tanzania to Burundi in the month after President Ndayizeye was installed in early May 2003. Integrated Regional Information Networks (IRIN), *Burundi: UN Agency Expresses Concern over Refugees*, (June 3, 2004), at <http://www.irinnews.org>; see also HUMAN RIGHTS WATCH, *EVERY DAY VICTIMS: CIVILIANS IN THE BURUNDIAN WAR*, chap. XI: The Return of Refugees from Tanzania (Dec. 2003), at <http://hrw.org/reports/2003/burundi1203/11.htm> (last visited Sept. 9, 2004).

84. Mark Doyle, *Aid Agencies Alarmed Over Funds*, BBC NEWS, Nov. 21, 2003, available at <http://newsvote.bbc.co.uk> (last visited Oct. 1, 2004).

Moreover, in both Tanzania and Burundi, GDP per capita levels are extremely low compared to other countries in the region, and percentages of individuals living on one or two dollars per day are very high.<sup>85</sup>

**Table C: Poverty, Income and Hunger Indicators in the Developing World, with Three Examples within Sub-Saharan Africa**

(data drawn from World Bank and United Nations sources, compiled in UNDP *Human Development Report 2003*, charts 1 and 3)

	Population living on ≤\$1/day	Population living on ≤\$2/day	Gross dom. product per capita	Poverty gap ratio*	Under-nourished 1990-1992	Under-nourished 1998-2000
<i>Burundi</i>	60%	90%	\$690	25%; 75 c.	49%	69%
<i>Tanzania</i>	20%	60%	\$520	5%; 95 c.	36%	47%
<i>Uganda</i>	82%	96%	\$1,490	40%; 60 c.	23%	21%
Developing counties	N/A	N/A	N/A	N/A	21%	18%
Least dev. Countries	N/A	N/A	N/A	N/A	37%	38%

#### E. U.N. Millennium Goals

As discussed briefly in Part II.A. above, even though the level of global hunger decreased in the early 1990s by thirty-seven million,<sup>86</sup> the number of hungry people worldwide has increased since 1995 at the rate of 4.5 million per year.<sup>87</sup> Moreover, industrialized countries on the whole slashed overall development assistance levels by nearly one third during the 1990s.<sup>88</sup> These disturbing trends were partially responsible for focusing the United Nations on basic poverty alleviation, which it has undertaken with increased urgency since 2000. In the Millennium Declaration of September 2000, the United Nations established eight goals for the international community's achievement in addressing global socio-economic problems including poverty, hunger, illiteracy,

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In a sign of mounting economic and political stresses attributed to the long-term presence of Burundian refugees, the Tanzanian government has been denounced by UNHCR for forcibly repatriating several groups of Burundian refugees in early 2005, in violation of international law. *See Contrary to International Law, Tanzania Continues Forcible Returns of Burundian Refugees*, U.S. Committee for Refugees and Immigrants (press release), Washington, DC, February 4, 2005, at <http://www.refugees.org/newsroomsub.aspx?id=1242>.

85. In Burundi, 58.4% of the population lived on \$1/day from 1990 to 2001 and 89.2% on \$2/day for the same period. In Tanzania the comparable figures are 19.9% at \$1/day and 59.7% at \$2/day. *See* UNDP REPORT, *supra* note 19, at 247. As for GDP per capita, the figure for Burundi in 2001 was \$690, and in Tanzania it was \$520. *Id.* These figures are in contrast to a GDP per capita of \$1,250 for Rwanda and \$1,490 for Uganda. *See id.* at 240 (displaying chart 1 regarding the "Human Development Index").

86. HUNGER 2004, *supra* note 22, at 3.

87. *Id.* at 3.

88. *Id.* at 11.

gender inequity, communicable diseases, and environmental degradation.<sup>89</sup> Eradicating extreme poverty and hunger is the first priority.<sup>90</sup> The United Nations and non-government agencies still race against the clock to meet a portion of survival needs in countries like Burundi, Tanzania, Ethiopia and Zimbabwe, for refugees, displaced persons and others struggling to survive war, poverty, AIDS, and environmental degradation.<sup>91</sup> These countries have the potential to move further toward conflict resolution and socio-economic development, but without sustained and large-scale humanitarian assistance and significant support for socioeconomic and political reforms, such nations are likely to experience renewed or increased conflict, and to become future flashpoints for military or humanitarian interventions of various kinds.<sup>92</sup>

Sadly, the so-called "War against Terrorism" has thus far had a negative impact on the global war on poverty. By November 2003, the U.S. Congress scaled down U.S. contributions toward poverty alleviation efforts under the U.N. Millennium Goals by one billion dollars, from the previously pledged \$1.6 billion to \$650 million.<sup>93</sup> InterAction, the U.S. umbrella organization for non-profit agencies engaged in humanitarian assistance activities, decried this diversion of anti-poverty funds to the "War against Terrorism."<sup>94</sup> In addition, CARE President

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89. See U.N. Millennium Development Goals, at <http://www.un.org/millenniumgoals/> (last visited Oct. 2, 2004) [hereinafter MDG]; see also U.N. Millennium Declaration, G.A. Res. 55/2, 55th Sess., 8th mtg., U.N. Doc. A/RES/55/2 (2000), available at [www.un.org](http://www.un.org).

90. See MDG, *supra* note 86.

91. For purposes of comparison, it is interesting to note that during the 1998-2000 period, the average annual receipts in official development assistance (ODA) to developing countries as a whole were over \$34 billion (\$34,450,000), or .6% of the average gross national income (GNI) of these countries. See, World Resources Institute, *World Resources 2002-04: Decisions for the Earth: Balance, Voice and Power*, (2003) at 242-43 (Data Table 3, regarding "Financial Flows, Government Expenditures and Corporations"). From 1998-2000, on average the nations of South America received .2% of their annual gross national income (GNI) in official development assistance (ODA). *Id.* For Central America and the Caribbean, the annual average for ODA is .4% of GNI over the same period. *Id.* For the Middle East and North Africa, the figure is .7%. *Id.* For Sub-Saharan Africa, ODA is 4.1% of GNI, signifying that in proportion to their national incomes, African countries on average rely upon six times the development assistance of Middle Eastern countries, seven times that of developing countries overall, ten times that of Caribbean countries and twenty times that of South American nations. *Id.* The figures for individual African countries experiencing conflict or hosting significant refugee populations are even more dramatic for the 1998-2000 period: Zimbabwe received on average \$234 million annually in official development assistance, or 4% of its gross national income, Ethiopia received \$665 million ODA, or 10.4% of its GNI, Burundi received \$81 million or 11% of its GNI, and Tanzania received over \$1 billion, or 11.7% of its GNI. *Id.*

92. In his year-end review of progress toward the Millennium Development Goals for fiscal year 2003-04, Secretary General Kofi Annan reported that while notable progress in reducing poverty had been achieved in Asia and North Africa since 2000, the reality in Sub-Saharan Africa was more sobering. Daphne Davies of the non-governmental organization LDC Watch (an umbrella group of NGO's working in the world's fifty least developed countries) elaborated that "some countries such as Sierra Leone and Burkina Faso were actually worse off now than when the MDG program started." Thalif Deen, *U.N. Seeks Rapid Action to Cut Poverty and Hunger*, Sept. 9, 2004, INTER PRESS SERVICE NEWS AGENCY, at <http://www.ipsnews.net/interna.asp?idnews=25415> (last visited Oct. 31, 2004).

93. See Doyle, *supra* note 81.

94. *Id.*

Peter Bell warned that "America's security is dependent upon vanquishing the poverty which breeds extremism."<sup>95</sup> It is particularly concerning that countries like Tanzania, which host the largest refugee populations and hence the largest humanitarian emergencies, also tend to be among the world's poorest countries.<sup>96</sup>

The cause of global survival calls for the development of an international strategic vision that pairs socioeconomic development with military security in the Iraqs, Burundis, and Tanzanias of the world.<sup>97</sup> The remaining challenge is whether a doctrine of multilateral poverty preemption can be grounded in legal obligations derived from international treaties and customary law governing both the protection of human rights and the conduct of war. The final section of this article builds such a legal framework upon the U.N. Charter's text and the provisions of relevant human rights and humanitarian law instruments.

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95. *Id.* Bell cautions that the struggle against hunger and poverty should not be subsumed into the war against terrorism. Telephone interview with Peter Bell, CARE President (Apr. 18, 2004). Poverty alleviation is fundamentally a question of human dignity rather than an aspect of geopolitical strategy. *Id.*

96. Tanzania, a country that has enjoyed relative peace over its 40 years as an independent country, is host to half a million Burundians, one of the world's largest refugee populations. Yet, like Burundi, the people of Tanzania experience one of the highest levels of under-nourishment in Sub-Saharan Africa, and hence in the world. See Population Statistics, *supra* note 68, at 3 tbl. 3. At an under-nourishment rate of 47% between 1998 and 2000, only ten countries in the world for which data are available are experiencing more hunger than Tanzania. Those countries are Zambia, Mozambique, Eritrea, the Democratic Republic of the Congo, Burundi itself, Angola and Somalia in Sub-Saharan Africa, Haiti in the Caribbean, and Tajikistan and Afghanistan in Asia. See UNDP REPORT, *supra* note 19, at 261.

Unfortunately, Tanzania is not unusual in its status as a "least developed country" in Africa that hosts a large refugee community. Of the roughly 16 million refugees in the world today, four million are Palestinians, most of whom reside in camps in the West Bank and the Gaza Strip; four million are Afghans, most of whom have enjoyed asylum in Pakistan; and half a million are Iraqis, most of whom remain in Iran. See UNHCR, *Refugees by Numbers (2004 Edition)*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/basics>; see also Ray Wilkinson, *Africa on the Edge*, REFUGEES, vol. 2, no. 131, at 15-17 (2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?id=3ee99eaf4&tbl=MEDIA> (last visited Sept. 12, 2004). Of the world's remaining eight or so million refugees, as many as four million have fled one conflicted and impoverished country in Africa to another perhaps less conflicted but still impoverished African country. Wilkinson, *supra* at 15-17. Among these four million refugees in Africa, the largest single group is the 400,000-strong Burundian refugee community in Tanzania. There are five additional refugee groups in Africa of comparable size. *Id.* In Uganda and elsewhere, there are close to half a million Sudanese. In Zambia and elsewhere, there are around 400,000 Angolans. *Id.* In Tanzania and elsewhere, there are roughly 400,000 Congolese (from the Democratic Republic of the Congo). *Id.* One significant regional grouping is composed of approximately 400,000 Liberians, Sierra Leoneans and Cote d'Ivoirians, geographically reshuffled throughout Cote d'Ivoire, Sierra Leone, Liberia and Guinea. *Id.* Finally, there are around 350,000 Somali refugees in Kenya and elsewhere. *Id.*

All eight of the African countries that host major refugee populations fall within the poorest tier of the world's developing countries. See Population Statistics, *supra* note 68, at 3 tbl. 3; see also UNDP REPORT, *supra* note 19, at 237-40. Moreover, with the exception of Zambia, all of these African nations are currently facing food emergencies, according to the Food and Agriculture Organization of the United Nations. See U.N. Foundation, *23 Sub-Sahara Countries Face Food Emergencies: FAO Says*, U.N. WIRE, July 23, 2003, available at <http://www.unwire.org>.

97. Matthew Kaminski, *Anti-Terrorism Requires Nation Building*, WALL ST. J., Mar. 15, 2002, at A10.

### III. INTERNATIONAL LAW ARGUMENTS SUPPORTING THE OBLIGATION TO PROMOTE HUMAN SECURITY

#### A. *The U.N. Charter*

The U.N. Charter has numerous references to human security in the context of strategic security validating the supposition that the latter is reliant on the former. To begin with, the Charter's Preamble sets forth the determination of the "Peoples of the United Nations" to "save succeeding generations from the scourge of war" and "to promote social progress and better standards of living in larger freedom . . . ."<sup>98</sup>

In the text of the Charter itself, there are two principal references to human security as linked to strategic or military security. The first is in Article 1, which sets forth the "Purposes and Principles of the Organization," pairing the objective of "maintain[ing] international peace and security" with "achiev[ing] international co-operation in solving international problems of an economic, social, cultural, or humanitarian character . . . ."<sup>99</sup>

The second major human security reference in the Charter is in Article 55, regarding the establishment of the Economic and Social Council:

With a view to the creation of conditions of stability and well-being *which are necessary for peaceful and friendly relations among nations . . .* the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems . . . ; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>100</sup>

There is also a third, more implicit, reference to socio-economic security, or social justice, in the U.N. Charter's text. Article 2, which sets forth the governing Principles that apply to both "the Organization and its Members," reads: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, *and justice*, are not endangered."<sup>101</sup> Article 2 also includes the more frequently cited prohibition on the use of force: "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 other manner inconsistent with the Purposes of the United Nations*."<sup>102</sup>

Taken together, Article 2 clauses 3 and 4 suggest that socio-economic justice is linked to the maintenance of peace and security. This interpretation is

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98. U.N. CHARTER pmbl., available at <http://www.un.org/aboutun/charter/index.html>.

99. *Id.* art. 1, paras. 1, 3.

100. *Id.* art. 55 (emphasis added).

101. *Id.* art. 2, para. 3 (emphasis added).

102. *Id.* art. 2, para. 4 (emphasis added).



strengthened by the reference in Article 2 to the use of force "inconsistent with the Purposes" of the United Nations,<sup>103</sup> which, in Article 1 include "solving problems of an economic, social, cultural, or humanitarian character,"<sup>104</sup> as well as the maintenance of "international peace and security."<sup>105</sup>

### B. *The Universal Declaration of Human Rights*

The U.N. General Assembly adopted the UDHR in 1948. Most General Assembly resolutions do not specifically bind states, in contrast to the obligatory character of Security Council resolutions passed pursuant to Chapter VII of the Charter.<sup>106</sup> Nevertheless, despite its original form, many scholars agree that in whole or in part the UDHR has attained the status of customary law, given that an extensive number of states have incorporated its provisions into their own constitutions.<sup>107</sup> Also buttressing the UDHR's claim to customary status is its role as an interpretive instrument for the various human rights references in the U.N. Charter, and the fact that the promotion of human rights is a fundamental purpose of the United Nations.<sup>108</sup>

As discussed briefly in Part I above, the UDHR includes a detailed proclamation of the "equal and inalienable rights of all members of the human family."<sup>109</sup> In addition to Article 1's attestation to the freedom, equality, and dignity of all human beings,<sup>110</sup> and Article 2's principle of non-discrimination or non-distinction on racial, gender, linguistic, religious, political, or social grounds,<sup>111</sup> the UDHR also enumerates nineteen civil-political rights,<sup>112</sup> followed by six socio-economic and cultural rights.<sup>113</sup> The UDHR's drafting history sheds light on the hard-won battle to accord primacy to both so-called "generations" of rights, favoring neither at the expense of the other.<sup>114</sup> Article 28 in an important

103. *Id.*

104. *Id.* art. 1, para. 3.

105. *Id.*

106. Compare U.N. CHARTER art. 13 (regarding the authority of the General Assembly to "make recommendations . . . assisting in the realization of human rights and fundamental freedoms) with U.N. CHARTER arts. 39, 41-43 (regarding the enforcement powers of Security Council in responding to a threat to international peace and security).

107. The 1959 Montreal Statement, the concluding document of a conference convened by the non-governmental Assembly for Human Rights, concluded that the "Universal Declaration of Human Rights . . . has over the years become a part of customary international law." See Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and Domestic Law*, in Lillich & Hannum, *supra* note 5, at 132.

108. See *id.* at 127; see also U.N. CHARTER art. 1, para. 3 (setting forth the United Nations' objective to establish "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 for fundamental freedoms for all . . .") (emphasis added).

109. UDHR, *supra* note 8, pmbl.

110. *Id.* art. 1.

111. *Id.* art. 2.

112. *Id.* arts. 3-21.

113. *Id.* arts. 22-27.

114. Eleanor Roosevelt served as Chair of the U.N. Human Rights Commission, the U.N. body that drafted the UDHR. In this capacity, she oversaw numerous debates over the text of the Declaration

sense links the two families of rights in stating that “[e]veryone is entitled to a *social and international order* in which the rights and freedoms set forth in this Declaration can be fully realized.”<sup>115</sup>

While there are no direct references in the UDHR’s text regarding the maintenance of international peace and security, an explicit link between human rights and peace is found in the Preamble, which states that the “recognition of the inherent dignity and of the *equal and inalienable rights* of all member of the human family is the *foundation of freedom, justice and peace* in the world . . . .”<sup>116</sup> With specific regard to socio-economic rights, the Preamble holds that:

[T]he peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to *promote social progress and better standards of life* in larger freedom . . . .<sup>117</sup>

If read together, Article 28’s establishment of “a social and international order” conducive to the full realization of socio-economic as well as civil-political rights, and the Preamble’s text regarding human rights guarantees as a precondition of “freedom, justice and peace,” the UDHR strengthens the Charter’s attestation to the interdependence of strategic security and human security.<sup>118</sup>

during the summer of 1948, in the run-up to the General Assembly vote in October. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 121, 123 (2001).

One controversy, over Article 22 and the right to social security, occurred against a backdrop of uncertainty regarding the obligatory bite of the “new” socio-economic rights as compared with the “old” civil-political rights. The Syrian delegate advocated replacing the term “social security” with that of “social justice,” because the latter term was deemed more expansive than the former in terms of the material support that the state should provide. See *id.* at 157. For his part the Soviet delegate, Alexei Pavlov, proposed amending the Declaration’s Preamble to include a state obligation “to ensure every individual a real opportunity to enjoy” socio-economic rights. See *id.* at 156-57.

While both the Soviet and Syrian amendments were rejected, a compromise proposal for Article 22 was offered by the Cuban delegate, resulting in the final text of that Article: “Everyone . . . has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” See *id.* at 157; UDHR, *supra* note 8, art. 22. This compromise language was considered “to give the ‘new’ rights parity with the ‘old’ by stating that the ‘new’ rights are ‘indispensable’ for the dignity and free development of the individual.” GLENDON, *supra*, at 157.

Eleanor Roosevelt’s work to entrench both generations of rights in the 1948 UDHR resonates with the thinking of her late husband President Roosevelt several years earlier. In his “Four Freedoms” speech in 1944, Franklin Delano Roosevelt had highlighted the interdependence of the two families of rights: “We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are hungry and out of a job are the stuff of which dictatorships are made.” See DUNOFF ET AL., *supra* note 7, at 448.

115. UDHR *supra* note 8, art. 28 (emphasis added).

116. *Id.* pmbl. (emphasis added).

117. *Id.* (emphasis added).

118. Compare UDHR, *supra* note 8, art. 28 with UDHR, *supra* note 8, pmbl.

### C. *The International Covenant on Economic, Social and Cultural Rights*

To a great extent, the International Covenant on Economic, Social and Cultural Rights (ICESCR) elaborates upon and gives greater legal authority to UDHR's Articles 22 through 27 on socio-economic rights.<sup>119</sup> In ICESCR's Article 2, "[e]ach State Party . . . undertakes to take steps, to the maximum of its available resources, with a view to achieving progressively the full recognition of the rights recognized in the present Covenant . . . ."<sup>120</sup> With regard to specific rights, Article 6 recognizes the right to work (paralleling Article 23 of the UDHR); Article 7, fair labor conditions; Article 8, the right to trade union formation and membership; Article 9, the right to social security (paralleling Article 22 of the UDHR); Article 10, protections for the family, including mothers and children; Article 11, the right to an "adequate standard of living," including "food, clothing and housing" (paralleling Article 25 of the UDHR); Article 12, the right to "the highest attainable standard of physical and mental health" (also treated in Article 25 of the UDHR); and Article 13, the right to education (paralleling Article 26 of the UDHR).<sup>121</sup>

While the ICESCR is clearly a blueprint in many ways for establishing human security through enumeration of the specific socio-economic rights that states must provide,<sup>122</sup> it is only in the Preamble, again, that we find a specific link between human security and international peace and security: "in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the *equal and inalienable rights* of all members of the human family is the *foundation of freedom, justice and peace in the world*."<sup>123</sup>

Moreover, while the ICESCR concentrates on socio-economic rights in contrast to the International Covenant of Civil and Political Rights (*see* Part IV.D below), the ICESCR's Preamble bears witness to the interrelationship between these two families of rights: "the ideal of free human beings enjoying *freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights*, as well as his civil and political rights."<sup>124</sup>

### D. *The International Covenant on Civil and Political Rights*

Like the ICESCR, the International Covenant on Civil and Political Rights (the ICCPR) expands upon and makes formally obligatory the corresponding rights enumerated in the UDHR.<sup>125</sup> In Article 2 of the ICCPR, "[e]ach State Party

119. *See supra* notes 110-11. ICESCR, *supra* note 9. Unlike the UDHR, the ICESCR is a treaty and a primary source of international law. *See* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9 (2d ed. 1993) ("[I]t is this obligatory aspect [of treaties] that makes them part of international law. International lawyers use the phrase *pacta sunt servanda* to express the fundamental principle that agreements, even between sovereign states, are to be respected.")

120. ICESCR, *supra* note 9, art. 2.

121. Compare ICESCR, *supra* note 9, arts. 6-13 with UDHR, *supra* note 9, arts. 23, 22, 25-26.

122. *See* ICESCR, *supra* note 9, art. 2.

123. *See id.* pmbl. (emphasis added).

124. *See id.* (emphasis added)

125. *See* UDHR *supra* note 8, arts. 3-21.

undertakes to *respect and to ensure* to all individuals . . . the rights recognized in the present Covenant.<sup>126</sup> With regard to specific rights, a facile distinction is often made between the ICESCR and the ICCPR. The ICESCR focuses on socio-economic rights, or what are predominantly material aspects of human security. Contrastingly, the ICCPR attempts to enumerate civil-political rights and liberties, and focuses on freedom from state-sponsored or tolerated violence, as well as the freedoms of expression and participation in government.<sup>127</sup>

Nevertheless, there is a substantial overlap between the two human rights covenants, and five articles of the ICCPR explicitly resonate with provisions of the ICESCR. To begin with, Article 1 of the ICCPR, the right to self-determination of peoples, is identical to Article 1 of the ICESCR. Both proclaim that “[a]ll peoples . . . [may] freely determine their political status and freely pursue their economic, social and cultural development.”<sup>128</sup> Second, Article 2 of the Civil and Political Covenant recognizes the principle of non-discrimination on racial, gender, linguistic, social, and other grounds, as does Article 2 of the Economic and Social Covenant.<sup>129</sup> Third, ICCPR Article 22 recognizes “the right to form and join trade unions” as does ICESCR Article 8.<sup>130</sup> Fourth and fifth, ICCPR Articles 23 and 24 protect the family and children, analogous to Article 10 of the ICESCR.<sup>131</sup>

Finally, like the Economic and Social Covenant, the Civil and Political Covenant recognizes the symbiotic relationship between both families of rights on the one hand, and the maintenance of peace and security on the other: “The equal and *inalienable rights* of all members of the human family is *the foundation of freedom, justice and peace in the world . . .*”<sup>132</sup> Moreover, “the ideal of free human beings enjoying civil and political freedom and *freedom from fear and want can only be achieved* if conditions are created whereby *everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.*”<sup>133</sup>

#### E. The Geneva Conventions of 1949

In addition to textual references in international human rights covenants regarding the interdependence between peace and security and human rights, there are also significant references to both families of human rights in treaty-based and customary humanitarian law. With regard to civil and political rights, Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (the Fourth Geneva Convention) resonates closely with

126. ICCPR, *supra* note 9, art. 2.

127. See *id.* art. 6 (right to life); art. 7 (prohibition against torture); art. 8 (prohibition against slavery); art. 9 (freedom from arbitrary detention); art. 12 (freedom of movement); art. 14 (right to a fair trial); art. 16 (right to legal personality); art. 17 (right to privacy); art. 18 (freedom of thought, conscience and religion); art. 19 (freedom of expression); art. 21 (right of peaceful assembly).

128. Compare ICCPR, *supra* note 9, art. 1 with ICESCR, *supra* note 9, art. 1.

129. Compare ICCPR, *supra* note 9, art. 2 with ICESCR, *supra* note 10, art. 2.

130. Compare ICCPR, *supra* note 9, art. 22 with ICESCR, *supra* note 10, art. 8.

131. Compare ICCPR, *supra* note 9, arts. 23, 24 with ICESCR, *supra* note 10, art. 10.

132. ICCPR, *supra* note 9, pmbl. (emphasis added).

133. Compare ICCPR, *supra* note 9, pmbl. with ICESCR, *supra* note 9, pmbl. (emphasis added).

Articles 6, 7, 14 and 16 of the Civil and Political Covenant:<sup>134</sup> "[T]he following acts are and shall remain prohibited . . . : (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;<sup>135</sup> (c) Outrages upon human dignity . . . ;<sup>136</sup> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court . . . ."<sup>137</sup> Analogously, ICCPR Article 6 protects the right to life; Article 7, the right to freedom from torture; Article 14, the right to a fair trial; and Article 16, the right to legal personality.<sup>138</sup>

With regard to the socio-economic rights of civilians in time of war, the Fourth Geneva Convention has several references regarding the occupying power's responsibility to guarantee the civilian population's human security. Pursuant to Article 55, "[t]o the fullest extent of the means available to it the Occupying Power has the duty of *ensuring the food and medical supplies of the population* . . . ."<sup>139</sup> Article 56 contains similar language concerning the duty of the occupying power to ensure the provision of medical services and sanitation:

[T]he Occupying Power has the duty of *ensuring and maintaining*, with the cooperation of national and local authorities, the medical and hospital establishments and services, *public health and hygiene* in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.<sup>140</sup>

Articles 55 and 56 of the Fourth Geneva Convention resonate with Articles 11 and 12 of the Economic and Social Covenant. ICESCR Article 11 recognizes the right to "adequate food, clothing and housing," and Article 12 proclaims the right to "the highest attainable standard of physical and mental health."<sup>141</sup>

The final significant reference to human security in the Fourth Geneva Convention clarifies that humanitarian organizations providing relief in the occupied territory "shall in no way relieve the Occupying Power of any of its

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134. Article 3, which is common to all four Geneva Conventions of 1949 applies by its own terms to an "armed conflict not of an international character," otherwise referred to as an "internal conflict" or "civil war." Fourth Geneva Convention, *supra* note 62, art. 3. Nevertheless, common Article 3 has been called a "mini convention," both condensing the more extensive protections of the Geneva Conventions, which in general apply to international armed conflicts, *id.* art. 2, and codifying general principles of customary humanitarian law. JEAN S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 56-58 (1975).

135. Compare Fourth Geneva Convention, *supra* note 62, art. 3 with ICCPR, *supra* note 9, arts. 6 (right to life), 7 (prohibition against torture).

136. Compare Fourth Geneva Convention, *supra* note 62, art. 3 with ICCPR, *supra* note 10, art. 10 ("respect for the inherent dignity of the human person").

137. See Fourth Geneva Convention, *supra* note 62, art. 3.

138. Compare Fourth Geneva Convention, *supra* note 62, art. 3 with ICCPR, *supra* note 10, arts. 6, 7, 14, 16.

139. See Fourth Geneva Convention, *supra* note 62, art. 55 (emphasis added).

140. See Fourth Geneva Convention, *supra* note 62, art. 56 (emphasis added).

141. Compare Fourth Geneva Conventions, *supra* note 62, arts. 55, 56 with ICESCR, *supra* note 10, arts. 11, 12.

responsibilities under Article[s] 55 [dealing with food and medical aid] [and] 56 [dealing with the maintenance of public health and hygiene].”<sup>142</sup>

As with the major human rights instruments and the U.N. Charter itself, additional insight into the fundamental interdependence between human security and “the maintenance of peace and security” can be derived from reading the introductory language of the humanitarian law treaties. In the case of the four Geneva Conventions of 1949, the International Committee of the Red Cross (ICRC) drafted the treaties and convened the conference at which they were adopted in 1949. ICRC wrote the “Preliminary Remarks,” which precede the text of the treaties themselves.

With respect to the Geneva Conventions in general, the ICRC stresses: “[e]ach of these fundamental international agreements is inspired by respect for human personality and dignity . . . .”<sup>143</sup> With respect to the Fourth Geneva Convention specifically, the drafters explain the need for a treaty specifically dealing with civilians: “[t]he development of arms and the increased radius of action given to armed forces by modern inventions have made it apparent that, notwithstanding the ruling theory, civilians were certainly in the war, and exposed to the same dangers as the combatants—and sometimes worse.”<sup>144</sup> The ICRC’s remarks also clarify the Fourth Geneva Convention’s objective of “ensuring that, even in the midst of hostilities, the dignity of the human person, universally acknowledged in principle, shall be respected.”<sup>145</sup> The ICRC further clarifies that human dignity entails material security, or “the general protection of populations against certain consequences of war,” including threats to public health and hygiene and the welfare of children and families.<sup>146</sup>

In contrast to the major human rights instruments, the UDHR, the ICESCR, and the ICCPR, the Geneva Conventions do not mention the phrase “international peace and security.” This omission likely occurred because in wartime the peace, by definition, has been breached. Nevertheless, the Geneva Conventions bear eloquent witness to the symbiotic relationship between human security and peace, by striving to reintroduce some measure of humanity and human security amidst the brutality of war.

### CONCLUSION

A commitment to poverty alleviation as a component of world peace is both philosophically coherent and pragmatically necessary. Furthermore, such an obligation is textually rooted in the provisions of the 1945 U.N. Charter, the 1948 Universal Declaration of Human Rights, and the two 1966 International Covenants on Civil and Political, and Economic, Social and Cultural Rights, respectively. Finally, the responsibility to attend to human security is recognized in international

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142. See Fourth Geneva Convention, *supra* note 62, art. 60.

143. See GENEVA CONVENTIONS OF AUGUST 12, 1949, Preliminary Remarks at 1 (published by the International Committee of the Red Cross).

144. *Id.* at 17.

145. *Id.* at 16.

146. *Id.* at 20.

humanitarian law, specifically in the Fourth Geneva Convention of 1949,<sup>147</sup> which requires the occupying power in an international conflict to provide for the basic needs of the civilian population.

The human rights movement has helped shed light on the interdependence between civil and political rights on the one hand, and economic and social rights on the other.<sup>148</sup> There is an equally urgent need to link the two dimensions of human security with strategic and military questions as well, if we are to make meaningful progress in preventing and combating violence in all its forms, from armed conflict and terrorism to entrenched poverty and repression. Without a doctrine linking multilateral poverty alleviation to collective security, the world community will be perpetually called to pay the price for militarism in social desperation and resurgent violence.<sup>149</sup>

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147. See *supra* notes 62, 131-140.

148. See DUNOFF ET AL., *supra* note 7, at 448 (citing President Roosevelt's 1944 "Four Freedoms" speech).

149. "Whenever you advise a ruler in the way of Tao,  
Counsel him not to use force to conquer the universe.  
For this would only cause resistance.  
Thorn bushes spring up wherever the army has passed.  
Lean years follow in the wake of a great war.  
Just do what needs to be done.  
Never take advantage of power . . . ."

LAO TSU, *supra* note 3, at ch. 30.

## HUMAN SECURITY, HUMANITARIAN INTERVENTION, AND THIRD WORLD CONCERNS

PRIYANKAR UPADHYAYA\*

*Concepts come and go; they do not stay around forever. "Human security" is in, "Humanitarian intervention" is on its way out.*<sup>1</sup>

The attenuation of global rivalries in the nineties raised new hopes and paved the way for realizing the dream of building a sustainable peace through global consensus and humanitarian law. It evoked expectations that the international community, led by the United Nations, would go beyond inter-state military threats and focus on the developmental and human rights issues which were sidelined during the long decades of the Cold War. Innovative notions like human security, peace-building, and global governance enriched the lexicon of international relations.

However, the initial optimism has been short lived. The decade following the end of Cold War has seen an unprecedented spurt of violent conflicts and other non-traditional security threats; the international community is divided as never before. Although the hotbeds of most of these conflicts are in the developing South or the Third World,<sup>2</sup> their ramifications are directly felt all the way into the Northern heartland in the form of refugee outflows, drug trafficking, organized crime, and health epidemics. The scourge of terrorism along with the rising scale of structural and cultural violence, have discounted the initial euphoria that the world would be a safer place after the end of the Cold War. Moreover, the unbridled sweep of globalized commerce, often to the detriment of the poverty-stricken Third World, the unabashed pursuance of unilateralism by the world's sole superpower, and an increasingly feeble role of the United Nations has demoralized a large chunk of democratic opinion the world over.<sup>3</sup> The Agenda for Peace,

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1. Johan Galtung, *Human Needs, Humanitarian Intervention, Human Security – and the War in Iraq*, Transcend: A Peace and Development Network (Feb. 12, 2004) (Keynote Address, Sophia University/ICU, Tokyo (12/14/2003) and Regional Studies Association, Tokyo, (01/10/2004)), at [http://www.transcend.org/t\\_database/articles.php?id=262](http://www.transcend.org/t_database/articles.php?id=262).

2. Although there is no "Second World" any more, the term "Third World" has been preferred to other alternative terms such as "developing world" and "the South" to highlight the historical disparities between the West and the post colonial states of Asia, Africa, and Latin America.

3. "By the end of the 1990s . . . Pax Americana seemed to have become bellum americanum, as the desire to keep the peace took second place to a desire to accomplish 'good' through war. Neutral intervention under the auspices of the UN gave way to support for one side in a conflict, from Bosnia



which signaled a new era of international peace and security not long ago, no longer serves as a blueprint for security in the new millennium.<sup>4</sup> The acrimony and contentions over "so-called" humanitarian interventions have led the scholars to doubt its continuing relevance. There is also a growing skepticism about the notion of human security in the Third World. How do we account for these paradoxical developments?

The paper explores the ramifications of human security as an alternative security discourse and the problem of evolving a universally accepted framework to implement it. It also analyzes the convergent and divergent perspectives on humanitarian intervention, particularly the fault lines between humanitarianism and *realpolitik*. The focus is on the Third World concerns and prospects of forging a truly global consensus on these critical issues.

### From State Security to People's Security

It has never been easy to conceptualize the notion of security around some universally agreed parameters as, "it involves not only the capabilities, desires and fears of individuals and states but also the capabilities, desires and fears of other individuals and states with which they interact."<sup>5</sup> It has meant different things for policy makers and analysts in different times and involves such subjective questions as: Security for whom? Security from what? And, by what means? Moreover, the dominant political and strategic community invariably has the upper hand in molding the discourse on security, both in national and international society. "Security is an empowering word" remarks Navnita C. Behera, "[i]t both sets political priorities and justifies the use of force. The way security is understood and used profoundly affects the way political life is conducted."<sup>6</sup> It is therefore critical to unravel the political and intellectual lineage of the traditional security discourse before delineating the concept of human security.

The traditional notion of security has derived typically from the growth of nation-states in Europe. Having resolved their internal security challenges through a long and arduous process of state building, the European nation-states understandably defined security exclusively in the context of a state's ability to counter external threats to its state's vital interests and core values. The state, as the exclusive referent object of security, was to guarantee the security of "citizens."<sup>7</sup> The two World Wars, followed by the intense bipolar jostling,

and Herzegovina to Kosovo to Sierra Leone." Hurst Hannum, *Bellum Americanum*, 27 SPG FLETCHER F. WORLD AFF. 29 (2003).

4. *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Report by the Secretary General, U.N. Doc. A/47/277-S/24111 (1992) [hereinafter *An Agenda for Peace*].

5. Barry Buzan, *Regional Security*, Arbejdspapier Working Papers, Centre for Peace and Conflict Research, Copenhagen at 1 (28/1989).

6. Navnita C. Behera, *Discourses on Security: South Asian Perspectives*, Occasional Paper Series III, Malaviya Centre for Peace Research, p.1 (Mar. 16, 2001), available at <http://www.mcpr-bhu.org/Publication.htm>.

7. Bhikhu Parekh expresses well the core assumption of the 'statist' approach. "Citizens are the exclusive responsibility of their state, and their state is entirely their own business." Nicholas J. Wheeler & Alex J. Bellamy, *Humanitarian Intervention and World Politics*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 473 (John Baylis & Steve Smith

schematized the state-centric notion of security and reinforced its militaristic trappings. The western politico-military constellations were quick to define the international security in terms of the East-West confrontation<sup>8</sup> and viewed any policy of abstaining from the Cold War with suspicion. As Peter Willets remarked, "[t]he Cold War belligerents, with their 'those who are not with us are against us' do not recognize any policy and decision to abstain from the Cold War."<sup>9</sup> The oft-quoted description of nonalignment by the U.S. Secretary of State's John Foster Dulles as "an immoral and shortsighted conception,"<sup>10</sup> is a case in point. It is suggested that the deliberate conflation of the U.S. national security with global security "rendered U.S. imperial interests justifiable, to make it the normal and desirable state of affairs."<sup>11</sup> The western sponsored strategic schema was globalized by the realist paradigm, and its modified version—the neorealist school of thought, emphasized the importance of power in enhancing security in the international anarchy of world politics.<sup>12</sup>

The protests from thinkers and philosophers in different cultures, seeking a broader and transnational vision of security embodying development and social justice issues have been mostly on the sidelines of the academic discourse.<sup>13</sup> The pacifist traditions such as Peace Research and Conflict Resolution, despite their perceptive criticism of realism and an alternate vision of security (almost identical to the human security), were mostly ignored.<sup>14</sup> The overwhelming salience of bipolar politics never allowed the focus to shift from the security of national

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eds., 2001) (quoting Bhikhu Parekh).

8. See, e.g. Elmo R. Zumwalt Jr., *Heritage of Weakness: An Assessment of the 1970s*, in NATIONAL SECURITY IN THE 1980'S: FROM WEAKNESS TO STRENGTH 17-51 (W. Scott Thompson ed., 1980).

9. PETER WILLETS, THE NON-ALIGNED MOVEMENT: THE ORIGINS OF A THIRD WORLD ALLIANCE 20 (1978).

10. J.F. Dulles, *The Cost of Peace*, DEP'T ST. BULL., June 1956, at 999-1000.

11. Behera, *supra* note 6, at 2 (quoting Robert Luckham).

12. See generally E.H. CARR, THE TWENTY YEARS' CRISIS: 1919-1939 (1939) (the trendsetter of realist writing); see also HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (2d ed. 1948, 3d ed. 1960, 5th ed. revised 1978) (the most influential work of realist writing); see also JOHN A. VASQUEZ, THE POWER OF POWER POLITICS: FROM CLASSICAL REALISM TO NEOTRADITIONALISM (1998).

13. See Gene Sharp, *Beyond Just War and Pacifism: Nonviolent Struggle towards Justice, Freedom and Peace*, in VIOLENCE AND ITS ALTERNATIVES: AN INTERDISCIPLINARY READER 317-333 (Manfred B. Steger & Nancy S. Lind, eds., 1999).

14. Johan Galtung's term "positive peace," Kenneth Boulding's "stable peace," and John Burton's "human needs" approach could be perceived easily as precursors of the recent conceptualization of Human Security. See Johan Galtung, Violence, Peace, and Peace Research, 6 J. PEACE RES. 166, 183 (1969); Kenneth Boulding, Future Directions in Conflict and Peace Studies, 22 J. CONFLICT RESOL. 342, 348-49 (1978); CONFLICT: HUMAN NEEDS THEORY 1-4 (John W. Burton, ed., 1990). However "some peace researchers raised concerns that a broadened notion of peace and security would divert attention from disarmament. . . ." HO-WON JEONG, PEACE AND CONFLICT STUDIES: AN INTRODUCTION 26 (2000). See also Bjørn Møller, *National, Societal and Human Security: General Discussion with a Case Study from the Balkans*, What Agenda for Human Security in the Twenty-first Century?, Proceedings from the First International Meeting of Directors of Peace Research and Training Institutions 41, UNESCO (2001), available at <http://unesdoc.unesco.org/images/0012/001238/123834e.pdf>; Astri Suhrke, *Human Security and the Interests of States*, 30 SEC. DIALOGUE 265 (1999).

boundaries, territorial integrity, and the integrity of state institutions.

However, the political transference of the past two decades, particularly the lifting of the cold war overlay, dramatically unraveled the inadequacies of state-centric security in meeting the challenges of the 21st Century.<sup>15</sup> The changed "global landscape . . . was marked by pervasive poverty and deepening inequality within and between states."<sup>16</sup> Unchecked population growth, unbridled globalization and inequitable distribution of wealth are now provoking political strife in many countries, sometimes leading to social disintegration and armed conflict.<sup>17</sup> The gravest threats to security today come from within nations, not from invading armies. "Of the 20 countries with the lowest scores on the human development index in 2002, 16 were in conflict or just out of it."<sup>18</sup> As population pressures build, and local resources collapse, people often resort to ethnic, religious, or other group-based identities for protection. Among the most vulnerable are the poor people that comprise two-thirds of the population in the so-called Third World, whose living on ecologically fragile lands are increasingly marginalized.<sup>19</sup> These societal threats arising in any part of the world have portents for threatening global security in today's integrated and globalized world.

Evidently the challenges of the twenty-first century necessitate an expanded notion of security which is not restricted to the well being of the state but takes care of basic security needs of the citizens residing therein. However, the realist paradigm has no theoretical tools to capture the complexity of identity-based conflicts or to produce effective policies toward conflict resolution. As aptly remarks E. Fuat Keyman: "[r]ealism falls short insofar as it privileges the state as the main actor and limits its focus toward interstate relations. By neglecting economic and cultural factors, it reduces casual potential to the level of the anarchical international system."<sup>20</sup> Johan Galtung puts it even more squarely: "[w]hen rape and ethnic cleansing is used as an instrument of war, when thousands are killed by floods resulting from ravaged countryside and when citizens are killed by their own security forces, then it is just insufficient to think of security in terms of national or territorial security alone."<sup>21</sup>

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15. Early rethinking on post-bipolar security was done by several scholars. See Stephen M. Walt, *The Renaissance of Security Studies*, 35 INT'L STUD. Q. 211(1991); Barry Buzan, *New Patterns of Global Security in the Twenty-First Century*, 67 INT'L AFF. 431 (1991); Edward A. Kolodziej, *What is Security and Security Studies? Lessons from the Cold War*, 13 ARMS CONTROL 1 (1992); see also David Baldwin, *Review Article: Security Studies at the End of the Cold War*, 48 WORLD POL. 117 (1995).

17. Caroline Thomas, *Global Governance and Human Security*, in GLOBAL GOVERNANCE: CRITICAL PERSPECTIVES 113 (Rorden Wilkinson & Steve Hughes eds., 2002).

18. EMIN FUAT KEYMAN, *GLOBALIZATION, STATE, IDENTITY/DIFFERENCE: TOWARD A CRITICAL SOCIAL THEORY OF INTERNATIONAL RELATIONS* 210 (1997); see also Thomas, *supra* note 17, at 116-117.

19. COMMISSION ON HUMAN SECURITY, *HUMAN SECURITY NOW* 21 (2003). [hereinafter HUMAN SECURITY NOW].

20. See MICHAEL RENNER, *FIGHTING FOR SURVIVAL: ENVIRONMENTAL DECLINE, SOCIAL CONFLICT AND THE NEW AGE OF INSECURITY* 83 (1996).

21. Keyman, *supra* note 17, at 210.

21. Møller, *supra* note 14.

No wonder the end of the Cold War inaugurated a renaissance in security studies. Ranging from critical theories, which draw on postmodernism and feminism and pose fundamental disagreements with the core categories of traditional security studies, we also have "new thinking" within the mainstream security discourse which seeks to widen the security debate by incorporating societal threats that affect not only states but also groups and individuals and other non state actors.<sup>22</sup>

However, it is the construction of human security discourse, which has attracted the widest interest among the policy makers, scholars, and civil society actors. It makes a fundamental transference in the security analysis by bringing people and society within the template of security. Indeed the construct of human security has become a catchphrase employed not only with the United Nations and its allied agencies but also, lately, by various states. Still there are divergent expositions offered by academia, state policies, and NGO sectors about what it entails, what should be its focus, and how it is to be operationalized.

### Interpreting Human Security

The earliest traces of human security concern could be discerned in the 1970s when the human rights and development activists conceptualized an umbilical link between disarmament and development. During this phase, an influential group of peace researchers also came out with an alternate paradigm based on basic human needs, which soon caught attention of the members of the U.N. family. It tried to aggregate the basic human rights with such basic needs as food, clothing, housing, health, and education.<sup>23</sup> These impulses led to various initiatives in the seventies and the eighties including the Independent Commission on International Development Issues chaired by Willy Brandt, the Olof Palme-led Independent Commission on Disarmament Security Issues and Brundtland Commission, and the Stockholm Initiative on Global Security and Governance. Nevertheless, it took a while for the concept to take roots and proliferate.

The first current usage of Human Security appeared in the Human Development Reports sponsored by the United Nations Development Program (UNDP).<sup>24</sup> Starting with 1993, the UNDP reports built upon and refined this concept.<sup>25</sup> In 1994, the Human Development Report focused explicitly on human security and defined it around two aspects: freedom from fear and freedom from want, which include safety from chronic threats such as hunger, disease and

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22. See generally *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1996). See generally Barry Buzan, *Re-thinking Security After the Cold War*, 32(1) *COOPERATION AND CONFLICT* 5, (1997) (Also significant is the contribution of the Copenhagen School, which mainstreams societal concerns within the security discourse.); Ole Waever, *Securitization & Desecuritization*, in *ON SECURITY* 46 (Ronnie D. Lipschutz ed., 1995); BARRY BUZAN ET AL., *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* (1998).

23. Galtung *supra* note 1, at ¶ 5 (Attributed essentially to Johan Galtung, the Basic Human Needs (BHN) draws on the Universal Declaration of Human Rights of 1948 and the Social, Economic and Cultural Covenant of 1966).

<sup>25</sup> See UNITED NATIONS DEVELOPMENT PROGRAMME, 1993 HUMAN DEVELOPMENT REPORT 2 (1993).

<sup>26</sup> See UNITED NATIONS DEVELOPMENT PROGRAMME, 1994 HUMAN DEVELOPMENT REPORT 3 (1994).

repressions, and protection from sudden and hurtful disruptions in the patterns of daily life.<sup>26</sup> The Report identified five steps: a human development conception with emphasis on equity, sustainability, and grassroots participation; a peace dividend to underwrite the broader agenda of human security; a new partnership between North and South based on justice and equitable access to global market opportunities and economic restructuring; a new framework of global governance built on reform of international institutions such as the IMF, World Bank, and the United Nations; and finally, a growing role for global civil society.<sup>27</sup>

Further, the UNDP Report listed seven "components," or specific values of human security: economic security, food security, health security, environmental security, personal security, community security, and political security.<sup>28</sup> The Canadian-led middle powers' approach subsequently endorsed by Norway makes a common cause with the core elements of UNDP definition when it incorporates "an acceptable quality of life" which, minimally, connotes physical safety and well-being, and "a guarantee of fundamental human rights" which means freedom from pervasive threats to the rights, the safety, or the lives of people.<sup>29</sup> The Japanese Government also defines human security, as "[t]he preservation and protection of the life and dignity of individual human beings . . . that . . . can be ensured only when the individual is confident of a life free of fear and free of want."<sup>30</sup>

However, the Canadian government and its Minister of Foreign Affairs, Lloyd Axworthy, linked human security more explicitly to human rights and humanitarian law and critiqued the UNDP version "for focusing too much on threats associated with underdevelopment at the expense of human insecurity resulting from violent conflict."<sup>31</sup> The Canadian view was endorsed by the other middle powers like Norway which joined Canada in a Human Security Partnership.<sup>32</sup> "The partnership identified a nine-point agenda of human security: landmines, formation of an International Criminal Court, human rights,

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<sup>27</sup> *Id.*

<sup>28</sup> See generally UNITED NATIONS DEVELOPMENT PROGRAMME, 1994 HUMAN DEVELOPMENT REPORT (1994).

<sup>28</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, 1994 HUMAN DEVELOPMENT REPORT 22 (1994).

<sup>29</sup> Louis Hamel, *Toward Human Security: A People-centered Approach to Foreign Policy*, Keynote address at the First International Meeting of Directors of Peace Research and Training Institutions, in WHAT AGENDA FOR HUMAN SECURITY IN THE TWENTY-FIRST CENTURY? 15 (UNESCO, Nov. 27-28, 2002). [hereinafter Hamel]. (However it is the distinct emphasis on "the threat of violence that distinguishes the human security objectives of Canadian foreign policy"). See, *Handling Human Security*, 15(4) PEACE MAGAZINE 13, 14 (1999), <http://www.peacemagazine.org/archive/v15n4p13.htm>

<sup>30</sup> Yukio Takasu, *Toward Effective Cross-Sectional Partnership to Ensure Human Security in a Globalized World*, Statement at the Third Intellectual Dialogue on Building Asia's Tomorrow, (June 19, 2000), [http://www.mofa.go.jp/policy/human\\_secu?spech0006.html](http://www.mofa.go.jp/policy/human_secu?spech0006.html).

<sup>31</sup> Amitav Acharya, *Human Security: East Versus West*, 56(3) INTERNATIONAL JOURNAL 445. Hamel, *supra* note 29, at 15. ("It is the threat of violence that distinguishes the human security objectives of Canadian foreign policy" from that of UNDP).

<sup>33</sup> Acharya, *supra* note 31, at 445.

international humanitarian law, women and children in armed conflict, small arms proliferation, child soldiers, child labour, and northern co-operation.”<sup>33</sup> This transference reflected “a new international climate marked by changing norms of state sovereignty with particular regard to human rights protection.”<sup>34</sup>

The notions of human security are very far removed from the liberal notions of “security of individual,” which entails competitive and possessive individualism.<sup>35</sup> They, however, focus particularly on reducing the systemic insecurities threatening individual lives.<sup>36</sup> Referring to the key elements of human security, U.N. Secretary General Kofi Annan remarked:

Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfill his or her potential. Every step in this direction is also a step toward reducing poverty, achieving economic growth and preventing conflict.<sup>37</sup>

Thus, in policy terms human security is an integrated, sustainable, comprehensive security from fear, conflict, ignorance, poverty, social and cultural deprivation, and hunger, resting upon positive and negative freedoms. At many levels, these human security arguments share a common genealogy with other much-recognized concepts as human development and human rights. As remarks Louis Hamel, Permanent Delegate of Canada to UNESCO, “[h]uman security is brother and sister to human development. Human security provides the sheltering environment for human development, the social peace and freedom from fear that make development practical.”<sup>38</sup> As amplified by the Commission on Human Security: “it necessitates the involvement of a range of non-state organizations and entities; and its success depends not only on protecting people but also empowering them.”<sup>39</sup> Seemingly, the construct of human security strives to reconcile humanitarianism and developmental concerns on the one hand, and international security on the other. However, of late “the tension between those embracing politics of development and those supporting human security paradigm has intensified because the transnational dimensions embodied within the latter approach have been under assessed.”<sup>40</sup>

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<sup>34</sup> *Id.* at 445-46.

<sup>35</sup> *Id.* at 445.

<sup>36</sup> Thomas, *supra* note 17, at 114-15.

<sup>37</sup> Thomas, *supra* note 17, at 115-16.

<sup>38</sup> Press Release, Kofi Annan, Secretary-General Salutes International Workshop on Human Security in Mongolia (May 8, 2000), <http://www.un.org/News/Press/docs/2000/20000508.sgsm7382.doc.html>.

<sup>39</sup> Hamel, *supra* note 29, at 15.

<sup>40</sup> HUMAN SECURITY NOW, *supra* note 18.

<sup>41</sup> Nicholas Thomas & William T. Tow, *The Utility of Human Security: Sovereignty and Humanitarian Intervention*, 33(2) *SECURITY DIALOGUE* 177 (2002).

### Toward Peace –Building

The notion of peace-building corresponds closely to human security.<sup>41</sup> Peace researchers and allied scholarship in conflict resolution have long emphasized a broader meaning of peace, which could deal with the generic causes of conflict.<sup>42</sup> As observed by Paul Cornish, “[r]eal peace is much more than stability, order, and the absence of war: peace is transformative, about individual and societal progress and fulfillment; and peace within and between societies is as much about justice as any thing else.”<sup>43</sup> As delineated earlier, the concept of basic human needs and structural violence with their emphasis on oppression and exclusion as generic causes of violent conflict provides a ready platform to the human security discourse.<sup>44</sup> Revealing complementarities between the contemporary notions of positive peace with human security, *An Agenda for Peace* called for “an integrated approach to human security” that would address “. . . the deepest causes of conflict: economic despair, social injustice, and political oppression.”<sup>45</sup> Much like the conception of positive peace, the defining feature of human security is the ‘vulnerability’ of three categories of victims: those of war and internal conflict, those living at or below subsistence levels, and victims of natural disaster.<sup>46</sup> The UNDP Reports and the subsequent *Human Security Now* both admit that the threats to human security at the societal level are often the root causes of protracted internal violence and thus recommend peace-building as the support for divided societies in their efforts to prevent internal threats to human security.<sup>47</sup> Echoing this, the U.N. Secretary General Kofi Annan observed, “[w]e must also broaden our view of what is meant by peace and security. Human security can no longer be understood in purely military terms. Rather, it must encompass economic development, social justice, environmental protection, democratization, disarmament, and respect for human rights and the rule of law.”<sup>48</sup>

### Against National Security?

Seemingly, human security does not find any contradiction between the people’s security and the state security – the two layers of security.<sup>49</sup> In the words

41. See John Linarelli, *Peace-Building*, 24 DENV. J. INT’L L. & POL’Y, 253, 253-83 (1996).

42. *Id.*

43. Paul Cornish, *Terrorism, Insecurity and Underdevelopment*, 1 J. CONFLICT, SECURITY & DEV. 30, 147-52 (2001).

44. JOHAN GALTUNG, *Three Approaches to Peace: Peacekeeping, Peacemaking and Peacebuilding*, in *PEACE, WAR AND DEFENSE: ESSAYS IN PEACE RESEARCH* at 282-304 (Christian Ejlertsen ed.) (1976).

45. *An Agenda for Peace*, *supra* note 3, at 43-44.

46. See Astrid Suhrke, *Human Security and the Interests of States*, 30 SECURITY DIALOGUE 3, 265-76 (1999).

47. JOHN G. COCKELL, *Peace building and Human Security: Frameworks for International Responses to Internal Conflict*, in *PREVENTING VIOLENT CONFLICT: PAST RECORD AND FUTURE CHALLENGES*, at 210-11, (Peter Wallensteen, ed.) (1998).

48. Kofi Annan, *Letters to future generations: Towards a Culture of Peace*, at <http://www.unesco.org/opi2/lettres/TextAnglais/AnnanE.html>.

49. Michael Ignatieff, *Peace, Order and Good Government: A Foreign Policy Agenda for Canada*, Skelton Lecture given at the Department of Foreign Affairs and International Trade (March 12, 2004) (transcript available at <http://www.dfait-maeci.gc.ca/skelton/lecture-2004-en.asp>).

of Heinbecker, human security is about “the ability to protect people as well as to safeguard states.”<sup>50</sup> However, it surely takes a critical view of neglecting societal security in the name of safeguarding national security.

*Human Security Now* emphasized that although human security complements state security, there may be situations in which “it often fails to fulfill its security obligations – and at times has even become a source of threats to its own people.”<sup>51</sup> The Canadian approach, often seen as disfavoring the issue of state security,<sup>52</sup> argues that since the Cold War it is increasingly clear that national security is insufficient to guarantee people’s security.<sup>53</sup> The Canadian idea finds that though the security of the state is a necessary condition of human security; it is not a sufficient condition. An official document of the Canadian Department of Foreign Affairs and International Trade thus observes: “When states are externally aggressive, internally repressive, or too weak to govern effectively, human security suffers. In such cases, the international community will hear calls for intervention and humanitarian necessity may ultimately outweigh arguments of sovereignty.”<sup>54</sup> In the similar vein, a Report of International Commission on Intervention and State Sovereignty, envisions the world of states as a series of interlocking duty holders toward the populations they are supposed to serve and where one state fails in its duties, other states must step in: to stop the killing, feed the hungry, restore order, and return sovereignty to those who can fulfill their duties.<sup>55</sup>

### Post 9/11 Transference

The terrorist attacks on the United States and the subsequent “global war on terror” have distorted the discourse on human security in various ways.<sup>56</sup> As Mark Drumble remarks: “[r]esponse to atrocities of September 11 whether on the level of modifying the rules regarding a self-rule, avoiding strict adherence to the approval of use of force, demonstrating diffidence to the Geneva Convention, or the exceptional use of military commission—may signify a movement away from

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50. P. Heinbecker, 56 *Human Security* 2, (1999) cited in Rorden Wilkinson and Steve Hughes, *supra* note 16, at 114. A leading public figure in India thus opined that “(f)rontiers of a State are important but so are frontiers of human dignity.” See M.N. Venkatachaliah, Former Chief Justice of India, *Proceedings of World Congress on Human Rights*, Institute for World Congress on Human Rights, India International Centre, New Delhi, 21-22 (November 1997).

51. HUMAN SECURITY NOW, *supra* note 18, at 2.

52. See Acharya, *supra* note 31, at 443.

53. *Freedom from Fear: Canada’s Foreign Policy for Human Security*, Human Security Program, Department of Foreign Affairs and International Trade at 2 (2003), available at [http://www.humansecurity.gc.ca/psh\\_brief-en.asp](http://www.humansecurity.gc.ca/psh_brief-en.asp).

54. *Id.*

55. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa (2001), at <http://www.idrc.ca> [hereinafter *The Responsibility to Protect*].

56. See Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993 (2001), available at <http://www.ejil.org/journal/Vol12/No5/index.html>; Lawyers’ Committee for Human Rights, *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties*, Sept. 2002 - March 2003 (details U.S. legislation in the aftermath of Sept. 11, 2001, and its effect on human rights), available at <http://www.lchr.org/us law/loss/imbalance/powers>.



legalism.”<sup>57</sup> The formal announcement of the policy of unilateralism by the United States, through its National Security Strategy,<sup>58</sup> saw the downgrading of multilateral institutions and the United Nations. Referring to this trend, *Human Security Now* observes:

In response to the threat of terrorism and the spread of weapons of mass destruction, states may revert to a narrower understanding of state security—rather than foster human security. Under the guise of waging a war against terrorism, human rights and humanitarian law are being violated. Even commitments to earlier international agreements are being reviewed. Humanitarian action now also seems to be in crisis.<sup>59</sup>

The post 9/11 responses by the United States created a paradox for those defining human security as freedom from fear. While the generic causes of terrorism defined in terms of poverty, inequality, and injustice remained tangential, more and more investment in human and material resources is being made to reinforce the traditional arsenal of the national security state to counter terrorism. It is true that terrorism violates the human security of the noncombatant and thus necessitates counter-terrorism measures to protect individuals as well as states. However, it also creates grounds for human rights abuse. The contention on “homeland security” is a case in point. What is worse is the blatant defiance of the international law by the world’s largest protagonist of democratic values. Critics point out that:

[t]he war on Iraq crisis may only serve to reinforce the skepticism of many people around the world who see international law as a set of commitments that are routinely ignored by governments or worse still, selectively implemented to benefit the strong at the exclusion of the weak. This would undermine the security of all of us.<sup>60</sup>

What is worse is that the vision of the world’s largest national security state has served as a role model of several Third World states. As pungently observed by the editorial of Refugee Watch published in India:

A nationalist state’s dream is perhaps to transform itself into a national security state. When the transformation occurs, it needs to create its other in the form of an enemy alien. It needs an enemy to hate and it needs a terrain where glorious wars of national retribution can be fought out. Who better to teach us these lessons in *realpolitik* than the United States that has mastered the art of creating a nameless enemy alien in its war against terrorism.<sup>61</sup>

57. Mark Drumble, *Terrorist Crime, Taliban Guilt, Western Victims and International Law*, 31 DEN. J. INT'L L. & POL'Y 1, 111 (2003).

58. The National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.html> (developed in the midst of the debate over Iraq and submitted to Congress in September 2002).

59. HUMAN SECURITY NOW, *supra* note 18, at 5.

60. Mary Robinson, *Shaping Globalization: The Role of Human Rights, The Fifth Annual Grotius Lecture, American Society of International Law 97<sup>th</sup> Annual Meeting* (April 2, 2003), in 19 AM. U. INT'L L. REV. 1, 8 (2003), available at <http://www.eginitiative.org/documents/grotius.html>.

61. South Asian Forum for Human Rights, *Editorial*, 18 REFUGEE WATCH 1 (April 2003),

There are clear indications that in the post 9/11 phase, the states have increasingly resorted to harder military measures to quell dissidence and separatist movements taking the umbrage under the global war on terrorism. Surely the increasing exposure of the way the United States distorted information about Iraqi weapons of mass destruction has blurred the line between humanitarian intervention (which can be a tool, albeit an extreme one, of human security) and intervention carried out for national security intentions. Mary Robinson, former U.N. High Commissioner for Human Rights, while recognizing the need to stamp out terrorism, cautioned against the threat of human rights violations posed by counter terrorism measures.<sup>62</sup> She found “[h]uman rights as a ‘uniting framework’ for states in the face of human insecurity created by international terrorism.”<sup>63</sup> In this light, she endorses the idea of human security as it places “individuals and their universal rights at the centre of national and global security policy” and encourages a “comprehensive strategy to address the causes of insecurity, not only its consequences and manifestations.”<sup>64</sup>

### Reconciling “humanitarian” with “*realpolitik*”?

Unlike humanitarian assistance that provides aid with the consent of the host state and other ground-level actors, humanitarian intervention refers to the use of force to protect a threatened or victimized population, from either local actors whom the government is unable or unwilling to control, or from the government itself. There are diverse opinions whether such intervention could be legal without Security Council authorization under Chapter VII of the U.N. Charter.<sup>65</sup> There is also an ongoing debate between restrictionists and counter-restrictionists; the former disfavoring forcible humanitarian intervention on the grounds of Article 2(4) and Article 2(7) of the Charter and the latter reinterpreting international legal provisions to legitimize intervention.<sup>66</sup> Hedley Bull, for instance, insists on the reciprocal recognition of sovereignty and the norm of non-intervention in evolving a consensus on what principles should govern collective humanitarian intervention.<sup>67</sup> Conversely, the counter-restrictionists such as Anthony Clark Arend and Robert J. Beck argue that states have both a legal right and a moral obligation to intervene in exceptional cases that offend against minimum standard of humanity.<sup>68</sup> The notion that there is an emerging guiding principle in favor of

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available at [http://www.safhr.org/refugee\\_watch18.htm](http://www.safhr.org/refugee_watch18.htm).

62. See Robinson, *supra* note 60.

63. *Id.*

64. Diana Ayton-Shenker, *A Global Agenda: Issues Before the 57<sup>th</sup> General Assembly of the United Nations*, (an annual publication of the United Nations Association of the United States of America), (Lanham, ed.) (2002).

65. *Embracing the Elephant: Perspectives on Humanitarian Operations: A Policy Brief* (A Workshop Report of the Academic Council of the United Nations System (ACUNS) and American Society of International Law (ASIL) at 2 (arguing that humanitarian intervention without Security Council authorization, is often justified under the so called “right to intervene”, but this interpretation remains controversial), available at [www.acuns.wlu.ca/publications](http://www.acuns.wlu.ca/publications) (last visited September 23, 2004).

66. See generally A. C. AREND & R.J BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 131-2 (1993).

67. See generally H.BULL, *INTERVENTION IN WORLD POLITICS* 193-94 (1984).

68. See generally AREND & BECK, *supra* note 66, at 132-7.

military intervention for human protection purposes is also supported by a wide variety of legal sources including sources that exist independently of any duties, responsibilities, or authority that may be derived from Chapter VII of the U.N. Charter.<sup>69</sup> The International Commission on Intervention and State Sovereignty thus emphasized the responsibility of states and the international community to protect people militarily in situations resulting in "a large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either deliberate state action, or state neglect or inability to act, or a collapsed state situation; or large scale ethnic cleansing, actual or apprehended, whether carried out by killing, force expulsion, acts of terror, or rape."<sup>70</sup>

As such, customary international law has been unreceptive not only to unilateral intervention in domestic affairs, but also to collective coercive action except in cases of threats to peace, breaches of peace, and aggression.<sup>71</sup> The international effort to protect human rights defied the norms of non-intervention and domestic jurisdiction and was rarely considered a viable policy option. The scope of enforcing the U.N. collective security was ostensibly constrained by Article 2(4), which explicitly states that the Council is to act in accordance with the principles and purposes of the organization. Similarly, Article 2(7), which provides that nothing in the Charter authorizes the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state, requires members to submit such matters to settlement under the present Charter.<sup>72</sup> There is also a view which wants to put the issue of intervention beyond legality, as suggests R.J. Vincent that "[i]t is not necessarily lawful or unlawful, but it does break a conventional pattern of international relations."<sup>73</sup>

Notwithstanding the theoretical contentions, the international community has been under pressure to play a proactive role toward the recurrent episodes of human catastrophes when major harm to civilians is occurring or imminently apprehended, and the state in question is incapable or unwilling to protect their own citizens. Human rights are also increasingly viewed as rights possessed by the

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69. See *The Responsibility to Protect*, *supra* note 55, at 16 for a rendition of these legal foundations, which include fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together with the Genocide Convention; the Geneva Conventions and Additional Protocols on international humanitarian law; the statute of the International Criminal Court; and a number of other international human rights and human protection agreements and covenants.

70. HUMAN SECURITY NOW, *supra* note 18, at 24.

71. See generally Tom Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185-201 (Lori Fisler Damrosch & David J. Scheffer eds., 1991). But cf. *Embracing the Elephant*, *supra* note 65, at 9-12 (However, there are emerging legal justifications for humanitarian intervention in customary international law especially around the Chapter VII of the United Nations Charter).

72. See *Embracing the Elephant* *supra* note 65, at 4 (however, it contains one, and only one exception – to wit that it shall not prejudice the application of enforcement measures under Chapter VII. This exception was inserted deliberately to ensure that declarations of domestic jurisdiction could not be used to impede Security Council efforts to maintain or restore international peace and security).

73. R.J. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 13 (1974).

individual for which there could be redress before the international community.<sup>74</sup> This new thinking has become more pronounced after spurts in internal violence in which the state either acquiesced or collaborated with the violent groups. The tragedies of Rwanda, Bosnia, and Kosovo have fostered a strong need to reexamine the international legal tools available to respond to human catastrophes.<sup>75</sup> More than any other episode, it was the genocidal violence in Rwanda which shook the consciousness of human kind as the international assistance and intervention came too little and too late. The fumbled efforts of the United Nations in Somalia and Bosnia once again underlined the lack of international preparedness in legal and logistical terms to meet these new challenges.<sup>76</sup>

Conscious of the inadequacy of the existing provisions to deal with these human emergencies, the U.N. community has been gearing itself in recent years to meet such situations of internal violence, often defining these as a threat to international peace and security to justify enforcement action under Chapter VII of the U.N. Charter. It also adopted an *aide memoire* on the protection of civilians, focusing on four themes: protection of civilians in conflict; women, peace and security; children in armed conflict; and conflict prevention.<sup>77</sup> In the similar vein, an Independent International Commission on Intervention and State Sovereignty (ICISS) was set up by the Canadian government in September 2000.<sup>78</sup> *The Report of the Panel on United Nations Peace Keeping Operations* (known as the Brahimi Report) recommended various reforms to conduct the peace operations of the twenty-first century.<sup>79</sup> Under this changed scenario, the long-standing international principles of non-intervention as enshrined in Article 2(7) were revisited ostensibly on humanitarian grounds. It was argued that the enforcement

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74. *The Limits of Sovereignty*, U.N. Doc. DPI/1178 (1992) (the UN Secretary-General, Javier Perez de Cuellar thus proposed a fresh and more innovative equilibrium between sovereignty and the protection of human rights).

75. See generally Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti-Revisiting the Validity of Humanitarian Intervention under International Law* (pt. 1), DENV. J. INT'L L. & POL'Y 305 (1992); Ved Nanda, Amy E. Eckert & Thomas F. Muther, Jr., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia-Revisiting the Validity of Humanitarian Intervention under International Law* (pt. 2) 26 DENV. J. INT'L L. & POL'Y 827 (1998), available at [http://www.law.du.edu/ilj/online\\_issues.html](http://www.law.du.edu/ilj/online_issues.html).

76. See generally Stanley Hoffman, *Humanitarian Intervention in Former Yugoslavia* in STANLEY HOFFMANN, *THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION* 38-60 (1996); see generally also Rosalyn Higgins, *The New United Nations and Former Yugoslavia*, 69(3) INT'L AFFAIRS 165-83 (1993) (both articles present an excellent analysis of the U.N. failure in Yugoslavia); see also Age Eknes, *The United Nations' Predicament in the Former Yugoslavia*, in *THE UNITED NATIONS AND CIVIL WARS* 109-26 (THOMAS G. WEISS ed., 1995).

77. HUMAN SECURITY NOW, *supra* note 18.

79. International Commission on Intervention and State Sovereignty, at <http://www.dfait-maeci.gc.ca/iciiss-ciise/menu-en.asp> (last visited October 1, 2004).

79. The Henry L. Stimson Center, William J Durch, Victoria K Holt, Caroline R Earle & Moira K Shanahan, *The Brahimi Report and the Future of UN Peace Operations* (2003), available at [www.stimson.org/fopo/pubs.cfm?ID=90](http://www.stimson.org/fopo/pubs.cfm?ID=90) (many recommendations viz strengthening conflict prevention and peacebuilding, developing rapid deployment capacities and improving management are yet to be implemented). HUMAN SECURITY NOW, *supra* note 18, at 10.

action stipulated in Chapter VII of the U.N. Charter nullifies the right to invoke the nonintervention principle contained in the Article 2(7) "[i]f it can be established that a matter occurring within the territory of a state is essentially outside that state's jurisdiction."<sup>80</sup> This new interpretation was employed in the 1991 Persian Gulf War. Once the issue of human rights violations by the Iraqi government against the Kurds was framed as constituting a threat to international peace and security, traditional "distinctions between domestic jurisdiction and foreign policy" were set aside.<sup>81</sup> However, it was the geostrategic matrix, rather than the humanitarian concerns, which led to such drastic revision of non-intervention norms.

Back in 1976, Johan Galtung had noted with considerable foresight that "with internal wars becoming more important, not less, the unlimited doctrine of humanitarian intervention will become increasingly anachronistic, and a search for more discriminating criteria will have to start."<sup>82</sup> Almost three decades after his observation, we still do not have a consensus on the ground rules for such intervention. As remarks Michael Bothe: "People who attempt to apply existing law to contemporary actions do not appear to be working with the same definitions of sovereignty, preemptive self defense, or humanitarian intervention." For some, all of those are a question of military security, for others they are the domains of humanitarian mission."<sup>83</sup> Bhikhu Parekh, for instance, argues that humanitarian intervention "is an act wholly or primarily guided by the sentiment of humanity, compassion or fellow-feeling, and is in that sense disinterested."<sup>84</sup> Others admit that "there are situations in which diplomatic and even economic measures are inadequate to restructure the political situation. If forceful measures can change the course toward a negotiated solution, a limited, politically informed use of military force can be defended on purely humanitarian grounds."<sup>85</sup> Stanley Hoffman has also pointed out the growing discrepancy between the norms of sovereignty and the traditional legal organization of the international system, and the realities of a world in which the distinction between domestic politics and international politics is crumbling.<sup>86</sup> Amid these ceaseless controversies, the consensus which defined the international mood at the beginning of 1990's seems to be crumbling.

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80. W. Andy Knight, *The Changing Human Rights Regime, State Sovereignty, And Article 2(7) in the Post Cold War Era*, in ARTICLE 2(7) REVISITED (Abiodun Williams et al. eds., 1994), available at [www.acuns.wlu.ca/publications](http://www.acuns.wlu.ca/publications).

81. Thomas G. Weiss & Kurt M. Cambell, *Military Humanitarianism*, 33(5) SURVIVAL 451, 455 (1991).

82. Cockell, *supra* note 47, at 205.

83. Michael Bothe, Michael Bothe Professor of Law at Johann Wolfgang University in Frankfurt reported in *Redefining Sovereignty*, MERSHON CTR. REPORT at 53 (2002-03) available at [www.mershon.ohio-state.edu](http://www.mershon.ohio-state.edu).

84. Bhikhu Parekh, *Rethinking Humanitarian Intervention* 18(1) INT'L POL. SCI. REV. 49-70 (1997).

85. Raimo Vayrynen, *How Much Force in Humanitarian Intervention?*, in THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION at 8-9 (Stanley Hoffmann ed., 1996).

86. Stanley Hoffmann, *Sovereignty and the Ethics of Intervention*, in THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 13 (Stanley Hoffmann ed., 1996).

The increasing use of humanitarian grounds for intervention has expectedly raised apprehensions in the postcolonial states of the Third World, including countries like China, India, and Malaysia.<sup>87</sup> This has much to do with their experience with the colonial interventions. As remarks Johan Galtung "... the tradition of interventionism has a bad name, reminiscent of the punitive expeditions by colonial powers in general, and the UK in particular, to punish the colonized and protect the settlers, and of numerous US military interventions (Iraq is No. 69 after the Second World War) to exercise control."<sup>88</sup> The resistance to any alteration in the norms of non-intervention was manifest in strong reactions from Asian countries to the humanitarian intervention in East Timor.<sup>89</sup> According to some Third World analysts the idea of humanitarian intervention discriminating as it applies only on the powerless third world countries ventilating these third world sentiments, M.V.Naidu observes:

It is unthinkable against a nuclear weapon's state or even a highly militarized and industrialized state. It is also doubtful if humanitarian interventions could take care of generic causes of human rights violation or basic human needs of the people. Thus, there is a common feeling in the third world that the developed countries tend to hide their strategic and national interest in the name of humanitarian intervention.<sup>90</sup>

However in the western eyes, the Third World resistance to any alteration in the norms of nonintervention is because "[m]any states have skeletons in their closets with respect to human rights (the UN resolution that condemned Iraqi repression of the Kurds could not invoke Chapter VII because of China's objection), and that in particular many new states have – like India – formidable problems with ethnic or religious minorities."<sup>91</sup>

### Not by Military Alone

Surely, military option for protecting people in risk is an extreme option and is fraught with unintended consequences. Any outside action is more acceptable, if it aggregates sovereignty instead of undermining it. In the short run, people may welcome outside agencies to secure them but they would soon like to reclaim their sovereignty. This explains Asian preference for milder forms of interventions to protect human security concerns. This includes 'constructive intervention' proposed by Anwar Ibrahim (to deal with internal conflicts in weaker regional states such as Cambodia) and 'flexible engagement' mooted by Surin Pitsuan (to deal with the fallout of the regional economic crisis) and the situation in Burma.<sup>92</sup> "Both concepts maintained a healthy respect for state sovereignty requiring the

87. Acharya, *supra* note 31.

88. Galtung *supra* note 31.

89. See generally Klomjit Chandrapanya, *Part of the Elite Thinks Policy on East Timor a Mistake*, *THE JAKARTA POST*, Thursday, June 17, 1999 at 5, available at [http://www.thejakartapost.com/special/os\\_3\\_news4.asp](http://www.thejakartapost.com/special/os_3_news4.asp).

90. See M.V.Naidu, *Security, Sovereignty, and Intervention: Concepts and Case Studies*, 34(1) *PEACE RESEARCH (CANADA)* 33-58 (2002) for an elaborate discussion of this point.

91. Hoffman, *supra* note 76, at 33.

92. Acharya, *supra* note 31, at 458.

regime's consent as the prerequisite for collective action."<sup>93</sup>

Arms embargoes are also a helpful statecraft tool to preempt, delimit, and defuse violent conflict and human rights abuses. However, embargoes are full of imperfections and have significant problems with their implementation.<sup>94</sup> For instance, the Five Permanent Members of the Security Council (P5) are also the five largest arms producers who would not easily give up their arms business. The U.N. led embargoes have been sluggish and are generally imposed after the protagonists have procured sufficient arms to prosecute a war. In Rwanda, the U.N. embargo could only be imposed in May 1994 when the genocide had been underway for several weeks and many thousands of people had already been slaughtered.<sup>95</sup>

Economic sanctions are other methods of pressing human security agenda on a recalcitrant state unwilling to cooperate in the face of a human catastrophe. However, the economic sanctions can create humanitarian disasters because of the practical difficulty of selective targeting. The international community has begun to recognize the devastating effects of economic sanctions on civilian populations, and is now placing increased emphasis on so-called "smart sanctions" or "targeted sanctions," targeting the assets and procurement channels of rogue leaders and resources that are essential for their rule.<sup>96</sup>

### Third World Anxieties

The human security paradigm provides a transformative framework by incorporating the imperatives of protecting and empowering people – a long cherished vision of humanity. Yet in the typical Third World parlance, human security and humanitarian intervention are often branded as western sponsored enterprises promoting western values and are used to legitimize intervention against the poor and weak states.<sup>97</sup> Ironically, the critique has come from two opposite camps. While the 'statist' opposes these doctrines for demolishing the norms of non-intervention and sovereignty, the civil society finds in it a western plot to re-colonize the Third World.<sup>98</sup>

The truth is that after being relieved from the threat of communist challenge,

93. *Id.*

94. See Elizabeth Kirkham & Catherine Flew, *Strengthening Embargoes and Enhancing Human Security: Briefing 17 Biting the Bullet*, International Alert-Safe World and University of Bradford, 3 (2003), available at [http://www.international-alert.org/pdf/pubsec/BB\\_Briefing171.pdf](http://www.international-alert.org/pdf/pubsec/BB_Briefing171.pdf).

95. *Id.* at 21-22.

96. *Executive Summary: Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, Final Report of the Stockholm Process on the Implementation of Targeted Sanctions, MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS, Uppsala University, Sweden at iii (Wallenstein, et al. eds., 2003).

97. This is despite the two leading exponents of human security- Mahbub-ul-Haq and Amartya Sen are South Asians. Also there is no dearth of human security related ideas in third world. A cursory glance at Mahatma Gandhi's writings would evidence this. However it is an irony that the third world must now address and absorb the concept only after they have been repackaged by donor agencies.

98. Arundhati Roy, *The New American Century*, opening plenary of the World Social Forum in Mumbai (Jan. 16, 2004) in *The Nation*, Jan. 22, 2004, available at [www.thenation.com/doc.mhtml?i=20040209&s=roy](http://www.thenation.com/doc.mhtml?i=20040209&s=roy).

“(t)he questions of human rights, protection of minorities and a right to democratic government including national self-determination – neglected after the fiasco of the post Versailles attempts – are again on the agenda of western powers.”<sup>99</sup> This new activism is hailed in many western quarters as a long overdue reclaiming of the Wilsonian norms of internationalization of democracy as the best guarantee of peace. Weak states have apprehensions about the possible misuse of humanitarian intervention; however, this is not an issue with the powerful countries. For them the critical concern is how to ensure the effective implementation of such intervention. No wonder the increasing episodes of humanitarian intervention in the post-Cold War Era have raised endless acrimony and divide.<sup>100</sup> It is not just legally controversial, but is also to a high degree politically controversial “. . . both when it has happened as in Somalia, Bosnia and Kosovo and when it has failed to happen, as in Rwanda.”<sup>101</sup>

While there is no doubt about the responsibilities of the international community in such situations, where governments are unwilling or incapable or they perpetuate human insecurities, the truth is that states do not intervene for primarily humanitarian reasons and tend to use them selectively when it suits their geo-strategic interest. The problem indeed is how to make ‘humanitarian’ concerns compatible with the *realpolitik*.

The problems are confounded by the inner contradictions in Third World states. Unlike the more stable and cohesive nation-states of developed west, the post-colonial states of the Third World are still struggling with the task of nation building and consolidating their territorial integrity and other state structures. There are deep-seated divisions, which along with acute scarcity of resources constantly hamper the process of nation building. Lack of domestic consensus creates an easy ground for the assertion of autonomy and self-determination by the disparate groups often evoking a large-scale military response from the state leading to the violation of human rights and consequent socioeconomic catastrophes.<sup>102</sup> And in many cases the ruling elite either overlook the human security issues or become a perpetrator of human atrocities. “The paradox of the state,” according to Robert Jackson is “that the most important threats to security in the Third World (and often elsewhere), arise from states and regimes, and are directed against individuals and communal groups.”<sup>103</sup> It is no surprise that the Third World elite remains so sensitive to any infringement on their sovereignty on

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99. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

100. Inger Osterdahl, “Humanitarian Intervention” in Inger Osterdahl, *Is Intervention Humanitarian? Protecting Human Rights and Democracy Abroad*, Report no. 62, Department of Peace and Conflict Research, Uppsala University, Sweden at 3 (eds., 2002)

101. Gareth Evans & Mohamed Sahnoun, *forward to THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (2001), available at [http://web.idrc.ca/en/ev-28716-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-28716-201-1-DO_TOPIC.html).

<sup>102</sup> See generally DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985); See also DONALD L. HOROWITZ, *THE DEADLY ETHNIC CONFLICT* (2001).

<sup>103</sup> ROBERT JACKSON, *QUASI-STATES; SOVEREIGNTY; INTERNATIONAL RELATIONS AND THE THIRD WORLD*, Cambridge University Press, Cambridge (1990).



the grounds of human rights protection. As observed succinctly by Paul R. Williams et. al., "[a]ll too frequently the mantra of sovereignty is used by states to shield them from international action to prevent them from violating human rights and committing atrocities in their attempts to stifle self-determination movement."<sup>104</sup>

Much like the contention in human rights,<sup>105</sup> the discourse on human security is also haunted by a divide between 'universalists' and 'cultural relativists.' It is contended that the western notions of human security focus more on western liberal values such as political rights and ignore a communitarian ethos prevalent in many Asian societies.<sup>106</sup> Accordingly, the Asian statesmen would not like to compromise development objectives to promote political and civil rights. These rights could be accorded priority only after the society has reached a certain level of development. This line of reasoning, according to Stephanie Lawson, "reflects a pragmatic prioritization of categories encapsulated the idea of 'rice before freedom.'"<sup>107</sup>

The criticism also relates to the historic urge in the postcolonial Third World to shake off the intellectual dependency and evolve an indigenous concept of security.<sup>108</sup> The predicament is that in the name of developing indigenous discourse, the elites in many post colonial societies tend to revive obscurantist traditions or fall into the trap of defending "our national security" and "our nation-state" – once again a legacy of the colonial powers.<sup>109</sup>

There are also suspicions in the Third World that human security has a 'donor driven agenda,' which intends to legitimize the forces of globalization.<sup>110</sup> "Donors," according to Anne Itto'an, "live far away from the realities of emergencies and too often have a close-minded paternalistic attitude that they know what is best; in fact, some agencies have no right to be involved in the delivery of humanitarian assistance."<sup>111</sup> It is also pointed out that while the

104. Paul R. Williams, et al., *Resolving Sovereignty- Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 DEN. J. INT'L L. & POL'Y 347, 350 (2003).

105. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 57 (2003).

106. *Id.* at 60; see Amitav Acharya, *supra* note 31, at 45 (China, Malaysia, Indonesia and Singapore are prominent Asian countries, which advocate the so-called Asian Values). See Amitav Acharya, *Guns and Butters: Why Do Human Security and Traditional Security Coexist in Asia?* 32(3) GLOBAL ECONOMIC REVIEW 1, 1-21 (2003).

107. Stephanie Lawson, *Global Governance, Human rights and the Problem of Culture*, in GLOBAL GOVERNANCE: CRITICAL PERSPECTIVES 84 (Rorden Wilkinson & Steve Hughes eds., 2002).

108. Conor Cruise O'Brien, *Epilogue: Illusions and Realities of Nonalignment*, in NONALIGNMENT 127-36 (J.W. Burton ed., 1966) (Early sixties saw the growth of nonalignment as a possible alternative to western paradigm on security. However, it could not flourish due to the internal weakness of nonaligned countries).

109. See Behera *supra* note 6; see also Yash Tandon *Towards a Common Security – Alternative Perspectives of the Third World*, 21(4) BULLETIN OF PEACE PROPOSALS 385-393 (1990).

110. *Human Security: Safety for People in a Changing World*, a paper prepared by the Department of Foreign Affairs and International Trade, Government of Canada, at [http://www.humansecurity.gc.ca/safety\\_changingworld-en.asp](http://www.humansecurity.gc.ca/safety_changingworld-en.asp).

111. Anne Itto, *Insider's View of Humanitarian Assistance*, 24 FLETCHER F WORLD AFF. 23, 23-24 (2000).

international agencies such as the UNDP prescribe the values and goals for the developing countries; the Bretton Woods institutions belonging to the same developed west advocate an unbridled sweep of globalization and economic liberalization which tend to undermine precisely that.<sup>112</sup> There is no dearth of studies which evidenced the negative role of globalization on land security, food security, water security and ultimately, human security of poor people in the Third World.<sup>113</sup> The lack of consensus on this issue may in the long run disorient the role of U.N. agencies in promoting human security. As observes R.A. Coate et al.:

As privileged positions, statuses, power base and ideologically narrow and culturally - specific meanings [of human security] come under threat by the challenge of other preferred meanings, strong defences can be expected to be mounted. Indeed those who claim 'high moral ground' in these ideological debates well be in the end fight against any meaningful role by the United Nations, especially as those challenges touch on the issue of state sovereignty.<sup>114</sup>

### Poverty and Disparities

Human security protagonists are concerned as much with the growing scale of poverty as with the gnawing global disparities. It is now a truism that poverty anywhere is poverty everywhere. The continued lopsided development in the world illustrates the fact that industrial countries, with 26 percent of the population, account for 78 percent of world production of goods and services, 81 percent of energy consumption, 70 percent of chemical fertilizers, and 87 percent of world armaments.<sup>115</sup> As fittingly remarked by Keyman, E. Fuat:

We don't really need to spend another dime on "intelligence" to recognize the conditions that leave whole countries in a state of despair and misery. Some 1.2 billion people worldwide struggle to survive on \$1 day or less 1.2 billion people lack access to safe drinking water and 2.9 billion have inadequate access to sanitation. About 150 million children are malnourished, and more than 10 million children under five will die in 2001 alone. At least 150 million people are unemployed and 900 million are "underemployed"-contending with inadequate incomes despite long hours of backbreaking work.<sup>116</sup>

A 1998 report by the UNDP estimated the annual cost to achieve universal access to a number of basic social services in all developing countries: \$9 billion would provide water and sanitation for all; \$12 billion would cover reproductive health for all women; \$13 billion would give every person on Earth basic health

112. *Id.*

113. See Thomas, *supra* note 16.

114. R.A. Coate, W.A. Knight and A.I. Maximenko, *Requirement of Multilateral governance for Promoting Human Security in a Postmodern Era*, in *ADAPTING THE UNITED NATIONS TO A POSTMODERN ERA, INDEED PROMOTING HUMAN SECURITY* 24 (W.A. Knight ed., Palgrave New York 2001).

115. ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT* 211-12 (1995).

116. EMIN FUAT KEYMAN, *GLOBALIZATION, STATE, IDENTITY/DIFFERENCE: TOWARD A CRITICAL SOCIAL THEORY OF INTERNATIONAL RELATIONS* 210 (1997).

and nutrition; and \$6 billion would provide basic education for all.<sup>117</sup> These social and health expenditures are just a fraction of the annual military budget for the United States alone. Clearly, the unchecked growth of militarism in the world is the single most constraining factor in helping out people in the situation of human insecurity. This has led to a rising discontent in impoverished and deprived Third World youth against the rich, powerful, and imposing west making them easy prey to the siren song of extremism.

The responsibility of protecting human security eventually rests on the concerted efforts to promote sustainable human development. Some of the crucial areas which warrant expanded global efforts for achieving human security goals are: increasing support for women's education, health, and family planning; programs to slow population growth; sustained efforts to manage and use forests, water, and soils—the resources that support most rural economies; regional and global recognition of the right of each person to a nationality; and measures to ensure effective citizenship.<sup>118</sup>

The United States, given its unique role as the most important mentor of the international human rights regime, must not be seen as ignoring these legal obligations at home or abroad.<sup>119</sup> The recent abuse of Iraqi prisoners has affected its credibility. While decrying the United States for opposing the International Criminal Court (ICC) Benjamin Ferencz, former prosecutor during the Nuremberg trial, warned: “[t]hey are trying hard to kill the ICC, by fair means or foul. . . . We must give law a chance. Arrogance and threats do not encourage friendships. The trashcans of history are filled with the ashes of nations that were the superpowers of their day. It should be clear to all that law is better than war.”<sup>120</sup>

This paper has argued that despite the increasing salience of human security as a reformist discourse, not much has changed in the domain of *realpolitik*. Notwithstanding the occasional winds of change, humanity is still living in the shadow of national security states, which, on the pretext of making the world a safer place are erecting more ramparts dividing nations and peoples. Instead of building a global consensus based on shared responsibilities and not humanitarian concerns, the geostrategic considerations dominate the schema of humanitarian interventions. This stultifies the very nomenclature of such interventions.

Finally, there is thus a need to strike a balance among humanitarian,

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117. World Watch Institute, Washington D.C., available at <http://www.worldwatch.org>.

118. See P. Upadhyaya, *Securitizing Non-Traditional Security Threats: Illegal Migration*, in JOURNAL OF CONFLICT MANAGEMENT & DEVELOPMENT, Vol. 1, Malaviya Centre for Peace Research, BHU at 15-44 (2003) (The misery of undocumented migrants devoid of citizenry of any state has yet to attract international attention. In South Asia alone, there are millions of such cases). M.V. Naidu, *Security, Sovereignty, and Intervention: Concepts and Case Studies*, 34(1) PEACE RESEARCH 33-58, (2002).

119. An Interview with Joschka Fischer, Germany's Foreign Minister, *The Hindu*, New Delhi (July 21, 2004).

120. Benjamin B. Ferencz, At the Hauge, Ferencz Defends The Nuremberg Principles and the Rule of Law, Address to the Inaugural Meeting of Judges of the International Court (Mar. 11, 2003) available at <http://www.benferencz.org/remarks.htm>.

political, military interest, and development strategies. Humanitarian action cannot be an alternative to peace settlements or to development assistance—or the pretext for military intervention.<sup>121</sup> Non-military options including targeted sanctions against the unruly ruling elite must be given a full chance.<sup>122</sup> The touchstone to determine the legitimacy of any act of intervention should be based on a balanced assessment of whether, in the long run, it would meet the basic needs of people at risk. To discourage great powers from violating the principles of equality and reciprocity, the international community should gradually qualify and eventually phase out the veto power to ensure that the authoritative decisions-makers in the Security Council are more representative of the entire world's people.<sup>123</sup> There are also suggestions for a greater inclusion of women in any such humanitarian intervention “[s]ince women would tend to relate more to people than to hardware, they could perhaps constitute 50% of the units.”<sup>124</sup>

The Third World anxieties on the agenda of human security and humanitarian intervention are not simply the manifestation of faultiness within their national societies but also symptomatic of asymmetries in the post Cold War international system. The critical problem before human security discourse, therefore, is to consider the ways through which the international system could be reformed on the basis of multilateralism and humanitarian law.

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121. HUMAN SECURITY NOW, *supra* note 18, at 27.

122. See Galtung, *supra* note 1 (In addition to hard military intervention (the US led), there could be soft military (European), soft nonviolence, hard nonviolence (like Gandhi). The best according to Johan Galtung would be people's hard nonviolence from the inside).

123. Robert C. Johansen, *Limits and Opportunities in Humanitarian Intervention*, in THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 73 (1996).

124. See Galtung, *supra* note 1.

## HUMAN SECURITY AND SOCIAL DEVELOPMENT

JOHN F. JONES\*

Global issues no less than community concerns influence social development, though the impact is not always apparent to those most closely involved. One of the harshest realities facing communities in the twenty-first century is the impact of a global economy as this is played out locally, whether on an American Indian reservation in Oregon or in a forced settlement in Ethiopia. Globalization means change, most dramatically demonstrated in those countries moving from central planning to a free market, like the present and former socialist countries in Asia, Central Europe, and Africa. Controversy surrounds approaches to economic reform. The field is roughly divided between those who endorse the "big bang" of immediate and drastic change, and those who prefer gradual development.<sup>1</sup>

The big bang or accelerated approach, heavily favored by the International Monetary Fund (IMF) and the World Bank, involves restructuring the economy in both its macro- and micro-economic policies, including privatization, decentralization, and deregulation, along with support for entrepreneurship and free market competition, all achieved as quickly as possible.<sup>2</sup> As envisaged by Richard Jackman, author of *Economic Policy and Employment in the Transition Economies of Central and Eastern Europe: What Have We Learned?*, the restructuring process proceeds through three stages: first, a shake-out of the old economy, eliminating waste and unprofitable operations; second, growth of private enterprises, recruiting the excess labor made redundant by reform; and third, establishment of equilibrium and competition in the new system, where pressure comes from the market rather than central planning mandates.<sup>3</sup> The approach to

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1. See Leonard Silk, *Dangers of Slow Growth*, 72 FOREIGN AFF. 167, 178 (1993); Jeffrey Sachs & Wing Thye Woo, *Structural Factors in the Economic Reforms of China, Eastern Europe, and the Former Soviet Union*, 18 ECON. POL. 102, 102 (1994); Ivan Szelenyi & Eric Kostello, *The Market Transition Debate: Towards a Synthesis?*, 101 AM. J. SOC. 1082, 1082-1096 (1996); Haider A. Khan, *Structural Adjustment and Human Development: Lessons for Low-income Transitional Economies*, in TRANSITIONAL ECONOMIES AND REGIONAL ECONOMIC DEVELOPMENT STRATEGIES: LESSONS FROM FIVE LOW-INCOME DEVELOPING COUNTRIES 25, 26 (Asfaw Kumssa & Haider A. Khan eds., 1996).

2. Asfaw Kumssa & John F. Jones, *The Social Consequences of Reform in Transitional Economies*, 26 INT'L J. SOC. ECON. 194, 195 (1999); Martin Godfrey, *The Struggle against Unemployment: Medium-term Policy Options for Transitional Economies*, 134 INT'L LAB. REV. 3, 3 (1995).

3. Richard Jackman, "Economic Policy and Employment in the Transition Economies of Central and Eastern Europe: What Have We Learned?," 133 INT'L LAB. REV. 327, 327-45 (1994). Both approaches to reform have much the same final goals, but the gradualists would proceed at a more measured pace than the big bang advocates. The economy would be restructured sector by sector, allowing some parts to shift to a market orientation while retaining central planning for the rest as a

economic restructuring, beyond being greatly divergent, is highly relevant.

### ECONOMIC TRANSITION: THE COMMUNITY IMPACT

The debate on the best approach to economic transition might seem purely academic and of little interest to social development were it not that the global economy affects local communities everywhere, and in disturbing ways. The persistence of poverty and the erosion of social services in transitional economies are cause for concern. There is general consensus among development scholars that in economic and political transition, social safety nets suffer, but how precisely countries are impacted depends on a number of factors.<sup>4</sup> The contrast was sharp between, on the one hand, the implosion of the former Soviet Union, with its broad economic and political revolution in the late 1980s and, on the other, China's narrower economic reform introduced gradually a full decade earlier.<sup>5</sup> Eastern Europe, torn apart politically after the dissolution of the Soviet Union and prodded towards economic stability by the IMF, most faithfully adopted the IMF/World Bank recommendations to speed transition until, in the case of the Russian Federation, the economy worsened to the point of near collapse and the IMF softened its demands.<sup>6</sup> Among the Asian socialist countries, the biggest player, China, largely ignored any calls from within its borders and from the outside world for instant capitalism or democracy, preferring to implement a type of reform sequencing.<sup>7</sup> African countries were variously affected by gradualist and big bang policies, caught between the World Bank's insistence on structural adjustment and the reality of national political and social restraints.<sup>8</sup>

The immediate consequences of radical economic reform are not really disputed. Any disagreement centers on the extent to which the safety nets are shredded, the type of development causing the most or least harm, and the prospects for rebuilding a welfare system in some new form.<sup>9</sup> Declaring that "development itself interferes with human and social development," Paul Streeten, author of *The Social Dimensions of Development*, asserts that "the poor shoulder the heaviest burden."<sup>10</sup> At present, the results of this world-wide movement to a market system are mixed. In some places, economic and political freedoms have

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temporary measure, notwithstanding the delays this would inevitably cause. The gradualists are as a rule much more ready to extend the time needed to complete the entire process.

4. Charles Guzzetta & John F. Jones, *Editorial Introduction*, 18 REGIONAL DEV. DIALOGUE iii, iii-xviii (1997).

5. Ronald McKinnon, *Financial Growth and Macroeconomic Stability in China, 1978-1992: Implications for Russia and Other Transitional Economies*, 18 J. COMP. ECON. 438, 438-40 (1994).

6. Pradumna B. Rana, *Reform Strategies in Transitional Economies: Lessons from Asia*, 23 WORLD DEV. 1157, 1157-58 (1995).

7. *Id.*

8. Though the debate on national policy is most commonly stated in economic terms, the decisions are to a large measure political. Adrian Leftwich, *Bringing Politics Back In: Towards a Model of the Developmental State*, 31 J. DEV. STUD. 400, 401 (1995).

9. See Asfaw Kumssa, *Transitional Economies and Regional Economic Development Strategies*, in TRANSITIONAL ECONOMIES AND REGIONAL ECONOMIC DEVELOPMENT STRATEGIES: LESSONS FROM FIVE LOW-INCOME DEVELOPING COUNTRIES 1 (Asfaw Kumssa & Haider A. Khan eds., 1996).

10. Paul Streeten, *The Social Dimensions of Development*, in ECONOMIC DEVELOPMENT 145, 145 (Enzo Grilli & Dominick Salvatore eds. 1994).

gone hand-in-hand, but benefits have been widely scattered often resulting in greater injustice than existed before the transition.<sup>11</sup>

Major groups have been consistent losers in the shuffling of opportunities, rewards, and costs. Women tend to be losers in transitional economies.<sup>12</sup> For instance, after Mongolia threw aside the policies of the Soviet Union that it had previously favored, women's unemployment jumped to fifty-four percent of the country's unemployed population.<sup>13</sup> As social welfare safety nets are dismantled, others at risk include children, the elderly, the disabled, and the poor.<sup>14</sup> Transition to a market economy, while desirable or even necessary in view of global competition, has its dangers for many countries. The breakup of old systems before new institutions are put in place is likely to disrupt production and cause massive uncertainty about the future direction of the economy.<sup>15</sup> Policy makers all too often pay little attention to the sequencing of reforms when it comes to privatization, liberalization, and institution building.

The impact economic reform will have on local communities must be considered not in a vacuum, but rather in a global context. For communities caught in national crises, outside pressures can be enormous. A case study is never just a study of a community in isolation, cut off from the region, from the country, from the world. Just as national boundaries are porous, so too are town walls and village ditches. Ordeals need not be sudden or spectacular to impact localities. Environmental quality no less than conflict can curtail basic necessities like food, and affect cultural norms as well as socio-political structures in a community.<sup>16</sup> Assessment of local social development has to take into account national and regional links, and threats to a community's security should be considered in whatever form they come.

### HUMAN SECURITY: A SHIFT OF EMPHASIS

To some extent the urgency of human security stems from fear of political instability, border conflict and social chaos following the disappearance of

11. See Zsuzsa Ferge, *Social Security Systems in the New Democracies in Central and Eastern Europe: Past Legacies and Possible Futures*, in CHILDREN AND THE TRANSITION TO THE MARKET ECONOMY: SAFETY NETS AND SOCIAL POLICIES IN CENTRAL AND EASTERN EUROPE 69, 70-71 (Giovanni Andrea Cornia & Sander Sipos eds. 1991).

12. See Lawrence Haddad & Lynn R. Brown, *The Gender Dimensions of Economic Adjustment Policies: Potential Interactions and Evidence to Date*, 23 WORLD DEV. 881, 881-896 (1995); Alistair McAuley, *The Economic Transition in Eastern Europe: Employment, Income Distribution, and the Social Safety Net*, 7 OXFORD REV. ECON. POL. 93 (1991).

13. John F. Jones & Asfaw Kumssa, *Mongolia's Transition to a Market Economy: Problems and Prospects*, 19 SOC. DEV. ISSUES 50, 57 (1997). For the negative consequences of transition for women in an Asian socialist economy, see UNITED NATIONS DEVELOPMENT PROGRAM, SOCIAL POLICIES AND DEVELOPMENT: STRATEGY AND ACTION PLAN FOR UNDP VIETNAM (1995).

14. Edwin Kaseka, *Local Social Development in Zimbabwe*, in SOCIAL DEVELOPMENT IN AFRICA 61, 69 (Aklilu Kidanu & Asfaw Kumssa eds., 2001).

15. See Izumi Ohno, *Review of Debates over Transition Strategies: 'Gradualism' Revisited*, 1 J. DEV. ASSISTANCE 43, 43-64 (1996).

16. See Chris Cocklin & Meg Keen, *Urbanization in the Pacific: Environmental Change, Vulnerability and Human Security*, 27 ENVTL. CONSERVATION 392, 392-396 (2000).

paradoxically stable cold war boundaries and (often forced) alliances. There are three major developments which have played a part in reshaping the notions of security and conflict resolution.<sup>17</sup> These are:

The shift in analysis from a narrow focus on military security in the defense of national sovereignty to consideration of internal sources of instability such as communal strife, ethnic unrest, poverty, unemployment, crime, and terrorism.

Recognition of the inevitable link between the welfare of citizens and the security of the state. Non-military barriers to stability can be economic, social, environmental or civil. Drug smuggling, illegal immigration, corruption, human rights violations, disease, and poverty can threaten a government no less than armed invasion from outside.

Increasing awareness that national and sub-national problems are amenable to, and sometimes require, international assistance or even intervention. Suddenly, regional humanitarian issues become geopolitical. Witness Bosnia, Kosovo, Rwanda, Iraq, and Liberia.<sup>18</sup>

Mass population displacement, taking the form of internal migrations and/or cross-border refugee movements, is a common consequence of in-country devastation.<sup>19</sup> While human security has a far wider scope than concern for refugees, there is little doubt that the multiple problems caused by the forced displacement of populations and the widespread phenomenon of asylum seekers in the 1990s has had the effect of forcing governments, international aid organizations, and U.N. agencies to examine their roles in humanitarian action, emergency relief, and conflict resolution.<sup>20</sup> State security has shifted from a focus on military defense from external threats to internal sources of instability, arising from economic, social and political considerations.

### HUMAN RIGHTS AND HUMAN SECURITY

The security of states brings the question of human rights to the center of the debate. Human rights are commonly divided into rights *from* (protection) and rights *to* (provision).<sup>21</sup> The first set of rights is intended to guarantee protection by the state or, where the need arises as it too often does, protection from the state.<sup>22</sup> This first set of rights involves civil liberties such as freedom of speech or freedom

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17. See UNHCR, *THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION* 1, 1-33 (2000).

18. See NORWEGIAN REFUGEE COUNCIL, *INTERNALLY DISPLACED PEOPLE: A GLOBAL SURVEY* 25, 133, 169 (2002).

19. Nana K. Poku & David T. Graham, *Introduction*, in *MIGRATION, GLOBALIZATION, AND HUMAN SECURITY* 1, 3 (David T. Graham & Nana K. Poku, eds. 2000); Howard Adelman, *From Refugees to Forced Migration: The UNHCR and Human Security*, 35 *INT'L MIGRATION REV.* 7, 7 (2001).

20. Ray Wilkinson, *Who's Looking After These People*, 4 *REFUGEES* 5, 5-8, 10-12 (1999), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=MEDIA&id=3b83e5df4>.

21. Charles Guzzetta, *The Theory of Human Security and the Task of Training*, 22 *REGIONAL DEV. DIALOGUE* 174 (2001).

22. *Id.*



of movement.<sup>23</sup> The second group represents rights to services or resources, which the government must itself provide or make available through civil society (e.g. health care, employment, and education).<sup>24</sup> The need for proscription against things that should be done to no one (rights *from*) is harshly demonstrated in victims of torture, persecution, and genocide, while mass poverty and disease illustrate the denial of basic human needs (rights *to*).<sup>25</sup>

In both poor and rich nations, human life is increasingly threatened by sudden, unpredictable violence. These threats take several forms such as physical torture, war, terrorism, ethnic tension, crime and street violence, rape and domestic violence, as well as threats directed at women and children based on their vulnerability and dependence.<sup>26</sup> When promoting or evaluating social development it is necessary to recognize the two components of human security, namely, civil rights and social welfare. The development practitioner may, depending on circumstances, concentrate on one or the other, but the total matrix must always be kept in mind. Civil rights guarantee protection, while social welfare encompasses the provision of basic needs.<sup>27</sup> Each is essential, and together they are the foundation of human security.

### PROTECTION

Human rights invoke a rule of law dating back to ancient religious and moral codes in Asia and Africa, and later formalized in increasingly legal language in Europe with the Magna Carta, the Treaty of Westphalia, the Napoleonic Code, and later various legislation.<sup>28</sup> In the post-World War II era, the 1948 Universal Declaration of Human Rights listed basic rights as the right to life, liberty and security of person, and the right to seek and enjoy asylum.<sup>29</sup> The 1951 Geneva Convention Relating to the Status of Refugees (1951 Convention) defined a refugee as a person outside his or her country of origin who has a well-founded fear of persecution because of race, religion, nationality, membership of a particular social group or political opinion, and one who is unable or unwilling to avail him or herself of the protection of that country, or to return there for fear of

23. PETER STOETT, HUMAN AND GLOBAL SECURITY: AN EXPLORATION OF TERMS 72 (1999).

24. See POPULATION AND GLOBAL SECURITY (Nicholas Polunin ed. 1998).

25. Paul Sieghart, THE LAWFUL RIGHTS OF MANKIND 107 (1985).

26. Josefa S. Edralin, *Total Human Security Awareness*, 24 REGIONAL DEV. DIALOGUE 1, 3-10 (2003).

27. *Id.*

28. MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 7-8 (2004); GEORGE B. ADAMS, THE ORIGINS OF THE ENGLISH CONSTITUTION vii-ix (1912); Alan S. Rosenbaum, *The Editor's Perspectives on the Philosophy of Human Rights*, in THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE 8-9 (Alan S. Rosenbaum, ed., 1980).

29. *Universal Declaration of Human Rights*, G.A. Res 217A (III), U.N. GAOR, U.N. Doc. A/810. at 71 (1948), available at <http://www.un.org/Overview/rights.html>; See also M. GLEN JOHNSON & JANUSZ SYMONIDES, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION 1948-1998, at 50 (1998); Johannes Morsink, *The Universal Declaration of Human Rights as a Norm for Societies in Transition*, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION 29-51 (Shale Horowitz & Albrecht Schnabe eds., 2004).

persecution.<sup>30</sup> An important right contained in the 1951 Convention was the right to be protected against forcible return (*refoulement*) to the territory from which the refugee had fled.<sup>31</sup> Subsequent covenants, such as the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), reinforced or extended these rights.<sup>32</sup>

In addition to international covenants, regional treaties broadened the language of the 1951 Convention's definition of a refugee. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa specifically inserted a political element into the definition when it included any persons compelled to leave their country owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of their country of origin or nationality.<sup>33</sup> The Cartagena Declaration on Refugees of 1984, which was approved by ten countries, recommended having the definition of refugee cover those fleeing a country because of generalized violence, internal conflicts, or massive violations of human rights.<sup>34</sup> Racism, certainly found in ethnically homogeneous and in industrialized countries, is a threat to human security recognized, for instance, in the 1997 Treaty of Amsterdam which empowered the European Union to act against discrimination based on racial or ethnic origin, religion, or belief.<sup>35</sup> National legislation on all continents, too numerous to cite, embodies selectively and sometimes restrictively the articles of international treaties, agreements, and covenants.

What stands in contrast to most social development literature and earlier peace studies is the explicit recognition enforcement gets in the human security agenda. Rights, the thinking goes, are meaningless unless they can be enforced, and the experience of recent decades exemplifies this.<sup>36</sup> While the need for

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30. Convention Relating to the Status of Refugees, Apr. 22, 1954, art. 1, 189 U.N.T.S. 150, available at <http://www1.umn.edu/humanrts/instree/vlcrs.htm>.

31. *Id.*, at art. 33 ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.")

32. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, G.A. Res. 39/46, U.N. Doc. A/39/51.

33. Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1001 U.N.T.S. 45.

34. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc. 10, rev. 1, at 190-93 (1984-85), available at: <http://www.asylumlaw.org/docs/international/CentralAmerica.pdf>; See also KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY? 99 (1998). The Cartagena Declaration on Refugees lacks binding power but offers guidelines for practice. Some of its recommendations were later incorporated into the national legislation of Latin American states.

35. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, art.2, 1997 O.J. (C340) 1.

36. See Allan Rosas & Jan Hegelsen, *Introduction*, in HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE 1, 2 (Allan Rosas & Jan Helgesen, eds., 1990).

protection applies first and foremost to vulnerable client populations, it also applies to the social workers and others who serve them. The civilian workers in humanitarian agencies put themselves at risk in civil war-torn regions. Nongovernmental organizations' (NGO) staff and U.N. personnel require protection, sometimes by force of arms.<sup>37</sup> Some 375 U.N. civilian workers have been killed in the line of duty in countries shaken by violence – Rwanda, East Timor, Somalia, Kosovo, and Iraq.<sup>38</sup> The first generally recognized line of defense is the legitimate government in countries where the rights of individuals, groups, or even large populations are threatened. The various conventions and treaties referred to above assume that it is the principal responsibility of states to protect their citizens.<sup>39</sup> But where this breaks down, as it did at one time or another in Burundi, Liberia, Rwanda, Sierra Leone, and Somalia, then *international protection* is invoked to guard against the forced displacement of minorities.<sup>40</sup> While there is an uneasy acceptance of the need for international aid and the logic of war, the very existence of international war crimes tribunals and U.N. peace-keeping forces points to the recognition of super-national legality and enforcement measures.<sup>41</sup> The OAU made itself clear on the need for intervention and in fact blamed the United Nations itself, along with the United States and European nations, for passivity in the face of Rwanda's tragedy.<sup>42</sup>

Few are comfortable with tying humanitarian assistance to police or military surveillance and control. The preference is to see the need for large-scale law enforcement, especially at the international level, as a necessary evil, a temporary obligation required only in the most drastic situations.<sup>43</sup> There is an understandable aversion to linking conflict resolution to force of arms in Rwanda or other war-torn countries.<sup>44</sup> That has made many NGOs disassociate themselves from force of any kind in the delivery of services or emergency aid.<sup>45</sup> This is particularly true with sectarian and religious agencies, but the hesitation is apparent

37. Guzzetta, *supra* note 21.

38. Mani Sheik et al., *Deaths among Humanitarian Workers*, 321 BRIT. MED. J. 166, 166 (2000).

39. *Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel: Report to the Secretary General*, U.N. GAOR, 56th Sess., Agenda Item 20(a), U.N. Doc. A/56/384 (2001).

40. *Scope of Legal Protection Under the Convention on the Safety of United Nations and Associated Personnel – Report of the Secretary General*, U.N. GAOR, 55th Sess., Agenda Item 20(a), U.N. Doc. A/55/637 (2000).

41. See Rosalyn Higgins, *To Save Succeeding Generations from the Scourge of War: The Role of the International Court of Justice*, 16 MED., CONFLICT AND SURVIVAL 60, 66 (2000); Ved P. Nanda, *The Establishment of a Permanent International Criminal Court: Challenges Ahead*, 20 HUM. RTS Q. 413, 415 (1998).

42. Guzzetta & Jones, *supra* note 4.

43. See Adam Hussein Adam, *Displacement, Minorities, and Human Security*, 24 REGIONAL DEV. DIALOGUE 120, [pg#] (2003).

44. Human Rights Watch, *Rwanda: The Search for Security and Human Rights Abuses*, Human Rights Watch, Apr. 2000, at 22-23 (2000), available at <http://www.hrw.org/reports/2000/rwanda/index.htm>.

45. See SUSTAINABILITY IN GRASS-ROOTS INITIATIVES: FOCUS ON COMMUNITY BASED DISASTER MANAGEMENT (Rajib Shaw & Kenji Okazaki eds., 2003)

on all fronts.<sup>46</sup> It is probably fair to say that the majority of social development personnel and conflict resolution advocates tend to distance themselves from violence, even in the protection of human rights.<sup>47</sup>

The majority's withdrawal from violence leaves a broad responsibility for human security to those whose main concern is people's immediate need for food and shelter, or to those involved with a wider service social agenda that includes health and education. A second feature of this social orientation, distinct from law enforcement, is widening the human security perspective to encompass not only refugees and displaced populations but the entire sweep of people who suffer severe deprivation of any kind. This is closer to a more traditional concern with sustainable development, and it echoes the emphasis of, for instance, the U.N. Development Programme (UNDP).<sup>48</sup> Protection, to be successful, requires not only enforcement, but a broadening of scope to encompass all severe deprivation.

### PROVISION

Provision, in the context of human security, means the alleviation of disease, hunger, unemployment, crime, and environmental hazards through programs and projects that seek to remove these dangers.<sup>49</sup> The intensity of the threats may differ from one country to another but, being almost universal, the risks are not confined to particular groups or ethnic populations, though the need may be more urgent in some cases. Scarcities of food, shelter, and healthcare in one place affect the common good everywhere else.<sup>50</sup> The security of nation states begins with the security of the people who form the state, and individual perceptions of insecurity are more often linked to worries about daily life than to the dread of world events. For people in developing countries and for the poor everywhere, job security and health and safety are of prime importance.<sup>51</sup> The framework of security is ultimately a social one.<sup>52</sup>

Because governments have almost always seen security from the top down, and have concentrated on national, regional, and international security, they have principally kept their eye on armed invasion from outside or ideological subversion threatening the nation from within.<sup>53</sup> Conflict between states has been the main

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46. KURT MILLS, *supra* note 34, at 126-165.

47. See Clarisa Bencomo, *Investigations into Unlawful Use of Force in the West Bank, Gaza Strip, and Northern Ireland*, HUMAN RIGHTS WATCH, Oct. 2000, available at <http://www.hrw.org/reports/2000/israel/index.htm>; Shannon Lindsey Blanton, *Instruments of Security or Tools of Repression? Arms, Imports and Human Rights Conditions in Developing Countries*, 36 J. PEACE RES. 233, 234 (1999).

48. See *infra*. note 60.

49. John F. Jones, *Inter-regional Models of Cooperation to Promote Effective Social Development in Asia and Africa*, in *Social Development Issues in Africa* 7, 7-21 (Akilu Kidanu & Asfaw Jumssa eds., 2002).

50. See John F. Jones, *From globe to village: Understanding Local Social Development*, 20 SOCIAL DEVELOPMENT ISSUES 1, 9-12 (1998).

51. Edralin, *supra* note 26.

52. See Michael G. Schechter, *Editor's Introduction*, in *FUTURE MULTILATERALISM: THE POLITICAL AND SOCIAL FRAMEWORK* 1,1 (Michael G. Schechter, ed., 1999).

53. See DAVID STOESZ, CHARLES GUZZETTA, & MARK LUSK, *INTERNATIONAL DEVELOPMENT*

issue that has defined the notion of security at the political level.<sup>54</sup> The result has been a reliance on arms to protect territory, often with scant attention to the condition of people living in that very same territory.<sup>55</sup> In reality, human security should be seen principally as a bottom-up issue since what really matters is the well being of people. Human insecurity is not some inevitable occurrence, but rather a direct result of existing power at several tiers, ranging from the global through the regional, the state, and finally down to the local level.<sup>56</sup>

Security is gradually becoming understood better and more broadly than in the past, meaning that the concept now extends beyond the security of states to the safety of groups and individuals within a society who are tied into international systems and who share a global environment. Although few definitions of security stress the conditions necessary for peace, these in fact include sustainable development, economic and social equity, in addition to the protection of human rights already discussed.<sup>57</sup> Security, therefore, affects and is affected by all aspects of human life, encompassing the use of natural resources, population dynamics, as well as ethnic and gender identities.

True human security takes human beings and their communities, rather than states, as the measure of safety.<sup>58</sup> While the security of states is necessary to ensure individual well being, it is not sufficient. Threats from military and non-military sources such as intrastate wars, small arms proliferation, human rights violations, crime, and drugs are equally dangerous to human welfare. Poverty is paramount in undermining social development. At the core, the safety and well being of individuals are the essential ingredients of global peace and human security.<sup>59</sup> The UNDP Human Development Report for 1994 put it this way:

People in rich nations seek security from the threat of crime and drug wars in their streets, the spread of deadly diseases like HIV/AIDS, soil degradation, rising levels of pollution, the fear of losing their jobs and many other anxieties that emerge as the social fabric disintegrates. People in poor nations demand liberation from the continuing threat of hunger, disease and poverty while also facing the same problems that threaten industrial countries.<sup>60</sup>

The UNDP was among the first to lay out the dimensions of human security,

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224-241 1999.

54. See DAVID P. FORSYTHE, *HUMAN RIGHTS AND PEACE: INTERNATIONAL AND NATIONAL DIMENSIONS* 1-17 (1993).

55. See Margaret E. Crahan, *The Evolution of the Military in Brazil, Chile, Peru, Venezuela, and Mexico: Implications for Human Rights*, in *HUMAN RIGHTS AND BASIC NEEDS IN THE AMERICAS* 46, 47 (Margaret E. Crahan, ed., 1982).

56. See Caroline Thomas, *Introduction*, in *GLOBALIZATION, HUMAN SECURITY AND THE AFRICAN EXPERIENCE* 1, 3-4 (Caroline Thomas & Peter Wilkin, eds., 2000).

57. See UNHCR, *supra* note 17.

58. See NAGAMINE HARUO, *REGIONAL DEVELOPMENT IN THIRD WORLD COUNTRIES: PARADIGMS AND OPERATIONAL PRINCIPLES* (Sato Hiroko trans., 2000).

59. Charles D. Cowger, *Dilemmas of Peace and Justice*, in *PEACE AND DEVELOPMENT: AN INTERDISCIPLINARY PERSPECTIVE* 79-88 (Daniel S. Sanders & Jon K. Matsuoka eds., 1989).

60. UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 1994* 24 (1994).

adopting a seven-fold categorization where the prerequisites for human security were listed as economic security, food security, health security, environmental security, personal security, community security, and political security.<sup>61</sup> Economic security requires an assured basic income usually from productive and remunerative work or, for people at risk, from a publicly financed safety net.<sup>62</sup> Real wages in many parts of the world have declined.<sup>63</sup> When the UNDP laid the groundwork for measuring human security in 1994, it estimated that in Latin America, wages had fallen by twenty percent, and in African countries, the value of the minimum wage had dropped by twenty percent in Togo, forty percent in Kenya and eighty percent in Sierra Leone.<sup>64</sup>

Food insecurity is a result of both physical and economic non-availability of provisions.<sup>65</sup> Remedying the situation requires not just enough food to go around, but that people have ready access to the basic food to which they are entitled, either by growing it themselves or by taking advantage of a public food distribution system.

Health insecurity is a result of inadequate or non-existent health services. In developing countries the major causes of death are infectious and parasitic diseases, which kill millions of people annually.<sup>66</sup> The latest plague in a series of preventable diseases is acquired immunodeficiency syndrome (AIDS), with Africa having the highest population affected by the disease.<sup>67</sup> A 1998 joint report by U.N. Programme on HIV/AIDS (UNAIDS) and World Health Organization (WHO) pointed out that Africa suffered 5,500 deaths per day from HIV/AIDS and no less than twelve million Africans had so far died of AIDS-related diseases.<sup>68</sup> Among the most vulnerable are the young, those who should guarantee the future of the continent. Adolescents and the young in general are a high at-risk group in this regard.<sup>69</sup> Sub-Saharan Africa has more than 10 percent of the global population, but accounts for seventy percent of all people living with HIV – some twenty-five million. In 2003 alone, an estimated three million people became newly infected, while 2.2 million people died of AIDS – seventy-six percent of

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61. Josefa S. Edralin, *Editorial Introduction: Total Human Security Awareness*, 24 REGIONAL DEV. DIALOGUE 3, 3-21 (2003).

62. CARL WELLMAN, WELFARE RIGHTS 114-48 (1982); AMARTYA SEN ET AL., THE STANDARD OF LIVING (Geoffrey Hawthorn ed., 1987); Edwin Kaseke, *Informal Social Security in Eastern and Southern Africa*, 9 REGIONAL DEVELOPMENT STUDIES 1, 1-10 (2003); See also Priyatosh Maitra, *The Globalization of Capitalism and Economic Transition in China*, 18 REGIONAL DEV. DIALOGUE 52, 52-69 (1997).

63. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 60, at 26.

64. *Id.* at 26.

65. See Edwin Kaseke, *Local Development in Zimbabwe*, in SOCIAL DEVELOPMENT ISSUES IN AFRICA 61-76 (Aklilu Kidanu & Asfaw Kumsaa eds., 2001).

66. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 60, at 27.

67. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, REPORT ON THE GLOBAL HIV/AIDS EPIDEMIC 6 (UNAIDS 2000).

68. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, REPORT ON THE GLOBAL HIV/AIDS EPIDEMIC (UNAIDS 1998).

69. *Id.* at 10.

global deaths.<sup>70</sup> In 2001, around 800,000 infants contracted HIV, ninety percent of them through mother-to-child transmission, according to U.N. Children's Fund (UNICEF) statistics.<sup>71</sup> Death from disease is clearly linked also to poor nutrition as well as to an unsafe and polluted environment where there is a lack of safe drinking water, poor sanitation, and chemical pollution.<sup>72</sup>

The environmental threats facing countries are a combination of the degradation of both local ecosystems and the global system. In developing countries, one of the greatest environmental threats is that of water scarcity.<sup>73</sup> Water scarcity is increasingly a factor in ethnic strife and political tension.<sup>74</sup> Air pollution too, in industrial and developing countries alike, is a major environmental threat.<sup>75</sup>

Community insecurity is affected by inter-group conflict and threats to family integration. Most people derive security from their membership in a unit such as a family, a community, an organization, a racial or ethnic group, all of which offer a cultural identity and group cohesiveness.<sup>76</sup> Some of these traditional group and community supports are breaking down under the steady process of modernization.<sup>77</sup>

### REDEFINING SECURITY

Over the past few years, the United Nations has been developing and refining the notion of human security.<sup>78</sup> Human security must include considerations of human development, which refers not simply to the income aspects of poverty but to poverty as a denial of choices and opportunities for living a tolerable life.<sup>79</sup> One-quarter of the global population lives in severe poverty, with some countries suffering much more than others.<sup>80</sup> The majority of poor people are still located in

70. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, AIDS EPIDEMIC IN SUB-SAHARAN AFRICA: FACT SHEET (UNAIDS 2004).

71. UNITED NATIONS CHILDREN'S FUND, MOTHER-TO-CHILD TRANSMISSION OF HIV: FACT SHEET (2002).

72. UNITED NATIONS DEVELOPMENT PROGRAMME, *supra* note 60, at 27.

73. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SUSTAINABLE DEVELOPMENT STRATEGIES: A RESOURCE BOOK 10 (2002).

74. See Baku Takahashi, *Dammed Rivers and Damned Lives*, 24:2 REGIONAL DEV. DIALOGUE 89 (2003).

75. Clem A. Tisdell, *Protecting the Environment in Transitional Situations*, in THE COST OF REFORM: THE SOCIAL ASPECTS OF TRANSITIONAL ECONOMIES 35 (John F. Jones & Asfaw Kumssa eds., 2000).

76. See Amitai Etzioni, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 120-25 (1993).

77. See Margot Breton, *Neighborhood Resiliency*, 9 J. OF COMMUNITY PRAC. 21, 21-36 (2001).

78. Ramesh Thakur, *Peace Research*, 15 UNITED NATIONS U. WORK IN PROGRESS 2, 3-4 (1999); UNITED NATIONS UNIV., ADVANCING KNOWLEDGE FOR HUMAN SECURITY AND DEVELOPMENT: THE UNU STRATEGIC PLAN 2002 15 (2002).

79. See Kwaku Osei-Hwedie & Bertha Z. Osei-Hwedie, *Structural Adjustment and Social Service Provision: Lessons from Four African Countries*, in THE COST OF REFORM: THE SOCIAL ASPECTS OF TRANSITIONAL ECONOMIES 35 (John F. Jones & Asfaw Kumssa eds., 2000).

80. See Robert Prescott-Allen, THE WELL-BEING OF NATIONS: A COUNTRY-BY-COUNTRY INDEX OF QUALITY OF LIFE AND THE ENVIRONMENT 25-35 (2001).

the developing or global South countries, though the countries of Central and Eastern Europe also experienced severe deterioration in the early and mid-1980s.<sup>81</sup> Human development and the perpetuation of poverty are heavily impacted by the modern trend toward globalization. Thus, the process of globalization has a direct impact on human security.

Despite overall economic growth worldwide, it can be argued that "the great unanswered question is whether the winds of globalization will be viewed as a great opportunity or a great threat, as a "fresh breeze or a violent hurricane."<sup>82</sup> Globalization in general has resulted in polarization between rich and poor throughout the world. Despite the enormous wealth of nations, 2.5-3 billion people are now living on less than two dollars per day.<sup>83</sup> While human security for some is being enhanced, for many it is being eroded. Two-thirds of the global population appear to have gained little or nothing to date from the economic growth that occurred as a result of globalization.<sup>84</sup> In the 1990s, income inequalities increased very sharply as shown in the UNDP human development report for 1997 which indicated that the world's poorest people, estimated at twenty percent of the global population, received 1.1 percent of global income, compared with 1.4 percent in 1991, and 2.3 percent in 1960.<sup>85</sup>

Globalization and capitalism have had detrimental effects on women's economic and human security throughout most developing countries. Women continue to be disadvantaged relative to men by what can only be described as global discrimination in the division of labor.<sup>86</sup> Though women disproportionately perform unremunerated subsistence or household tasks and low-paid work, which are effectively subsidizing global capitalism, their security and well being are being threatened by the harsh economic system.<sup>87</sup>

There are considerable links and overlaps among the various threats to human security, and a weakness in one category inevitably affects all the other forms of human security. Famines, ethnic conflicts, social disintegration, terrorism, pollution, and drug trafficking can no longer be confined within national borders and no nation can isolate its life from the rest of humanity.

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81. John F. Jones & Asfaw Kumssa, *Economic Reforms and the Social Dimensions of Transition to a Market Economy*, 24 UNCRD PROCEEDINGS SERIES 39, 44-45 (Carolyn L. Gates & Asfaw Kumssa, eds., 1997).

82. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1997 9-10 (1997).

83. THE WORLD BANK, WORLD DEVELOPMENT REPORT 2003: SUSTAINABLE DEVELOPMENT IN A DYNAMIC WORLD I (2002).

84. See Stuart L. Hart, *Beyond Greening: Strategies for a Sustainable World*, 75 HARV. BUS. REV. 66, 68 (1997).

85. UNITED NATIONS DEV. PROGRAMME, *supra* note 82, at 9.

86. Lawrence Haddad et al., *The Gender Dimensions of Economic Adjustment Policies: Potential Interactions and Evidence to Date*, 23 WORLD DEVELOPMENT 881, 893 (1995).

87. Asfaw Kumssa & John F. Jones, *The Social Consequences of Reform in Transitional Economies*, 26 INT'L J. OF SOC. ECON. 194, 205 (1999).



# THE ROLE OF THE MEDIA, LAW, AND NATIONAL RESOLVE IN THE WAR ON TERROR

ROBERT HARDAWAY\*

## I. INTRODUCTION

In the aftermath of the terrorist attacks of September 11, 2001, the government of the United States took unprecedented steps to protect American lives and property.<sup>1</sup> Measures imposed included tightened security at nuclear power plants,<sup>2</sup> airports,<sup>3</sup> and numerous other government and private installations around the United States.<sup>4</sup>

Debate over an appropriate U.S. response centered on whether there was proof of a foreign state's complicity in the attacks. On September 15, 2001, a *New York Times/CBS News* poll revealed that eighty-five percent of Americans would

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1. See, e.g., Michael R. Gordon, *After the Attacks: An Assessment; U.S. Force vs. Terrorists: From Reactive to Active*, N.Y. TIMES, Sept. 14, 2001, at A16. ("The analogy between this week's terrorist attacks and Pearl Harbor is apt in one sense. The attacks have shaken the American public and the Pentagon leadership. Strategies and tactics that seemed unthinkable just weeks ago are thinkable now.").

2. See AAP Information Services, *Bush Administration Orders Tighter Nuclear Plant Security*, Feb. 15, 2002, available at 2002 WL 5749902 (declaring that the Bush administration "ordered all 103 U.S. nuclear power plants to tighten anti-terrorism measures" as evidence of "the Federal Aviation administration banning flights within 19 km of most U.S. nuclear plants."). See also Raymond McCaffrey & Monte Reel, *Terror Attacks' Fallout Reaches Southern Md.: Security Alerts, Road Snarls, Grief Grip Counties*, WASH. POST, Sept. 13, 2001, at T1 (stating that security increased drastically at the Calvert Cliffs Nuclear Power Plant in Lusby, Maryland as a result of the terrorist attacks). See also Mark Barabak & Beth Shuster, *America Attacked*, L.A. TIMES, Sept. 12, 2001, at A29 ("As the first reports of terror arrived from the East early Tuesday, the California Highway Patrol scrambled its aircraft to secure the skies above the state Capital, the California Aqueduct, and state's electricity grid, nuclear power plants, and other critical locations.").

3. See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (allowing the federal government to have control of the security of airports) ("The Under Secretary shall (1) be responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935; (2) develop standards for the hiring and retention of security screening personnel; (3) train and test security screening personnel; and (4) be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate Federal agencies and departments.") *Id.* § 101(e).

4. Press release, Office of the Press Secretary, White House, *Strengthening Homeland Security Since 9/11* (Apr. 11, 2002), available at [http://www.whitehouse.gov/homeland/six\\_month\\_update.html](http://www.whitehouse.gov/homeland/six_month_update.html). (discussing measures to increase safety in response to the September 11, 2001, including the establishment of terrorism task forces, increased border patrols and INS regulations, increased screening at airports and employee background checks, increased funding to eliminate viruses and possible chemical weapon attacks, increased security at major dams, reservoirs, and nuclear power plants, and the institution of more civic groups to aid with community protection).

support military action against whoever was responsible for the attacks, while only six percent would oppose any military retaliation.<sup>5</sup> To a large degree, therefore, the debate over U.S. policy in Iraq may be reduced to the simple question of whether Iraq was in fact involved in the 9/11 attacks.

While official investigations were immediately begun, it was not until May 7, 2003, that a federal court, considering all the evidence and applying the strict Federal Rules of Evidence (F.R.E.), made specific findings that Iraq, Saddam Hussein, and al Qaeda were jointly responsible for the 9/11 attacks.<sup>6</sup> In *Smith v. Islamic Emirate of Afghanistan*,<sup>7</sup> families of 9/11 victims brought a tort case against Hussein and the Republic of Iraq pursuant to the Antiterrorism Act of 1991, which specifically provides that victims of terrorism may sue for damages in an appropriate federal district court.<sup>8</sup>

Since neither Iraq nor Hussein appeared in court to defend the allegations and thus, failed to provide discovery materials required, the plaintiffs argued that a lower standard of evidentiary proof should be imposed in establishing Iraq's complicity in 9/11.<sup>9</sup> However, the Court rejected this argument, citing 28 U.S.C. 1608(e), which states that no judgment by default may be entered against a foreign state unless the "claimant establishes his claim or right to relief by evidence satisfactory to the court."<sup>10</sup>

In other words, the court insisted that, even though neither Iraq nor Hussein appeared, the plaintiffs would nevertheless have to submit evidence sufficient to meet the higher burden of proof required by the statute despite having been disadvantaged by lack of access to discovery.<sup>11</sup> Even more disadvantageous to the plaintiffs, the court ruled that strict rules of evidence, including the very technical hearsay rules imposed by the F.R.E, would have to be strictly complied with in presenting the plaintiff's case.<sup>12</sup>

At the evidentiary hearing, Robert Woolsey, CIA Director under President Clinton, testified that according to information available, "*I believe it definitely more likely than not that some degree of common effort in the sense of aiding and abetting or conspiracy was involved here between Iraq and al Qaeda.*"<sup>13</sup>

5. CBS News.com, *Poll: Revenge and Return* (Sept. 15, 2001), available at <http://cbsnews.com/stories/2001/09/15/opinion/main311417.shtml>.

6. *Smith v. The Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

7. *Id.*

8. Anti-Terrorism Act of 1991 § 2333, 18 U.S.C. § 2333 (2005).

9. *Smith*, 262 F. Supp. 2d at 222-23.

10. *Id.* at 222-24 (emphasis added); see also 28 U.S.C. § 1608(e) (2004) ("No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.")

11. *Smith*, 262 F. Supp. 2d at 224-25.

12. *Id.* at 223.

13. *Id.* at 232 (emphasis added); see also generally, Interview by PBS Frontline with R. James Woolsey, attorney and former Director of the CIA, (Oct. 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/woolsey.html>.

Expert on Iraq and a former Clinton advisor, Dr. Laurie Mylroie of Harvard, after examining the evidence concluded that, "Iraq . . . provide[d] support and resources for the September 11 attacks . . . al Qaeda acts as a front for Iraqi intelligence. Al Qaeda provides the ideology, the foot soldiers, and the cover . . . [a]nd Iraq provides the direction, the training, and the expertise."<sup>14</sup>

In a previous study, Dr. Mylroie noted that Iraq had made little effort to hide its intent to attack the United States;<sup>15</sup> she cited the following threats published by Iraq in its official news organ prior to the events of 9/11:

1. Does the United States realize the meaning of every Iraqi becoming a missile that can cross countries and cities.<sup>16</sup>

2. The crime of annihilating the Iraqis will trigger crises whose nature and consequences are known only to God.<sup>17</sup>

3. When one realizes that death is one's inexorable fate, there remains nothing to deter one from taking the most risky steps to influence the course of events.<sup>18</sup>

4. When peoples reach the verge of collective death, they will be able to spread death to all.<sup>19</sup>

Similar direct threats of violence against the United States were published by Iraq on an almost daily basis.<sup>20</sup>

However, the court declared certain items of otherwise persuasive evidence of Iraqi complicity in the 9/11 inadmissible on narrow technical grounds under the F.R.E.<sup>21</sup> Thus, the court did not consider a compendium of evidence presented, including a litany of contacts between al Qaeda and Iraqi intelligence, as well as the testimony of defectors concerning Hussein's training camp for al Qaeda terrorists at Salman Pak in Iraq (which included among other props, a full-scale mock up of an airliner with no runway nearby).<sup>22</sup> Other evidence presented, but excluded

14. *Smith*, 262 F. Supp. 2d at 229.

15. Laurie Mylroie, *The World Trade Center Bomb: Who is Ramzi Yousef? And Why it Matters*, NAT'L INT., Winter 1995/1996, at 12-14.

16. *Id.* at 12, (quoting *Babil*, the official Iraqi newspaper, Sept. 29, 1994).

17. *Id.* at 13 (citing *al-Jumhuriyah*, an Iraqi daily newspaper Oct. 8 1994).

18. *Id.* (quoting *al-Jumhuriyah*, Oct. 5, 1994).

19. *Id.* at 12 (quoting *al-Jumhuriyah*, Oct. 4 1994).

20. *Id.*

21. *Smith*, 262 F. Supp. 2d, at 224-25.

22. For a review of the evidence presented, see *id.* at 228-32.

Dr. Laurie Mylroie, an expert on Iraq and its involvement . . . in the bombing of the World Trade Center in 1993 . . . described Iraq's covert involvement in acts of terrorism against the United States in the past, including the bombing of the World Trade Center in 1993. Dr. Mylroie testified to at least four events that served as the basis for her conclusion that Iraq played a role in the September 11 tragedy . . . . Specifically, Abdul Rashman Yasin returned to Baghdad after the bombing and Iraq has provided him safe haven ever since. Also, Ramsey Yusef arrived in the United States on an Iraqi passport in his own name but left on false documentation—a passport of a Pakistani who was living in Kuwait and whom the Kuwaiti government kept on file on at the time that Iraq invaded Kuwait. Second, she noted bin Laden's *fatwah* against the U.S., which was motivated by the presence of U.S. forces in Saudi Arabia to fight the Gulf War against Iraq. Third, she noted that

by the court, included an assertion in an official Iraqi newspaper in July 2001, just two months before the 9/11 attacks, that "bin Laden will try to bomb the Pentagon after he destroys the White House."<sup>23</sup> It is widely believed that the intended target of the hijacked airliner which crashed in Pennsylvania was the White House.<sup>24</sup>

Even after throwing out this mass of evidence, the court concluded on the basis of the remaining evidence, and pursuant to the legal standard of "evidence satisfactory to the court," that "Iraq provided material support to bin Laden and al Qaeda."<sup>25</sup> A judgment in the amount of sixty million dollars was entered against Hussein and Iraq for its involvement in the 9/11 attacks.<sup>26</sup>

One interesting question is why there has been so little media coverage of this very important federal case. One possible, though perhaps unduly cynical, explanation is that those who seek peace at any price are not eager for the public to become aware of a specific U.S. federal court finding that Iraq was involved in 9/11 for fear that it might strengthen national resolve to support U.S. policy in Iraq and to enforce U.N. resolutions.

Although President Bush's reticence to rely on court precedent and evidence of Iraq's complicity has been severely criticized,<sup>27</sup> it is perhaps understandable in light of virulent anti-war skepticism, such as in France where a best-selling book asserts that no airliner ever attacked the Pentagon and that Bush and the Jews masterminded 9/11.<sup>28</sup> No amount of evidence is ever likely to convince those who op-

threats by bin Laden in late 1997 and early 1998 which led up to the bombing of the U.S. embassies (on August 7, 1998) were "in lockstep" with Hussein's threats about ousting the U.N. weapons inspectors . . . *Id.* at 228-29.

23. *Id.* at 231.

24. *Id.* at 231 n.23.

25. *Id.* at 232; see also Richard Willing, *Lawsuit Ruling Finds Iraq Partly Responsible for 9/11*, USA TODAY, May 7, 2003, available at [http://www.usatoday.com/news/nation/2003-05-07-911-judge-awards\\_x.htm](http://www.usatoday.com/news/nation/2003-05-07-911-judge-awards_x.htm); Douglas Jehl, *More Proof of Iraq-Qaeda Link, or Not?*, N.Y. TIMES, Nov. 20, 2003, at A18. An Oct. 27, 2003 memorandum from Pentagon official Douglas J. Feith outlined "50 points of raw intelligence" between Iraq and Al Qaeda. The memo supports Bush administration officials' arguments that former ties between Al Qaeda and Iraq were the primary justification for the invasion of Iraq, as a direct response to the 9/11 attacks. Among other intelligence, the leaked memo included a report stating that "the Sept. 11 hijacker Muhammed Atta met several times in Prague with a former Iraqi intelligence chief, who in 2000 is said to have requested a transfer of funds to Mr. Atta." The memo added that the CIA had not confirmed the meetings. Although C.I.A. spokespersons declined to comment on the memo, they stated that the letter delivered to the Senate Intelligence Committee from former CIA director George Tenet remained the best measurement of the government's knowledge of the links between Al Qaeda and Iraq. The October 2002 letter from Tenet stated that "there was 'credible reporting' that Al Qaeda leaders sought contacts in Iraq that could help them acquire the capability to use weapons of mass destruction, and that 'Iraq has provided training to Al Qaeda members in the areas of poisons and gases and making conventional bombs.'"

26. See *Smith*, 262 F. Supp. 2d at 233, 240-41. For an explanation of the exception to the general rule that foreign states are immune from U.S. jurisdictions see generally, Kristine Cordier Kamezis, Annotation, *Award of Damages Under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act* (28 U.S.C.A. § 1605(A)), 182 A.L.R. FED. 1 (2002).

27. See, e.g., Deroy Murdock, *Saddam's Terror Ties*, NAT'L REV. ONLINE, Oct. 21, 2003, at <http://www.nationalreview.com/murdock/murdock200310210934.asp>.

28. See THIERRY MEYSSAN, 9/11: THE BIG LIE (2003).

pose the war on terror, especially when vested business interests may be at stake.

On October 26, 2001, Congress overwhelmingly passed, and the President signed, an act entitled, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (sometimes misleadingly referred to as "The Patriot Act").<sup>29</sup> In addition to condemning discrimination against Arab and Muslim Americans,<sup>30</sup> providing for victims of terrorism,<sup>31</sup> and providing for the sharing of information between government agencies (i.e., establishing an infrastructure for "connecting the dots"),<sup>32</sup> this Act extended current constitutionally tested procedures for investigating organized crime to investigations of terrorist activity.<sup>33</sup>

In 2002, the U.S. Congress overwhelmingly authorized the use of military force against Iraq,<sup>34</sup> and on November 8, 2002, a unanimous U.N. Security Council adopted Resolution 1441,<sup>35</sup> which found that Iraq had not "provided an accurate, full, final, and complete disclosure, as required by Resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction,"<sup>36</sup> and held further that Iraq "has been and remains in material breach of its obligations under relevant resolutions."<sup>37</sup> Finally, a unanimous Security Council authorized "serious

29. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, H.R. 3162 RDS 107th Cong. (1st Sess. 2001). The acronym of this act, which if spelled out to delete certain words, spells USAPATRIOT, is misleading in the sense that it conveys the impression to those unfamiliar with the act that the act has something to do with patriotism per se.

30. *Id.* § 102. Section 102(a)(2) states: "The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom."

31. *Id.* §§ 611-14, 621-24. Section 611(a) in general provides for expedited payment to beneficiaries of public safety officers killed or permanently disabled as a result of a personal injury sustained in the line of duty "in connection with prevention, investigation, rescue, or recovery efforts related to a terrorist attack." The Act also sets up various victim's and emergency funds, for example, § 621 Crime Victims Fund, 621(d) Antiterrorism Emergency Reserve, 621(e) Victims of Sept. 11, 2001, § 622 Crime Victim Compensation, § 623 Crime Victim Assistance, § 624 Victims of Terrorism.

32. *Id.* § 203. In relation to law enforcement, section 203(b)(1) states: "Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence . . . to assist the official who is to receive that information in the performance of his official duties."

33. *Id.* §§ 201-02, 204-25. The constitutionally protected procedures referred to include the interception of terrorist communications through the use of wire taps, audio and video surveillance, physical searches, and the use of foreign intelligence.

34. H.J. Res. 114, 107th Cong., 2nd Sess. (2002). The House of Representatives on Oct. 10 passed the resolution by a vote of 296-133. Senate approval came in a late-night vote of 77-23.

35. S.C. Res. 1441, U.N. SCOR, 45th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002) [hereinafter S.C. Res. 1441].

36. *Id.* at 1; S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg. at 11, U.N. Doc. S/RES/687 (1991); see also *Information on biological weapons programme reported hidden. (Iraq)*, U.N. CHRON. (Dec. 1, 1995), 1995 WL12598335.

37. S.C. Res 1441, *supra* note 35, at 3; see also Russell Taylor, 'Seize This Opportunity' Iraq Indicated it Will Comply, UN CHRON. (Dec. 1, 2002) 2002 WL 21468499.

consequences as a result of its continued violations of its obligations."<sup>38</sup>

In light of later claims by some journalists and pundits that the U.S. Congress and the President went to war in Iraq based on faulty intelligence that Iraq had weapons of mass destruction,<sup>39</sup> it is useful to note that a unanimous Security Council, including Syria, France, Germany, Russia, and China made a specific finding that Iraq was *already* in possession of weapons of mass destruction (having been found in previous U.N. inspections).<sup>40</sup> Thus, the imposition of "serious consequences" by Syria et al., against Iraq was authorized not on the basis of a possible discovery of weapons at some future time, but rather on the basis that Iraq had not *accounted* for weapons *previously discovered* by U.N. inspectors. In any case, U.N. inspector David Kay has since reported his discovery in Iraq of "dozens of WMD-related program activities . . . stains of organisms . . . used to produce biological agents . . . a clandestine network of laboratories . . . that contained (chemical-biological weapons) research . . . and unmanned aerial vehicles . . . in violation of UN resolutions."<sup>41</sup>

After the unanimous adoption of Resolution 1441, the only question remaining was the import of the words "serious consequences." Not surprisingly, an overwhelming majority of European leaders, including those in Italy, Spain, Great Britain, and a virtually unanimous block of Eastern European countries, interpreted this phrase as including military action,<sup>42</sup> and supported the U.S. effort to enforce U.N. Resolution 1441 by the use of military force. In the end, the only significant European holdouts in supporting the U.S. effort to enforce Resolution 1441 were France, Germany, and Belgium.<sup>43</sup>

Indeed, in light of the fact that severe economic sanctions had already been imposed on Iraq for a number of years, it is difficult to imagine any reasonable interpretation of the U.N. mandate to impose "serious consequences," other than actual enforcement by armed force.

The U.N. mandate authorizing serious consequences was reinforced by a previous U.N. Resolution, which had acknowledged that the 9/11 terrorist attacks on the World Trade Center were a "threat to international peace and security," and specifically "recognize(d)" the right of self-defense and a "readiness to take all necessary steps to respond to the terrorist attacks."<sup>44</sup> This latter recognition by the Security Council was important in applying Article 51 of the U.N. Charter, which

38. S.C. Res 1441, *supra* note 35, at 5; Taylor, *supra* note 37.

39. See Robert Dreyfuss, *More Missing Intelligence*, THE NATION, June 19, 2003, available at <http://www.thenation.com/doc.mhtml?i=20030707&s=dreyfuss>.

40. See S.C. Res. 1441, *supra* note 35.

41. Colin Powell, *Powell Says Kay Report Confirms Iraq Defied UN Resolution 1441*, (Oct. 7, 2003), at <http://usinfo.state.gov/mena/Archive/2004/Feb/11-286155.html> (quoting the report of David Kay, a U.N. weapons inspector in Iraq).

42. See Harvey Sicherman, *Why France Gave the U.S. the Boot*, Hist. News Network, (Mar. 24, 2003), at <http://www.hnn.us/articles/1347.html>.

43. Edward I. Koch, *History is Now Repeating Itself – Why Don't the American Bashers Gasp It?*, JEWISH WORLD REV., (Feb. 12, 2003), at <http://www.jewishworldreview.com/0203/koch021203.asp>.

44. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4386th mtg., U.N. Doc. S/RES/1368 (2001).

specifically states, "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>45</sup>

In light of the fact that the terrorist attacks on the World Trade Center and Pentagon were equal to or greater in scope than the attack on Pearl Harbor by the Japanese in 1941,<sup>46</sup> it is not surprising that the Security Council recognized the terrorist attacks as armed attacks, thus justifying the use of unilateral action by the United States even without prior U.N. authorization. However, the latter point has proved superfluous, as "serious consequences" against Iraq were indeed specifically authorized by a unanimous Security Council in Resolution 1441.<sup>47</sup>

Despite the unanimous U.N. Security Council authorization of the imposition of serious consequences on Iraq, the once overwhelming support of the American people,<sup>48</sup> and the U.S. Congress' authorization of the use of force against Iraq, the effort by a coalition of forty-six nations<sup>49</sup> to enforce U.N. Resolution 1441 has been undermined by political and media opposition—not only by some Islamic countries, Germany, and France, but also by some Americans.<sup>50</sup>

The tone for this opposition has been set by the "fringe" or alternative press. Examples of the latter include the much publicized statements by a Columbia University professor who told students at an anti-war "teach-in" that he hoped America would suffer "a million" deaths in the form of "a million Mogadishus."<sup>51</sup> Others have suggested that President Bush and the Jews knew about the attacks before they happened.<sup>52</sup>

45. U.N. CHARTER, art. 51.

46. See generally Mike Bursleson, *September 11 & Pearl Harbor*, Buzzle.com, (Dec. 5, 2002), at <http://www.buzzle.com/editorials/12-4-2002-31581.asp>.

47. S.C. Res. 1441, *supra* note 35, at 5.

48. See, e.g., Doyle McManus, *Public Still Backs Military Move on Iraq*, L.A. TIMES, Sep. 2, 2002 ("The poll found that 59% of Americans believe the U.S. should take military action to remove Hussein from power; 29% were opposed; and 12% were unsure.").

49. The following forty-six nations publicly committed themselves to the coalition effort in Iraq: Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, United Kingdom, United States, Uzbekistan. The White House, *Operation Iraqi Freedom: Coalition Members*, (Mar. 21, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html>.

50. *Arab Opposition to War Against Iraq Escalated*, Arabic News.com, (Feb. 11, 2003), at <http://www.arabicnews.com/ansub/Daily/Day/030211/2003021101.html>. See e.g., Veterans Against the Iraq War, at <http://www.vaiv.org/vet/index.php>.

51. Jonah Goldberg, *Columbia Prof's Comments Anti-American*, (Apr. 2, 2003), available at <http://www.freerepublic.com/focus/f-news/882520/posts>. Professor Nicholas De Genova was quoted as stating that he wished America would suffer "a million Mogadishus", in apparent reference to the "Black Hawk Down" incident in which 18 Americans were killed. A "million" Mogadishu's would therefore actually translate into 18 million American deaths.

52. See generally John King, *Bush Briefed on hijacking threat before September 11*, CNN.com, May 16, 2002, at <http://www.cnn.com/2002/US/05/15/bush.sept.11/>; David Duke, *How Israeli Terror-*

Although pundits such as Paul Krugman of the *New York Times* (*Times*) have not been quite so candid,<sup>53</sup> any misfortune which befalls American troops in Iraq is used as ammunition with which to undermine the allied effort in Iraq, creating a kind of symbiotic, though surely unintended, relationship between anti-war politicians in the United States and Iraqi terrorists. The terrorists kill innocent people in Iraq, thereby giving U.S. politicians grounds for asserting that the war is a quagmire, and therefore Bush should be removed from office; in return, the terrorists are rewarded with support in the form of demands by U.S. politicians to withdraw and leave Iraq to the tender mercies of al Qaeda.

Indeed, political opposition has continued even after a unanimous U.N. Resolution was passed in mid-2004 affirming the U.S. policy and timetable for handing over political power to a freely elected Iraqi government.<sup>54</sup>

It is now apparent that the media will play a large role in both defining and influencing the national will in the war on terror, and more specifically the effort to transfer full sovereignty to the people of Iraq. Considerations of international law, as well as domestic constitutional law will also have a significant impact on the conduct of this war.

Part II will examine the role of the media in influencing this first major war of the twenty-first century. Part III will review current considerations of international and domestic constitutional law, and Part IV will consider the effect of national will and resolve. Part V concludes that: 1) the coalition effort to enforce U.N. Resolution 1441 has been in accordance with international law; 2) domestic anti-terrorism laws and policies comply with U.S. Supreme Court precedent; and 3) the thrust of current media coverage is undermining both the war against terror and the coalition effort to stabilize Iraq and transfer full sovereignty.

## II. MEDIA COVERAGE OF THE WAR AGAINST TERROR

Unlike dictatorships in which one leader can make the decision to go to war, democracies require the broad support of the citizenry. The media, represented by

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*ism and American Treason Caused the September 11 Attacks*, David Duke Online, Sept. 11, 2002, at <http://www.duke.org/writings/howisraelcaused911.pdf>.

53. Paul Krugman, *Who Lost Iraq?*, N.Y. TIMES, June 29, 2004, at 27. Krugman writes:

The Iraq venture may have been doomed from the start—but we'll never know for sure because the Bush administration made such a mess of the occupation. Future historians will view it as a case study of how not to run a country. Up to a point, the numbers in the Brookings Institution's invaluable Iraq Index tell the tale. Figures on the electricity supply and oil production show a pattern of fitful recovery and frequent reversals; figures on insurgent attacks and civilian casualties show a security situation that got progressively worse, not better; public opinion polls show an occupation that squandered the initial good will. What the figures don't describe is the toxic mix of ideological obsession and cronyism that lie behind that dismal performance.

*Id.* See also Paul Krugman, *What About Iraq?*, N.Y. TIMES, Aug. 6, 2004, at A19. Again Krugman: One thing is clear: calls to 'stay the course' are fatuous. The course we're on leads downhill. American soldiers keep winning battles, but we're losing the war: our military is under severe strain; we're creating more terrorists than we're killing; our reputation, including our moral authority, is damaged each month this goes on.

54. S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).



films, television, newspapers, magazines, and in recent years the internet, plays a pivotal role in shaping that opinion.

For this reason, it has been rare in human history that a true democracy initiates aggressive war. Thus, it is a Hitler's Germany that attacks Poland, or an Italy's Mussolini that attacks Ethiopia. It is rarer still for a democratic nation to engage in successful war without the overwhelming support of the electorate.

In World War II, public support for the allied war effort was nurtured and promoted by the western media in films, newspapers, and magazines.<sup>55</sup> It has now become fashionable in journalistic circles to denigrate the uncritical coverage of World War II by the Western media as "cheerleading" and war-mongering; it is suggested that the Western media should have been more neutral in its coverage, giving the pro-Nazi view alongside the anti-Nazi view.<sup>56</sup>

Balance in journalism goes far beyond simply reporting facts accurately. Emphasis, punctuation, and selection of visual images often speak louder and more effectively in shaping opinions than editorial expressions.

Even aside from assertions coming from the "fringe" and alternative press, most Americans can recognize propaganda in its crudest form (just as they took the rants of "Baghdad Bob" with a generous dose of salt.<sup>57</sup> Far more insidious, however, are the more disguised forms of propaganda camouflaged as news.

For example, in the aftermath of the *Times* scandal in which reporter Jayson Blair's fabrications corrupted literally hundreds of "mainstream" media stories,<sup>58</sup> there has been a closer examination of the abusive methods and practices that the *Times* has employed to present opinion in the guise of news—methods which include omission, distortion, emphasis, and outright falsification.<sup>59</sup> When the *Times* deliberately distorted the views of former Secretary of State Henry Kissinger as the basis for publishing a headline that "Republicans Break With Bush on Iraq,"<sup>60</sup> the *Washington Post* published an article by Pulitzer Prize-winning columnist Charles Krauthammer decrying the *Times'* unscrupulous journalistic tactics:

Not since William Randolph Hearst famously cabled his correspondent in Cuba, "You furnish the pictures, and I'll furnish the war," has a newspaper so blatantly

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55. JORDAN BRAVERMAN, *TO HASTEN THE HOMECOMING: HOW AMERICANS FOUGHT WORLD WAR II THROUGH THE MEDIA* (1995).

56. Noam Chomsky, *What Makes Mainstream Media Mainstream*, ZMAGAZINE, June 1997, available at <http://www.zmag.org/chomsky/articles/z9710-mainstream-media.html>.

57. Center for Individual Freedom, *The Collected Quotations of "Baghdad Bob," Mohammed Saeed al-Sahaf: The Iraqi Minister of Disinformation*, at [http://www.cif.org/htdocs/freedomline/current/in\\_our\\_opinion/baghdad\\_bob.htm](http://www.cif.org/htdocs/freedomline/current/in_our_opinion/baghdad_bob.htm).

58. See BOB KOHN, *JOURNALISTIC FRAUD: HOW THE NEW YORK TIMES DISTORTS THE NEWS AND WHY IT CAN NO LONGER BE TRUSTED* 2-3, (2003).

59. *Id.*; see also Bob Kohn, *Bad Times: The Decline and Fall of the New York Times*, THE WKLY STANDARD May 24, 2004, at Books & Arts Section (reviewing Jayson Blair's book, *Burning Down My Masters' House My Life at the New York Times*); see e.g., Christopher Caldwell, *The New York Times's Meltdown: What explains it?*, THE WKLY. STANDARD, May 26, 2003.

60. Todd S. Purdum & Patrick E. Tyler, *Top Republicans Break with Bush on Iraq Strategy*, N. Y. TIMES, Aug. 16, 2002, at A1.

devoted its front pages to editorializing about a coming American war as has Howard Raines' New York Times. Hearst was for the Spanish American war. Raines (for those who have been incommunicado for the last year) opposes war with Iraq.<sup>61</sup>

Although an unabashed *Times* later printed a retraction (buried on a back page), and *Times* Editor Harold Raines responded to Krauthammer's with an *ad hominem* attack on Krauthammer,<sup>62</sup> it was apparent that both Raines and the *Times* had missed the point: it is well and fine to slant, editorialize, and even propagandize on the *editorial* page, but it is dishonest and unprincipled—akin to the use of subliminal messages—to disguise opinion as objective news.

A review of *Times* practices by prize-winning essayist and attorney, Bob Kohn, has revealed a litany of journalistic abuses;<sup>63</sup> a few examples are illustrative. Perhaps most notorious is the deliberate manipulation of polls—a tactic often used by totalitarian regimes.<sup>64</sup> In addition to laying the groundwork for a selected poll by running a series of editorials disguised as objective news stories and then selectively commissioning and timing polls on issues it has been advocating, the *Times* either declines to publish results it deems unsatisfactory or distorts the poll results in huge headlines.<sup>65</sup>

For example, when a *New York Times/CBS News* Poll revealed that 88 percent of Americans supported Bush's military action against Afghanistan, the *Times* "objective" analysis of the results was: "Survey Shows Doubts Stirring on Terror War."<sup>66</sup>

Satisfied that its own distortions and selective reporting must have had an adverse effect on public opinion, a confident *Times* commissioned a poll on public opinion about the war in Iraq. When the results revealed that 67 percent of the American people supported going to war against Iraq but that a smaller majority of Americans agreed that the President was spending his time "about right" on the war, the *Times* was faced with the problem of spinning these results in a negative way. It finally came up with the blaring headline: "Public Says Bush Needs to Pay More Heed to Economy, Less to Iraq."<sup>67</sup>

61. E.g., Charles Krauthammer, *Kidnapped by the Times*, WASH. POST, Aug. 18, 2002 at B7, available at <http://www.washingtonpost.com/wp-dyn/articles/A31321-2002Aug17.html>; accord Education for Peace in Iraq Center, *Understanding the New Debate on Iraq*, Aug. 19, 2004, at <http://www.epic-usa.org/Default.aspx?tabid=92>; Cynthia Cotts, *Howellin' Wolf: 'Times' Hounds Bush Over War Plan*, VILLAGE VOICE, Sept. 3, 2002, available at <http://www.villagevoice.com/issues/0235/cotts.php>.

62. See Rem Rieder, *Asking the Tough Questions*, AM. JOURNALISM REV., Oct. 2002, available at <http://www.ajr.org/Article.asp?id=2633> (disagreeing with Krauthammer).

63. See generally KOHN, *supra* note 61.

64. *Id.*

65. *Id.*

66. Richard L. Berke & Janet Elder, *Survey Shows Doubts Stirring On Terror War*, N. Y. TIMES, Oct. 30, 2001, at A1. The apparent basis for the blaring headline was the response to a secondary question about whether the government was telling "everything" it knew about the anthrax attacks; a majority of 3% said no.

67. Adam Nagourney & Janet Elder, *Public Says Bush Needs to Pay Heed to Weak Economy*, Oct.

The latter distortion was too much to stomach even for a former political advisor to President Clinton, who observed that, "[t]he phrasing of the questions is so slanted and biased that it amounts to journalistic 'push polling'—the use of 'objective' polling to generate a predetermined result, and so vindicate a specific point of view."<sup>68</sup>

When a *New York Times/CBS News* poll taken on March 21, 2003 revealed that 74 percent of Americans approved of military action against Iraq,<sup>69</sup> the *Times* analysis of the results was predictable: "there are deep-partisan divisions in the nation's view of the conflict."<sup>70</sup> *CBS News*, on the other hand, had no problem in reporting directly: "Poll: U.S. Backs Bush on War."<sup>71</sup> Indeed, it is difficult to imagine the *Times* publishing such a headline no matter what the poll results showed.

The war in Iraq has been fraught with difficulties and dangers to American soldiers. But one might think that on a celebrated day of success—the fall of Baghdad and the tumbling of Hussein's statue by elated Iraqis—the *Times* might have softened just once to set aside its negative spinning. However, on the same day that *USA Today* reported the fall of Baghdad with a headline reading, "Baghdad Falls; Jubilant Troops Swarm Around U.S. Troops,"<sup>72</sup> the *Times* could only mangle a grudging, "U.S. Forces Take Control In Baghdad; Bush Elated."<sup>73</sup> In other words, what was important in the *Times* story was not the jubilation of the Iraqi people, but the fact that a presumably gloating Bush was "elated."

Perhaps mindful of a 2001 *New York Times/CBS News* poll that only 6 percent of Americans would oppose military action against those responsible for the

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7, 2002, N. Y. TIMES, at A1.

68. KOHN, *supra* note 58, at 217 citing Dick Morris, *The Times Push Poll*, N. Y. POST, Oct. 8, 2002.

69. Dick Meyer, *Polls, Powell and the Iraq Campaign*, CBS NEWS, Feb. 7, 2003, available at <http://www.cbsnews.com/stories/2003/02/07/opinion/meyer/main539846.shtml>.

70. KOHN, *supra* note 58, at 245 citing Adam Nagourney & Janet Elder, *Support for Bush Surges at Home, But Split Remains*, N. Y. TIMES, March 22, 2003, at A1.

71. *Id.*; see also Meyer, *supra* note 69 ("On Thursday, CBS News and The New York Times re-interviewed a sample of respondents first interviewed two weeks ago . . . 74% now approve of the U.S. taking military action against Iraq . . .")

72. USA TODAY, April 10, 2003, at front page.

73. Anthony DePalma, *A Nation at War: An Overview: April 9, 2003: Joy in Baghdad, Arab Consternation and the Mystery of Saddam Hussein*, N. Y. TIMES, Apr. 10, 2003, at B1; see also Gallup Poll, ROCKY MOUNTAIN NEWS, Sept. 24, 2003, at A30; See also Nicholas Johnson, *Poll of Baghdad Residents Finds Optimism and Criticism*, THE PHILADELPHIA INQUIRER, Sept. 25, 2003, available at <http://www.philly.com/mld/inquirer/2003/09/25/news/nation/6853491.htm>. A 2003 Gallup poll revealed that "almost 2/3 of those polled in Baghdad said it was worth the hardships suffered since the U.S. led invasion ousted Saddam Hussein." In addition, 67% of 1,178 Iraqi's polled stated that "within five years, their lives would be better than before the American and British invasion." *American Enterprise* magazine with Zogby International completed a poll of 600 Iraqis in August 2003 which showed that 37% of Iraqis polled stated that the United States government was the government they would most like to see their new government modeled after. Saudi Arabia came in second with 28%. Further, 60% stated that they would not want to see the formation of an Islamic government. *Data Reveal Inaccuracies in Portrayal of Iraqis*, Zogby International, available at <http://www.zogby.com/soundbites/Readclips.dbm?ID=5974>.

9/11 attacks,<sup>74</sup> the mainstream media has assiduously avoided reporting any evidence that might link Iraq to the 9/11 attacks. For example, when on May 7, 2003, a federal court in Manhattan found evidence sufficient under the F.R.E. to establish that "Iraq provided material support to bin Laden and al-Qaeda,"<sup>75</sup> and ordered Hussein to pay \$104 million to the families of two 9/11 victims,<sup>76</sup> one might have thought this an item worthy of reporting to the American public. However, projecting its anti-war views in the face of a nation united by an 88 percent support for retaliation should Iraqi involvement be revealed, was obviously something neither the *Times* nor any other mainstream media was prepared to confront, and so the legal findings of Iraqi complicity in the 9/11 attacks were neatly buried.

Evidence buried by the media includes the following: 1) a report in an official Iraqi newspaper, in which Hussein's son Uday ran a "List of Honor" which included the Iraqi intelligence officer responsible for coordinating activities with al-Qaeda;<sup>77</sup> 2) evidence that an al-Qaeda operative, Abu al-Zarqawi, opened a terrorist training camp in Iraq;<sup>78</sup> 3) the discovery of documents in Takrit, Iraq, revealing that al-Qaeda operative, Abdul Yasin, was on Hussein's payroll (Yasin was later indicted for bombing the World Trade Center);<sup>79</sup> and 4) Hussein's Salman Pak terror camp trained hijackers on an actual passenger jet.<sup>80</sup>

74. KOHN, *supra* note 58, at 213.

75. Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 232 (S.D.N.Y. 2003).

<sup>103</sup> *Id.*

77. *Id.*; see also, Gilbert S. Merritt, *Document Links Saddam, bin Laden*, THE TENNESSEAN, June 25, 2003, available at [http://tennessean.com/nation-world/archives/03/06/34908297.shtml?Element\\_ID=34908297](http://tennessean.com/nation-world/archives/03/06/34908297.shtml?Element_ID=34908297).

The list was reportedly published on the back page of the now-defunct Iraqi daily newspaper *Babil* on November 14, 2002. Uday Hussein was the publisher of *Babil* and the story was described a "List of Honor," purportedly a list of Saddam's regime members with their names and positions listed. Judge Merrit, who was in Iraq to help rebuild the judicial system, describes the list as "the 600 people closest to Saddam Hussein," and states:

Through an unusual set of circumstances, I have been given documentary evidence of the names and positions of the 600 closest people in Iraq to Saddam Hussein, as well as his ongoing relationship with Osama bin Laden . . . the list contained not only the names of the 55 "deck of cards" players . . . but also 550 others . . . The document shows that an Iraqi intelligence officer, Abid Al-Karim Muhamed Aswod, assigned to the Iraq embassy in Pakistan, is "responsible for the coordination of activities with the Osama bin Laden group."

78. *Id.*

79. Merrit, *supra* note 77; see also, John Diamond, *U.S. says Iraq sheltered suspect in '93 WTC Attack*, USA TODAY, Sept. 17, 2003, available at [http://www.usatoday.com/news/world/iraq/2003-09-17-iraq-wtc\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-09-17-iraq-wtc_x.htm).

Military, intelligence, and law enforcement officials reported finding a large cache of Arabic-language documents in Tikrit, Saddam's political stronghold. A U.S. intelligence official, who spoke on condition of anonymity, said translators and analysts are busy "separating the gems from the junk." The official said some of the analysts have concluded that the documents show that Saddam's government provided monthly payments and a home for Yasin. Yasin is on the FBI's list of 22 most-wanted terrorist fugitives; there is a \$25 million reward for his capture. The bureau questioned and released him in New York shortly after the bombing in 1993. After Yasin had fled to Iraq, the FBI said it found evidence that he helped make the bomb, which killed six people and injured 1,000. Yasin is still at large.

80. *Id.*; see also, Deroy Murdock, *The 9/11 Connection: What Salman Pak Could Reveal*, NAT'L

Writing in the *Times*, columnist William Safire, on November 23, 2003, revealed government "evidence that Saddam's spy agency and top Qaeda operatives were in frequent contact for a decade."<sup>81</sup> A sixteen page letter issued by the Defense Department in response to a Senate Intelligence Committee request for evidence of a Hussein link to 9/11 included a "classified annex of raw reports" of "the relationship between Iraq and al-Qaeda."<sup>82</sup> Safire concluded that "with so much connective tissue exposed . . . the burden of proof has shifted to those still grimly in denial."<sup>83</sup>

It is understandable that a journal unalterably committed to an agenda of peace at any price would be tempted to suppress evidence of a foreign country's attack on the United States for fear that such evidence might provide a basis for retaliation; it shows, however, a deep lack of respect for the right of the people to know.

Unscrupulous as such journalistic methods are, however, it would be naïve to pretend they are not effective. The daily, relentless diet of journalistic emphasis on the negative aspects of the effort to restore democracy in Iraq is having its desired effect, sapping the will of the American people to restore democracy and sovereignty to the people of Iraq.<sup>84</sup> In a self-fulfilling prophecy, support for U.S. policy in Iraq is indeed being undermined effectively, as support falls to a bare majority—insufficient to sustain a credible war on terror.<sup>85</sup>

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REV. ONLINE, Apr. 3, 2003, available at <http://www.nationalreview.com/murdock/murdock040303.asp>. See also, Interview with Sabah Khodada, former Iraqi Army Officer by PBS Frontline, (Oct. 14, 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/khodada.html>. Khodada describes what went on at Salman Pak, including details on training hijackers. When asked about the relationship between the September 11 attacks and Salman Pak Khodada stated:

I assure you, this operation was conducted by people who were trained by Saddam. And I'm going to keep assuring the world this is what happened. Osama bin Laden has no such capabilities. Why? Because this [*sic*] kind of attacks must be, and has to be, organized by a capable state, such as Iraq; a state where they can provide high level of training, and they can provide high level of intelligence to do such training. How could Osama bin Laden—who's hiding in the middle of nowhere in Afghanistan in small caves and valleys—train people and gather information and send people to do such high-level operation? We all know this is a high-level operation. This cannot be done by a person who does not even own a plane in Afghanistan, who cannot offer such training in Afghanistan. This is definitely done by a mastermind like Saddam . . . .

81. William Safire, *Missing Links Found*, N.Y. TIMES, Nov. 24, 2003, at A23.

82. *Id.*

83. *Id.*; see also, William Safire, *Al Qaeda's Links to Saddam Emerge*, INT'L HERALD TRIB., Nov. 25, 2003, at 7; see also, Stephen F. Hayes, *Case Closed: The U.S. Government's Secret Memo Detailing Cooperation Between Saddam Hussein and Osama Bin Laden*, THE WKLY. STANDARD, Nov. 24, 2003; Stephen F. Hayes, *The Connection: Not So Long Ago, the Ties Between Iraq and Al Qaeda were Conventional Wisdom. The Conventional Wisdom was Right*, THE WKLY. STANDARD, June 7, 2004.

84. See generally, Josh Bernstein, *Corzine Warns of Difficult Road Ahead in Iraq*, BURLINGTON COUNTY TIMES, Apr. 15, 2003, available at <http://corzine.senate.gov/clippings/iraqburlingtontimes%204.15.03.pdf>.

85. In an August 20, 2004 report titled, "U.S. Public Beliefs and Attitudes about Iraq," from The Program on International Policy Attitudes (PIPA/Knowledge Networks Poll) in the Center on Policy Attitudes and the Center for International and Security Studies at the University of Maryland, College Park, the researchers compiled polling information from a nationwide poll given August 5-11, 2004 to a

### III. INTERNATIONAL AND DOMESTIC LAW

The legal aspects of the war on terror can be divided into three distinct categories: 1) international law relating to the law of war and the use of force, 2) domestic law relating to internal national security, and 3) international and domestic law relating to the legal rights of detainees captured in the war on terror. Each shall be addressed separately in this section.

#### *A. International Law Relating to the Law of War and the Use of Force*

It has already been noted that the primary legal basis for military action against Iraq was Security Council Resolution 1441,<sup>86</sup> which found Hussein's Iraq to be in possession of weapons of mass destruction and in violation of directives to account to the United Nations for those weapons previously discovered by U.N. inspectors.<sup>87</sup> In addition, it was noted that U.N. Resolution 1368 specifically recognized that the 9/11 attacks constituted an armed "threat to international peace and security," and that Article 51 of the U.N. Charter specifically provides for the unilateral use of armed force in self defense to such an armed attack.<sup>88</sup>

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random sample of 733 Americans. The polling data revealed that positive perceptions of the war in Iraq had steadily decreased and negative perceptions of the war effort had steadily increased since July of 2003. Among other questions, PIPA asked participants, "Do you think the US made the right decision or the wrong decision in going to war against Iraq?" In July of 2003, 63% thought that going to war was the right decision and in the August 2004 survey only 46% thought it was the right decision.

Furthermore, when asked "how confident are you that the US intervention in Iraq will succeed?" 36% were in the "confident" range (i.e. gave a 6-10 in a scale of 0-10), 17% were in the neutral range (5), and 46% were in the pessimistic range (0-4). The earlier polling that PIPA conducted in 2003 through early 2004 revealed that positive perceptions of the war in Iraq were based largely on the views that Iraq possessed weapons of mass destruction and that Iraq was linked to al Qaeda and the 9/11 attacks. The decrease in support is attributed to an increase in the opposing positions, namely that Iraq did not have WMD's, that Iraq did not support al Qaeda in any deep sense, and also that world public opinion was unfavorable to the Iraq war.

Similar polls that have been conducted show a decrease in public support of the war effort as well. A nationwide Pew Research Center/Council on Foreign Relations survey conducted by Princeton Survey Research Associates on August 5-10, 2004, revealed similar results to the PIPA survey, although the number of those who supported the war effort was slightly higher. Pew asked the following question. "Do you think the U.S. made the right decision or the wrong decision in using military force against Iraq?" 53% stated that military force was the right decision and 41% said it was they wrong decision. This is in contrast to the results from that same poll question in April of 2003 in which 74% answered that military action was the right decision and 19% answered that it was the wrong decision. A graph of the polling results from the Pew Research Center reveals a fairly steady decrease in support for the war effort from spring of 2003 to the present. This data is consistent with Newsweek and Gallup polls conducted from July 2003 to September 2004. *Eroding Respect for America Seen as Major Problem: Foreign Policy Attitudes Now Driven by 9/11 and Iraq*, The Pew Research Center for People and the Press (2004), available at <http://people-press.org/reports/pdf/222.pdf>; see also What Now? <http://www.pollingreport.com/iraq.htm>.

86. S.C. Res. 1441, *supra* note 35.

87. See *supra* notes 22-42 and accompanying text.

88. S.C. Res. 1368, U.N. SCOR, 4730th Mtg., U.N. Doc. S/Res/1368 (2001). In addition to recognizing that the 9/11 attacks were a "threat to international peace and security," Resolution 1368 stated that the U.N. is "determined to combat by all means threats to international peace and security caused by terrorist acts. . . and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable. . ." Articles 51 and 42 of the U.N.

Furthermore, it should be noted that terms of the 1991 Gulf War cease-fire agreement required Iraq to permit U.N. inspectors into the country.<sup>89</sup> When Iraq openly breached that agreement in 1998, it effectively abrogated the cease-fire agreement and thereby re-established the state of war in existence prior to the signing of the agreement.<sup>90</sup> President Bush even made a special trip to the United Nations to explain that the primary purpose of going to war in Iraq was the enforcement of these U.N. resolutions.<sup>91</sup>

Despite what might appear to be a clear statement of the grounds for taking military action in Iraq, there have been persistent claims in the media that the real reasons for going to war were "for oil,"<sup>92</sup> or to find weapons of mass destruction.

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Charter allows the Security Council to use force if economic sanctions or other methods prove inadequate, but article 51 maintains the right of each sovereign nation to defend itself. U.N. CHARTER art. 51.

Article 42 states, "Should the Security Council consider that measures provided for in Article 41 [economic sanctions etc.] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." U.N. CHARTER art. 42, para. 1.

89. S.C. Res. 687, U.N. SCOR, 2983d mtg., U.N. Doc. S/Res/687 (1991), para 9(a). ("Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration on the locations, amounts and types of all items specified in paragraph 8 [all chemical and biological weapons, including stocks of agents, related components, subsystems, research, development, support, and manufacturing facilities and all ballistic missiles with a greater range than 150 km including related parts, repair, and production facilities] and agree to urgent on-site inspection . . . [by United Nations Special Commission]").

90. S.C. Res. 1205, U.N. SCOR, 3939th mtg., U.N. Doc. S/Res/1205 (1998).

The Security Council, *Noting* with alarm the decision of Iraq on 31 October 1998 to cease cooperation with the United Nations Special Commission, and its continued restrictions on the work of the International Atomic Energy Agency (IAEA), . . . Acting under Chapter VII of the Charter of the United Nations; *Condemns* the decision by Iraq of 31 October 1998 to cease cooperation . . . as a flagrant violation of resolution 687 (1991); *Reaffirms* its intention to act in accordance with the relevant provisions of resolution 687 (1991) on the duration of the prohibitions referred to in that resolution, and *notes* that by its failure so to comply with its relevant obligations Iraq has delayed the moment when the council can do so. *Id.*

91. See U.N. GAOR, 57th Sess., 2d plen. mtg., U.N. Doc. A/57/PV.2 (2002). President Bush stated in his address to the General Assembly: "In order to suspend hostilities and 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 that he is complying with every one of those obligations . . ." *Id.* at 6.

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? We want the resolutions of the world's most important multilateral body to be enforced, and right now those resolutions are being unilaterally subverted by the Iraqi regime. *Id.* at 8.

See also, White House, *President's Remarks at the United Nations General Assembly*, Sept. 12, 2002, available at <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>.

92. John le Carre, *The United States Has Gone Mad*, THE TIMES (LONDON), Jan. 15, 2003, at 20; Anthony F. Greco, Letter to the Editor, *Iraq and Oil, Still Inseparable*, N. Y. TIMES, Feb. 17, 2003, at A20 ("The Bush administration is committed to the forceful assertion of American primacy in the world. The maximization of American power and influence in the Middle East is critical to that end, and Saddam Hussein stands in our way."). See also *White House Continues to 'Spin' Reasons for Flawed Iraq War*, USA TODAY, June 23, 2004, at 12A.

Some commentators have even gone so far as to claim that the United States relied on the doctrine of "preemptive strike" to justify going to war,<sup>93</sup> despite the fact that Secretary of State Colin Powell specifically and publicly rejected this rationale, stating, "If you look at our National Security Strategy, you will see that there is no chapter that says 'preemption.' It talks about partnerships. It talks about alliances. It talks about human rights. It talks about trade. It talks about all those things that will make a better world for all people."<sup>94</sup>

Vice President Cheney has spoken of the preemption doctrine in very limited terms: "If the United States could have preempted 9/11, we would have; no question. Should we be able to prevent another, much more devastating attack, we will; no question."<sup>95</sup> In other words, the United States reserves the right to shoot down aircraft attacking U.S. cities.

Thus, although the United States did not rely on the preemptive strike doctrine to justify going to war, it is clear that it could have done so. As international lawyer, Stephen Murdoch, has noted, preemption "is considered (by international lawyers) to be a legitimate use of force in international law."<sup>96</sup> Indeed, few international lawyers today would deny that Israel did not have the right in 1967 to engage in a preemptive strike against the Arab countries that were threatening imminent invasion and expressing the intent, as stated by Iraq President Rashman Aref that "Our goal is clear—to wipe Israel off the map."<sup>97</sup>

#### *B. Domestic Law Relating to Internal National Security*

The primary federal statute relating to internal security is an act entitled, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, often referred to by its acronym, the USA PATRIOT Act (Patriot Act).<sup>98</sup> The inch-thick act, which runs to some 342 printed pages, is a heavy read, and it is questionable how many commentators have taken the minimum twelve to sixteen hours it takes to read and fully analyze this act.

93. Mike Allen & Barton Gellman, *Preemptive Strikes Part of U.S. Strategic Doctrine: "All Operations" Open for Countering Unconventional Arms*, WASH. POST, Dec. 11, 2002, at A1.

94. Interview by The Washington Post Editorial Board with Colin Powell, Secretary of State, (July 23, 2003), available at <http://www.hongkong.usconsulate.gov>.

95. Memorandum from Ivo Daalder to Members of the CFR/ASIL Roundtable on Old Rules/New Threats: Policy Implications of the Bush Doctrine on Preemption, Council on Foreign Relations (Oct. 11, 2003), available at <http://www.cfr.org/publication.php?id=5251>.

96. Stephen Murdoch, *Preemptive War: Is It Legal?*, Jan. 2003, at <http://www.dcb.org>.

97. *Who Started the Six Day War?*, HASBARA FELLOWSHIPS, at [http://www.israelactivism.com/resources/factsheets/factsheets/who\\_started\\_the\\_6.asp](http://www.israelactivism.com/resources/factsheets/factsheets/who_started_the_6.asp). (The full quote from President Abdel Rahman Muhammad Aref of Iraq was: "The existence of Israel is an error that must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear—to wipe Israel off the face of the map."). See also Michael B. Oren, *Did Israel Want The Six Day War?*, 5759 AZURE 1-37 (Spring 1999), available at <http://www.azure.org.il/7-Oren.html>; see generally 110-11 DAVID KIMCHE & DAN BAWLY, *THE SANDSTORM: THE ARAB-ISRAELI WAR OF JUNE 1967: PRELUDE AND AFTERMATH* (Stein and Day, 1968); see also Policy Statement, *Israel and the Occupied Territories: Statement made by The International Association of Jewish Lawyers and Jurists at the UN Commission on Human Rights*, INT'L ASS'N OF JEWISH LAW. & JURISTS, Apr. 2, 2002, available at [http://www.intjewishlawyers.org/html/policy\\_statements/april\\_2.html](http://www.intjewishlawyers.org/html/policy_statements/april_2.html).

98. HR 3162 RDS, 107<sup>th</sup> Cong. (2001) (enacted) (also known as "The Patriot Act").



This daunting task has not kept a number of commentators from expressing their opinion of the Patriot Act's import. It has been asserted, for example, that the Patriot Act "gives . . . law enforcement the ability [to] monitor email and telephone conversations without probable cause."<sup>99</sup> The American Civil Liberties Union states that "the USA PATRIOT act gives the Attorney General and federal law enforcement unnecessary and permanent new powers to violate civil liberties that go far beyond the stated goal of fighting international terrorism."<sup>100</sup> The Electronic Frontier Foundation claims, "[t]he civil liberties of ordinary Americans have taken a tremendous blow with this law, especially the right to privacy in our online communications and activities."<sup>101</sup>

The notion that any surveillance in defense of national security and safety is suspect recalls the statement of the Secretary of War in 1941 when explaining why it was not appropriate to conduct the kind of electronic surveillance that could have alerted the United States to the impending attack on Pearl Harbor, "Gentlemen don't read other gentlemen's mail."<sup>102</sup> Commendable and civil as such sentiments might be, they appear strangely naïve in the aftermath of attacks on Pearl Harbor, the World Trade Center, and the Pentagon.<sup>103</sup>

In fact, however, the Patriot Act primarily extends to investigations of terrorist activity the surveillance and search procedures which had previously been applied (and constitutionally approved) in organized crime cases.<sup>104</sup> Where new procedures are provided, specific provisions are made for judicial review.<sup>105</sup> For example, Section 215<sup>106</sup> is often maligned as providing for unlimited warrantless searches of such tangible items as records and papers, and most notoriously it is

99. Catlin Gregg, *Patriot Act of 2001—Friend or Foe*, July 1, 2004, available at <http://www.home-inter.net/CaitlinGregg/finalproject.htm>.

100. Letter from Laura Murphy, Director, ACLU Washington Office to the U.S. Senate, (Oct. 23, 2001), available at <http://www.aclu.org/NationalSecurity.cfm?ID=922&C=n1>.

101. Electronic Frontier Foundation, *EFF Analysis of the Provisions of the USA PATRIOT Act*, Oct. 31, 2001, at [http://www.eff.org/Privacy/Surveillance/20011031\\_eff\\_usa\\_patriot\\_analysis.html](http://www.eff.org/Privacy/Surveillance/20011031_eff_usa_patriot_analysis.html).

102. See, e.g., R. Emmett Tyrrell Jr., *CIA's Future*, WASH. TIMES, July 16, 2004, available at <http://www.washingtontimes.com/functions/print.php?StoryID=20040715-082643-4571r>.

103. See, e.g., DAVID KAHN, *THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING* (2004); accord Joseph C. Goulden, *A Brave Spy, Tracking Carlos, Code Work*, WASH. TIMES, Aug. 1, 2004, available at <http://www.washingtontimes.com/books/20040731-101353-6386r.htm>. Kahn reproduces a Stimson diary entry of June 3, 1931, in which he recounts halting funding for code work because diplomats 'are supposed to deal internationally on a gentlemen's basis.'; see also, RICHARD HOLM, *THE AMERICAN AGENT: MY LIFE IN THE C.I.A.* (2003); CONSTANTINE FITZGIBBON, *SECRET INTELLIGENCE IN THE TWENTIETH CENTURY* 158 (1976); Louis Kruh, *Stimson, the Black Chamber, and the 'Gentlemen's Mail' Quote*, Cryptologia, Apr. 1988, at 65-83; see generally, Mark G. Young, *What Big Eyes and Ears You Have! A New Regime for Covert Governmental Surveillance*, 70 *FORDHAM L. REV.* 1017 (2001) (examining the government's powers and citizens' liberties in the aftermath of 9/11).

104. Electronic Frontier Foundation, *EFF Analysis of the Provisions of the USA PATRIOT Act*, Oct. 31, 2001, at [http://www.eff.org/Privacy/Surveillance/20011031\\_eff\\_usa\\_patriot\\_analysis.html](http://www.eff.org/Privacy/Surveillance/20011031_eff_usa_patriot_analysis.html).

105. *Id.*

106. This section amends Title V of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1861 (1978).

claimed, library books. As a result, it has been observed that "Section 215 is one of the surprising lightning rods of the Patriot Act, engendering more protest, lawsuits, and congressional amendments than any other. In part this is because this section authorizes the government to march into a library and demand a list of everyone who's ever checked out a copy of *My Secret Garden* but also because those librarians are tough."<sup>107</sup>

In fact, Section 215 contains no such provisions; indeed it specifically states that an order requiring the production of tangible items may be issued only "if the judge finds that the application meets the requirements of this section"<sup>108</sup> requirements include that the item requested be shown to be for the purpose of protecting "against international terrorism or clandestine intelligence activities."<sup>109</sup>

Likewise, Section 215 of the Patriot Act is specifically entitled, "Seizure of Voice-Mail Message pursuant to *Warrants*."

Interpretations of the Patriot Act appear to be undergoing a process of judicial interpretation comparable to that of the aviation security regulations and laws promulgated in the 1970's after a rash of airline hijackings linked to Cuba. In 1972, a series of Federal Aviation Administration (FAA) directives ordered magnetometer screening and warrantless searches without probable cause of all airline passengers.<sup>110</sup>

The reactions of outrage by civil libertarians to these airline regulations were comparable to today's reactions to the Patriot Act. It was claimed that these new regulations were a precursor to a government police state. Judge Goldberg, writing in the Fifth Circuit case of *U.S. v. Legato*, wrote that "[s]eeking to prevent or deter crime, standing alone, has never justified eroding the right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment."<sup>111</sup>

Unfortunately, the civil libertarians' notion of halcyon days were rudely interrupted with still more hijackings, prompting the government to justify its regulations authorizing warrantless searches of airline passengers on grounds that passengers wishing to travel impliedly "consented" to the magnetometer search by buying an airline ticket and attempting to board the aircraft.

Federal courts purporting to uphold civil libertarian principles were initially hostile to the "consent" theory as a basis for warrantless searches without probable

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107. Dahlia Lithwick & Julia Turner, *A Guide to the Patriot Act, Part I: Should You Be Scared of the Patriot Act?*, JURISPRUDENCE, Sep. 8, 2003, available at <http://slate.msn.com/id/2087984>.

108. Title V of the Foreign Intelligence Surveillance Act of 1978 50 U.S.C. § 1861 (1978), § 501 (c)(1), as amended by the Patriot Act, § 215.

109. *Id.* § 501 (a)(1).

110. A list of these directives can be found in *U.S. v. Lopez-Pages*, 767 F.2d 776 (11th Cir. 1998); a summary of the development of FAA rules in this area can also be found at *U.S. v. Davis*, 482 F.2d 893 (9th Cir. 1973); see also 37 Fed. Reg. 4904-05 (Mar. 7, 1972); 37 Fed. Reg. 5689-91 (Mar. 18, 1972); 37 Fed. Reg. 7150 (Apr. 11, 1972). For a comprehensive discussion of FAA regulations in this area, see DEMPSEY et al., *AVIATION LAW AND REGULATION* (1992).

111. *U.S. v. Legato*, 480 F.2d 408, 414 (5th Cir. 1973) (concurring opinion).

cause.<sup>112</sup> In *U.S. v. Kroll*, for example, the Eighth Circuit suppressed evidence seized from an airline passenger during mandatory security screening, declaring that a defendant's attempt to board an aircraft did not constitute consent "in any meaningful sense."<sup>113</sup>

Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consented to search when to do otherwise would have meant foregoing the constitutional right to travel.<sup>114</sup>

Likewise, in *U.S. v. Albarado*, the Second Circuit declared that:

To make one choose between flying to one's destination and exercising one's constitutional rights appear to us, as to the Eighth Circuit, in many situations a form of coercion, however subtle. While it may be argued that there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternative form of transportation.<sup>115</sup>

In the aftermath of continued threats to the safety of passengers, however, it soon became clear that strict interpretations of the Fourth Amendment, must of necessity, give way to real concerns for the safety of passengers. However, it was not until Judge Friendly in *U.S. v. Edwards* adopted the "danger alone" test<sup>116</sup> for upholding warrantless searches without probable cause at airport security checkpoints that the tide of federal court opinions shifted toward upholding magnetometer searches.

Although civil libertarians continue to express their abhorrence of warrantless searches at airports, such security searches are today recognized and accepted by the general public as a necessary precaution against hijacking; indeed one might question how many passengers today would be willing to embark on an aircraft knowing that a hijacker with deadly weapons could freely embark on the same aircraft without any search of his person or baggage.

Although perceptions might differ as to whether today's routine airport searches constitute the tyrannical police state envisioned by the civil libertarians, one airline executive has expressed surprise that such warrantless searches were so readily accepted by the traveling public:

It seems ironic that we find ourselves in a situation where each and every air traveler in the United States is treated as a suspect as soon as he enters an airline terminal. It would seem ironic to the citizen of 1937 that air travelers today not only submit willingly to searches of their person and carryon baggage, but actually laud the virtues of and need for such action.<sup>117</sup>

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112. *U.S. v. Kroll*, 481 F.2d 884 (8th Cir. 1973).

113. *Id.*

114. *Id.*

115. *U.S. v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1973).

116. *U.S. v. Edwards*, 498 F.2d 496 (2d Cir. 1974).

117. M.J. Fenello, *Individual Rights v. Skyjack Deterrence: An Airline Man's View*, 18 VILL. L.

In the same way that searches and security procedures which constitute modest inconveniences to the public were accepted in the aftermath of serious threats to the safety of airline passengers, the willingness of the public to accept similar inconveniences in order to provide security against attacks of the type initiated by enemy force on 9/11 is reflected in the overwhelming vote in Congress for the Patriot Act.<sup>118</sup>

*C. International and Domestic Law Relating to the Rights of Detainees Captured in the War on Terror*

Since 9/11, a number of new legal issues have arisen concerning the jurisdiction of military courts,<sup>119</sup> material witness detentions,<sup>120</sup> access to counsel,<sup>121</sup> and discovery of sensitive information.<sup>122</sup>

The most contentious of these issues includes the rights of the detainees held at Guantanamo Bay, Cuba.<sup>123</sup> In particular, questions have been raised about the rights of prisoners detained outside the territory of the United States to invoke habeas corpus relief in the federal courts. This, in turn presents a narrow question of the subject matter jurisdiction of the federal courts.

The applicable statutory authority is 28 U.S.C. § 2241, which states, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit court judge *within their respective jurisdictions*."<sup>124</sup> This statute also specifically provides that any "order of a circuit judge shall be entered in *the district court of the district where the restraint complained of is had*."<sup>125</sup>

In the case of the Guantanamo detainees, it is not disputed that detainees are being restrained in Guantanamo, Cuba, and a cursory look at any map shows that Cuba is not located within the territorial jurisdiction of any federal court of the United States. In addition, the U.S. Supreme Court has made it clear that

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REV. 996 (1973).

118. Brian Wilson, *Ashcroft to Launch Patriot Tour*, FOX NEWS (Aug. 14, 2003), at <http://www.foxnews.com/story/0%2C2933%2C94668%2C00.html>. "Congress overwhelmingly passed the Patriot Act in the weeks following the Sept. 11, 2001, terror attacks. The Senate voted 98-1, the House 357-66. The new measures give law enforcement enhanced tools to fight the war against terrorism." *Id.*

119. *E.g.*, *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002).

120. *E.g.*, *In re The Application of the U.S. for a Material Witness Warrant*, 213 F.Supp.2d 287 (S.D.N.Y. 2002).

121. *E.g.* *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) *vacated by* 124 S. Ct. 2633 (2004)

122. *E.g.* *U.S. v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

123. *See The Prisoners at Guantanamo*, N.Y. TIMES, Jan. 22, 2002, at A18 (opining that disturbing reports have been given regarding the treatment of the prisoners at Guantanamo Bay and concern of the humane treatment of prisoners under military conditions.); *see also*, Gordon Tagge, Letter to the Editor, *The Conditions at Guantanamo*, N.Y. TIMES, Jan. 24, 2002, at A26 (describing reports of prisoners' quarters being bug infested and horrible means); *see also* Katherine Q. Seelye, *On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A16 (stating that the amount of prisoners is growing faster than the ability to quarantine them from each other and facility development).

124. 28 U.S.C. § 2241 (a) (2004) (emphasis added).

125. *Id.* (emphasis added).

"[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which *is not to be expanded by judicial decree*. It is to be *presumed* that a cause lies *outside* this limited jurisdiction . . . ." <sup>126</sup>

Although the meaning of these statutes appears plain on their face, the U.S. Supreme Court had occasion to interpret their meaning in three seminal cases: *Ahrens v. Clark*,<sup>127</sup> *Johnson v. Eisentrager*,<sup>128</sup> and *Braden v. 30<sup>th</sup> Judicial Circuit Court of Kentucky*.<sup>129</sup>

In *Ahrens*, the court dismissed the habeas petitions of detainees held on Ellis Island because the detainees filed their petitions in the District Court for the District of Columbia rather than the district in which they were being detained,<sup>130</sup> a clear violation of 28 U.S.C. § 2241,<sup>131</sup> which states that a habeas petition must be filed in the district where the detainees are being held.

In *Eisentrager*, alien detainees imprisoned in a U.S.-controlled prison in Germany filed petitions for writs of habeas corpus in the District Court for the District of Columbia.<sup>132</sup> Again, the Supreme Court dismissed these petitions on grounds that Germany, where the prisoners were being detained, was not within the territorial jurisdiction of any federal court.<sup>133</sup>

Nothing in the text of the Constitution extends such a right, nor does anything in our statutes . . . . These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all *beyond the territorial jurisdiction of the United States*.<sup>134</sup>

In *Braden*, a prisoner who was the subject of a detainer order in Kentucky, but actually held in physical custody in Alabama, filed a habeas corpus petition in Kentucky.<sup>135</sup> The Supreme Court in that case modestly broadened the definition of "custody" under the statute to include a territory within the United States in which the prisoners had been the subject of a detainer order even though the detainee was not being physically held in that jurisdiction.<sup>136</sup> This case did not even mention *Eisentrager*, since both Kentucky and Alabama are within the territorial jurisdiction of the United States.

126. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (emphasis added).

127. *Ahrens v. Clark*, 335 U.S. 188 (1948).

128. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

129. *Braden v. 30<sup>th</sup> Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

130. *Ahrens*, 335 U.S. at 189.

131. In 1948, the statutory precursor of 28 U.S.C. § 2241 (2004) was 28 U.S.C. § 452 (1948).

132. *Johnson*, 339 U.S. at 765.

133. With regard to the extent of military court jurisdiction, see *Madsen v. Kinsella*, 343 U.S. 341 (1952); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin v. Cox*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte Vallandigham*, 68 U.S. 243 (1863); *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash. 1943); *In re Egan*, 8 F. Cas. 367 (N.D.N.Y. 1866) (No. 4303).

134. *Johnson*, 339 U.S. at 768, 777-778 (emphasis added).

135. *Braden*, 410 U.S. at 485.

136. *See Id.*

Finally, in *Rasul v. Bush*,<sup>137</sup> the U.S. Supreme Court considered a case virtually indistinguishable on its facts from the facts in *Eisentrager*—that is, a case involving habeas corpus petitions filed by alien detainees held in custody in a country outside the territorial jurisdiction of the United States.<sup>138</sup> Nevertheless, the court purported to find the following differences in the facts in *Rasul*: 1) the petitioners in *Rasul* were not nationals of countries at war with the United States, and 2) they were imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>139</sup> These purported significant distinctions are curious, since at the time the petitioners in *Eisentrager* filed their petitions, the United States was not at war with Germany, and the prison in which the petitioners were being held in Germany was, like Guantanamo, also within the exclusive control of U.S. authorities.<sup>140</sup>

Certainly reasonable arguments might be made before Congress to amend 28 U.S.C. § 2241 to authorize the extension of U.S. judicial power beyond the boundaries of the United States. Although such a course might be questionable under applicable provisions of international law and serve to confirm suspicions by many around the world that the United States seeks to extend its hegemony and project its jurisdiction beyond its territorial limits, such an amendment by Congress would at least provide a domestic legislative basis for extending the subject matter jurisdiction of U.S. courts.

In *Rasul*, however, the court chose not to defer to the legislative branch of government in this regard but rather chose to do precisely what it had previously forbidden—namely, to expand the subject matter jurisdiction of the federal courts “by judicial decree.”<sup>141</sup>

Alarming, the Court even declined to overrule *Eisentrager*, presumably to avoid the task of having to justify taking the extraordinary step of disregarding its own clear legal precedent. Instead, it purported to find that since *Braden* modestly expanded the legal definition of “custody” to permit a petitioner in physical custody in one jurisdiction in the United States to file a habeas writ in another jurisdiction within the United States where the petitioner was under a legal order of detention,<sup>142</sup> neither *Ahrens* nor *Eisentrager* can be viewed as establishing “an

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137. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

138. *Id.* at 2686-91.

139. *Id.* at 2693. The other two factual distinctions given by the court were that the petitioners in *Rasul* had not been afforded access to any tribunal, and that they denied being guilty of any grounds for detention. However, the court in *Rasul* never explained how the underlying merits of a case had any bearing on the underlying subject matter jurisdiction of the courts. Moreover, although it is true that the court in *Eisentrager* made no mention of what alternative courts were made available to German prisoners of war, it is highly unlikely that a significant percentage of the over one million prisoners of war in Germany were given trials in military courts. It may also be presumed that the petitioners in *Eisentrager* also would have claimed grounds which would entitle them to release; otherwise there would have been little point in filing their habeas petitions.

140. *Id.*

141. See *Kokkonen*, 511 U.S. at 377.

142. *Id.*

inflexible jurisdictional rule"<sup>143</sup> that precludes detainees *outside of the United States* from filing a habeas petition in U.S. courts.<sup>144</sup> This holding is all the more remarkable in that *Braden* never even *referred* to *Eisenrager*.

The holding in *Rasul* is already raising some alarming questions. For example, if the power of the U.S. courts is determined not by territorial limits of sovereignty, but rather by the exercise of "complete jurisdiction and control over and within said areas,"<sup>145</sup> would this mean that an Osama bin Laden, cornered in a cave in an area of Afghanistan controlled by U.S. forces, would have a right under the Fourth Amendment of the U.S. Constitution to demand that U.S. forces first obtain a search warrant before entering his cave? What appeared to be a silly question under *Eisenrager* suddenly becomes pointed after *Rasul*. As the Chief Justice noted, "since 'jurisdiction and control' obtained through a lease is no different in effect from 'jurisdiction and control' acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws,"<sup>146</sup> including presumably the Fourth Amendment of the U.S. Constitution.

In a vigorous dissenting opinion in *Rasul*,<sup>147</sup> Justice Scalia noted one of the dire warnings set forth by the court in *Eisenrager*:

To grant the writ of these prisoners might mean our army must transport them across the seas for a hearing. This would require allocation for shipping space, guarding personnel billeting and rations . . . . The writ since it is held to be a matter of right would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort . . . . It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his effort and attention from the military offensive abroad to the legal defensive at home.<sup>148</sup>

The spectacle of a General Eisenhower having to return to the United States to defend a civil action brought against him by one of two million German prisoners of war in Germany, or that of an Osama bin Laden suing his military captors in a U.S. court in Washington D.C., is perhaps bizarre, but a very real possibility under the ill-considered majority opinion in *Rasul*.

Justice Scalia remarked on this omission in his dissenting opinion:

The consequence of holding, as applied to aliens outside the country, is breathtaking. It permits an alien capture in a foreign theater of active combat to bring a (28 U.S.C.) 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. (In World War II) U.S. forces had in custody approximately two million enemy sol-

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143. *Id.*

144. *Rasul*, 124 S. Ct. at 2691.

145. *Id.* (citing the terms of the U.S. lease of Guantanamo Naval Base in Cuba).

146. *Id.*

147. The dissenting opinion in *Rasul*, was written by Justice Scalia, with whom the Chief Justice and Justice Thomas joined.

148. *Rasul*, 124 S. Ct. at 2707 (Scalia, J., dissenting).

diers. A great many of these prisoners no doubt would have complained about the circumstances of their capture and the terms of their confinement.<sup>149</sup>

It is difficult not to conclude that *Rasul* represents the exercise of raw judicial power for the purpose of usurping the legislative power of the people in direct violation of the principle of separation of powers. Journalists and media pundits may not understand the distinction between rights and jurisdiction, but surely the same cannot be said of members of the U.S. Supreme Court. Although the popular media no doubt placed pressure on the Supreme Court to rule the way it did, it is doubtful if *Rasul's* extraordinary judicial extension of U.S. judicial power, beyond the territory of the United States, will have any measurable effect on the ultimate rights of detainees; indeed, it may well serve to further confirm the suspicions of many around the world that the United States seeks to expand its hegemony and project its jurisdiction beyond its own territory into that of its neighbors.<sup>150</sup> Rather, Congress should by statute establish meaningful provision for the fair and civil treatment of all detainees in U.S. custody, including a requirement that any detainee's status be determined by a military court within a specific period of time.

#### *D. The Role of National Resolve*

When attacked, democratic nations are heavily dependent on the support and resolve of their people to mount a credible defense. A bare majority is rarely sufficient to enable a democratic nation to prosecute a war to a successful conclusion. Under rules of the U.S. Senate, a minority of senators can block spending bills through a variety of procedural tools, such as the filibuster; a yellow or sensationalist press can divulge information useful to an attacking enemy, encourage an enemy to press its attack on American soldiers more zealously, or vilify its own national leaders.

Although many think of World War II as a war fought with the overwhelming support of the American people, it should be recalled that until the attack on Pearl Harbor in 1941 there was considerable debate over whether to go to war with Germany<sup>151</sup> and massive anti-war demonstrations were staged in such public ven-

149. *Id.* (Scalia J., dissenting).

150. The exercise of military jurisdiction as a necessary incident of the laws of war is widely recognized; the imposition of civil jurisdiction, on the other hand, suggests political hegemony which is recognized as a greater threat to the sovereignty of an occupied territory.

151. See, e.g., Adam J. Berinsky, *American public Opinion and World War II: A Research Agenda and some Preliminary Findings*, 6 (2004) (unpublished manuscript), available at <http://web.mit.edu/berinsky/www/APO.pdf>; see generally, WAYNE S. COLE, CHARLES A. LINDBERGH AND THE BATTLE AGAINST AMERICAN INTERVENTION IN WORLD WAR II (1974); CHARLES BEARD, *THE DEVIL THEORY OF WAR* 107-24 (1936); The Neutrality Act of 1937, 49 Stat. 1081; Franklin D. Roosevelt, *Four Freedoms speech*, The Public Papers of Franklin D. Roosevelt 663-73 (Jan. 6, 1941); Franklin D. Roosevelt, *Fireside Chat on National Defense*, The Public Papers of Franklin D. Roosevelt 384-89 (Sept. 11, 1941); *America First Committee Charges Roosevelt with Fighting a One-Man War*, Did You Know? (Am. First Comm.), Sept. 13, 1941, at 1, 5 (Lindbergh representing the majority of the nonintervention viewpoint); JUSTUS DOENECKE, *ANTI-INTERVENTION: A BIBLIOGRAPHICAL INTRODUCTION TO ISOLATIONISM AND PACIFISM FROM WORLD WAR I TO THE EARLY COLD WAR* (1987) (General bibliography at [http://www.onpower.org/foreign\\_non\\_inter.html](http://www.onpower.org/foreign_non_inter.html)); but see Bear F. Braumoeller, *The Myth of American*



ues as Madison Square Gardens.<sup>152</sup> Even after Pearl Harbor, there was opposition in Congress to declaring war on either Japan or Germany.<sup>153</sup>

It must also be recalled that what appears to be massive public support for going to war can quickly dissolve once military setbacks and difficulties are encountered and the media can play a large role in undermining national resolve to prosecute a war to a successful conclusion. At the outset of the Civil War in 1861, for example, there was overwhelming support in the North to go to war with the South to preserve the Union. After several years of military setbacks at the hands of the Confederacy, however, much of the news media in the North began both to vilify the national leaders who were leading the war effort and to question the expenditure of lives and national treasure on a war to free slaves.<sup>154</sup> This vilification led President Lincoln to conclude that he could not be reelected in 1864.<sup>155</sup> Indeed, Lincoln resolved that he would have to win the war prior to the inauguration of a new president since he assumed that whoever beat him in the election would have done so on terms that would prevent the new president from winning the war

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*Isolationism* (2003) (unpublished manuscript), available at <http://www.people.fas.harvard.edu/~bfbraun/MythOfUSIsol.pdf> (representing the counter argument to U.S. isolationism before Pearl Harbor).

152. See COLE, *supra* note 151; accord Charles Lindbergh, Speech Delivered in New York City (Apr. 23, 1941), available at <http://www.charleslindbergh.com/americanfirst/speech2.asp>; Charles Lindbergh, Election Promises Should Be Kept We Lack Leadership that Places America First, Delivered in New York City, Madison Square Garden (May 23 1941), available at <http://www.charleslindbergh.com/pdf/speech7.pdf>; see generally Douglas Charles, *Informing FDR: FBI Political Surveillance and the Isolationist-Interventionist Foreign Policy Debate, 1939-1945*, 24 Diplomatic History 211 (2000); cf. Hartzel v. U.S., 322 U.S. 680 (1944) (reversing a conviction under the Espionage Act of June 15, 1917); but see Schenck v. U.S., 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); U.S. v. Hartzel, 138 F.2d 169 (7th Cir. 1943).

153. Charles Lutton, *Pearl Harbor: Fifty Years of Controversy*, 11 J. OF HIST. REV. 431, 467 (1991), available at [http://www.ihr.org/jhr/v11/v11p431\\_Lutton.html](http://www.ihr.org/jhr/v11/v11p431_Lutton.html). President Roosevelt commissioned an investigation into the Pearl Harbor attacks following the incident. The committee, led by Associate Supreme Court Justice Owen Roberts, submitted its report on January 23, 1942. See also S. REP. NO. 79-244, at 493 (1946), available at <http://www.ilibio.org/pha/pha/congress/minority.html> (entire transcript of the minority report filed in opposition to the above committee's findings that further justified America's entering WWII against Japan and Germany).

154. Lincoln's Second Inaugural Address reiterates at length the purpose of the War and the need to overcome for the sake of blacks:

Neither party expected for the war the magnitude of the duration which it has already attained. Neither anticipated that the *cause* of the conflict might cease with or even before the conflict itself should cease.

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

Abraham Lincoln, Second Inaugural Address (Mar. 4, 1965), reprinted in CHRISTOPHER WALDREP & LYNNE CURRY, *THE CONSTITUTION AND THE NATION: THE CIVIL WAR AND AMERICAN CONSTITUTIONALISM* 140-42 (2003). See also CARL SANDBURG, *ABRAHAM LINCOLN: THE PRARIE YEARS AND THE WAR YEARS* (1954).

155. JOHN C. WAUGH, *REFLECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY* (2001).

thereafter.<sup>156</sup> Only a timely capture of Atlanta by General Sherman in the waning days of 1864 strengthened national resolve and secured President Lincoln's reelection.

One hundred and forty years later, President Bush has experienced similar circumstances. In September of 2002, the *Los Angeles Times* reported a poll that showed that "[b]y a margin of more than three to one (76 percent to 23 percent) Americans said they think the United States should take military action to remove Hussein from power . . . . Nearly eight in 10 say they believe Hussein has supported Al Qaeda's terrorist activities"<sup>157</sup> (a belief later confirmed by the findings of a federal court in *Smith v. Islamic Emirate of Afghanistan*).<sup>158</sup> By the eve of the 2004 Presidential election, a series of setbacks in Iraq and a relentless media barrage had reduced the margin of public support considerably.<sup>159</sup> It remains to be seen whether a success in Iraq comparable to Sherman's capture of Atlanta can re-establish public support to the point where the war on terror can be prosecuted to a successful conclusion.

#### IV. CONCLUSION

U.N. Resolution 1441 has provided a firm foundation for the prosecution of the allied war on terror in Iraq. Domestic terrorism laws, such as the Patriot Act, while yet to be fully tested in the courts, have their foundation in investigative procedures already tested by the courts. Although the overwhelming support for the war on terror and the war against Iraq has diminished considerably in the aftermath

156. *Id.* at 543 (quoting a letter written by President Lincoln in 1864):

This morning, as for some days past, it seems exceedingly probable that this Administration will not be re-elected. Then it will be my duty to co-operate with the President elect, as to save the Union between the election and the inauguration; as he will have secured his election on such ground that he can not possibly save it afterwards.

157. See e.g., Sonni Efron, *Across Nation, Critics of Bush Express Support for Iraq War*, L.A. TIMES, Sep. 15, 2002, at A14.

158. *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

159. "President George W. Bush's job performance rating has slipped to 53% positive, his lowest since the terrorist attacks in 2001, according to a poll of 1,004 likely U.S. voters by Zogby International. His negative rating reached 46%, just under his pre-9/11 unfavorable of 49%" Bush Job Performance, Zogby International, (July 18, 2003), available at <http://www.zogby.com/news/ReadNews.dbm?ID=721>; but see The Pew Research Center for the People and the Press, *Part Five: Opinion About the Bush Administration's Stewardship*, available at <http://people-press.org/reports/display.php3?PageID=867> (last visited Feb. 6, 2005) [hereinafter Pew Poll].

But Bush's handling of the situation in Iraq, and his foreign policy in general, continue to receive more negative reactions from the public. Just 42% approve of Bush's overall handling of foreign policy and roughly the same number (43%) approve of the way he is handling the war in Iraq. Bush's ratings on Iraq, like his measures on terrorism, have been fairly consistent over the past few months. And when it comes to how the president has handled international trade issues, just one-in-three approve, with 45% disapproving and a relatively high number (22%) declining to offer an opinion. Pew Poll, *supra* note 159.

"Forty-four percent (44%) of Americans now give the President good or excellent marks for his handling of the situation in Iraq. An identical number say he is doing a poor job in this area." Rasmussen Reports, *44% Rate Bush Good/Excellent on Iraq: Another 44% Give the President Poor Marks*, Dec. 8, 2004, available at <http://www.rasmussenreports.com/War%20with%20Iraq%20Bush%20Ratings.htm>.

of extensive and negative media coverage, national resolve in the face of setbacks can provide the foundation for securing the peace through enforcement of international law.

## THE “IMMINENT THREAT” REQUIREMENT FOR THE USE OF PREEMPTIVE MILITARY FORCE: IS IT TIME FOR A NON-TEMPORAL STANDARD?

Mark L. Rockefeller\*

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves . . . scholars and international jurists often conditioned the legitimacy of preemption on the existence of an *imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack*.<sup>1</sup>

Under customary international law, a state may use preemptive military force only if faced with an imminent threat.<sup>2</sup> The concept of imminence is traditionally understood in a temporal sense—that is, imminent is nearly synonymous with immediate. Thus, a preemptive strike may generally only take place immediately prior to the attack it is intended to thwart. Put another way, the *nearness* of the impending attack determines the *appropriateness* of a preemptive strike.

We now live in an age of terrorism and “uniquely destructive weaponry,”<sup>3</sup> such as Weapons of Mass Destruction (WMDs).<sup>4</sup> The capabilities of the Al-Qaeda<sup>5</sup> network and the willingness of terrorist organizations to cause calamitous

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1. NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (emphasis added).

2. See generally Michael N. Schmitt, *The Sixteenth Waldemar A. Solf Lecture in International Law*, 176 MIL. L. REV. 364, 378 (2003).

3. Louis R. Beres, *The Newly Expanded American Doctrine of Preemption: Can it Include Assassination?*, 31 DENV. J. INT'L. L. & POL'Y 157, 165 (2002).

4. Weapons of Mass Destruction (WMD) is the general term given for a class of weapons to include: nuclear, biological, chemical, and radiation weapons.

5. Al-Qaeda, “the base” in Arabic, was founded by Osama bin Laden in 1989, eventually merging with Egypt's Jihad, the organization behind the assassination of Egyptian President Anwar Sadat in 1981. Al-Qaeda claimed responsibility for the deaths of U.S. soldiers in Somalia in 1993, the World Trade Center bombing in 1993, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the U.S.S. Cole in 2000, and the September 11, 2001 attacks in New York City and Washington, D.C. See generally PETER L. BERGEN, JR., HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN (2002).

harm are as clear as the images seared into the minds of television viewers around the globe on September 11, 2001.

The issue therefore arises: Do modern technologies make waiting for a visible "mobilization of armies" unrealistic? Do terrorist tactics necessitate a broader interpretation of imminence by the international community? Could a non-temporal standard adequately assure the necessity of the use of preemptive force and that other, non-forceful options have been exhausted?

This article explores whether the traditional temporal interpretation of imminence should be changed. The article argues for an improved standard—one that retains the requirement for necessity, while eliminating the outmoded requirement for immediacy. It argues that modern weaponry and terrorist tactics countermand the current time-based standard. Part I gives background information, a history of the current understanding of imminence in international law, the evolution in weaponry, and an overview of current state behavior relative to the existing standard. Part II analyzes why a temporal interpretation of imminence may be outdated, reviews current scholarship in the field, and notes other areas of law in which the concept of imminence is understood non-temporally. Part III suggests an alternative approach, describes the components of such an approach, and discusses its relative strengths and weaknesses. Finally, Part IV summarizes and gives recommendations for the implementation of this new standard.

## I. BACKGROUND

While Articles 2(3) and 2(4) of U.N. Charter broadly prohibit the use of unilateral military force, Article 51 provides an exception for instances of self-defense.<sup>6</sup> Considered an "inherent right"<sup>7</sup> for states, self-defense is the only justifiable rationale for the use of armed force without U.N. Security Council approval.<sup>8</sup> Self-defense is an established doctrine. However, the legality of the use of force in self-defense to thwart an attack *before* the attacker fires the first shot (i.e. preemptive military force) is hotly debated. Scholars disagree on whether preemptive force is permissible at all under a strict interpretation of Article 51 and struggle to reconcile prohibitions on the use of force with actual state practice.

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6. U.N. CHARTER art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); U.N. CHARTER art. 2, para. 4 ("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 other manner inconsistent with the Purposes of the United Nations."); U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."), available at <http://www.un.org/aboutun/charter/>.

7. Michael J. Glennon, *Preemptive Terrorism: The Case for Anticipatory Self-Defense*, THE WKLY. STANDARD, Jan. 2002, at 3.

8. *Id.*

Customary international law requires that force, when used, “comply with three basic criteria—necessity, proportionality, and imminency.”<sup>9</sup> In this paper, I will not discuss proportionality. I shall assume that a state adheres to this doctrine in any use of force it applies—be it preemptive or otherwise. Similarly, necessity will only be discussed within the broader concept of imminence. This article focuses, rather, on the legality of a specifically preemptive action, the concept of imminence, and its inadequacy to meet contemporary threats.

To conceptualize this issue, it is useful to think of a timeline, with the occurrence of the armed attack at the center and lines extending into the past and the future. Given this framework, the current standard of imminence requires that an anticipatory attack be close to the center of the timeline; that is, near to the time at which the actual armed attack would occur absent intervention.<sup>10</sup> Please keep this conceptualization in mind as we explore the history of the current standard.

*A. History, Evolution and Ambiguity of the Imminent Threat Requirement*

The classic definition of imminence governing the use of preemptive force is found in the famous *Caroline* incident. On December 29, 1837, approximately eighty British soldiers crossed the U.S. border into New York from Canada and seized a small steamer known as the *Caroline*.<sup>11</sup> Canada was a British colony, and British forces believed that rebels attempting to overthrow the Crown were using the vessel to support raids into Canada. Acting in “self-defense,” the British crossed into U.S. territory, stormed the ship, set it on fire, and sent it over Niagara Falls.<sup>12</sup> Protesting the incident, U.S. Secretary of State Daniel Webster argued that in order to legitimately claim self-defense, the British must have had “necessity of self-defense, *instant*, overwhelming, leaving no choice of means, and *no moment of deliberation*.”<sup>13</sup> To those who believe preemptive self-defense is legally justifiable, this classic temporal definition still applies today.<sup>14</sup>

It is important to note, however, that the legality of preemptive force as a legal concept is not codified in the U.N. Charter, even though the principle has been recognized by international legal bodies as customary international law. For example, the *Caroline* standard was relied on by the International Military Tribunal at Nuremberg, by the International Court of Justice in its *Nicaragua* decision, and by the International Court of Justice in its advisory opinion on the *Use of Nuclear Weapons*.<sup>15</sup> Thus, there exists general agreement that preemptive military force is acceptable under customary international law *if the threat is imminent*.<sup>16</sup>

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9. Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 529 (2003).

10. Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L.J. 413, 420 (2002).

11. See Schmitt, *supra* note 9, at 529.

12. *Id.* at 529.

13. *Id.* at 530.

14. See Magenis, *supra* note 10, at 420.

15. See Schmitt, *supra* note 9, at 530.

16. In class comment from Professor Ved P. Nanda, class discussion, International Law,

But this classic standard has not remained static. For example, during the Cold War, a polarized world and the threat of nuclear holocaust led to the suggestion that the traditional concept of immediacy adjust to a more liberal understanding of imminence—one that aligned with mid-twentieth century state practice.<sup>17</sup> In the opinion of some, it was President John F. Kennedy and the Cuban Missile Crisis in 1962 that manifested a shift in the U.S. policy of preemption.<sup>18</sup> The Kennedy Administration's use of a "quarantine" against Cuba was technically a blockade—arguably, a preemptive act of aggression.<sup>19</sup> Yet, in hindsight, the blockade was generally viewed positively by the international community as a "cautious, limited, and carefully calibrated" response.<sup>20</sup> Thus, as early as the 1960s, an evolution in the *Caroline* standard was evident.

The ambiguity of the imminent standard, as reflected in the inconsistent international reactions to acts of preemption, supports a call for further evolution. For example, in 1967, Israel, surrounded by opposition forces, initiated a preemptive first-strike against Egypt.<sup>21</sup> The United Nations did not condemn Israel's preemptive action (it only asked Israel to return the conquered territories), because Israel's use of force was deemed to be sufficiently necessary—that is, the Egyptian threat was considered to be imminent.<sup>22</sup> Yet in 1981, Israel performed preemptive air strikes once again, this time against an Iraqi nuclear plant.<sup>23</sup> Here, Israel's claims of "self-defense" fell on deaf ears. The U.N. Security Council unanimously condemned the attack, because it doubted the imminence of the threat posed by the incomplete reactor.<sup>24</sup> Israel's 1981 attack was viewed as being without legal basis, and the distinction between the 1967 and 1981 attacks was ostensibly reasonable. In contrast, however, consider Operation Desert Fox, a 1998 four-day British and American bombing campaign against chemical and biological weapons facilities in Iraq.<sup>25</sup> The potential use of, or target for, Iraq's weapons was unknown. Only speculation linked the threat to British or American interests—a chemical or biological attack was not imminent, in the traditional sense. Yet, Operation Desert Fox was not condemned by the U.N. Security Council; tacit approval was given for the preemptive use of force in order to counter a threat which was not yet demonstrated to be imminent.<sup>26</sup> Thus, conflicting international reactions to state practice, in seemingly analogous

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University of Denver College of Law (Jan. 2004).

17. See Magenis, *supra* note 10, at 423.

18. See Schmitt, *supra* note 9, at 545.

19. THOMAS FRANCK, *RECOURSE TO FORCE* (2002), excerpted in BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 985 (2003).

20. *Id.*

21. Jeffrey F. Addicott, *Proposal on a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 776 (2003).

22. Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 191 (1984); see also Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 81 (2002).

23. See Schmitt, *supra* note 9, at 546.

24. *Id.*

25. See Magenis, *supra* note 10, at 428.

26. *Id.* at 429-30.

situations, represent ambiguity in the traditional standard used to determine what constitutes an imminent threat.

### *B. Evolution in Weaponry*

On a parallel timeline, the weapons of war have evolved. In modern warfare, a single attack can be instantaneous and devastating. As U.N. Secretary General Kofi Annan stated regarding September 11<sup>th</sup>, 2001, "it is hard to imagine how the tragedy could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions."<sup>27</sup> It has become increasingly clear that terrorists, fueled by the desire for mass casualties and increased media attention, are more and more willing to use devastating technologies.<sup>28</sup>

Proliferation of nuclear materials adds to this concern. The post-Cold War disintegration of the Soviet Union, with the accompanying economic and political tribulations, created a market for WMDs and associated materials.<sup>29</sup> This era similarly gave rise to an increase in rogue states and transnational terrorist groups.<sup>30</sup> Indeed, the potential of such groups to acquire WMDs is greater now than at any other time in history.<sup>31</sup> The risk is profound.

Consider the capabilities of modern weapons. For example, beginning in March of 1988, the Iraqi military, using a combination of artillery and air forces, dumped chemical agents on Kurdish cities in northern Iraq.<sup>32</sup> Experts estimate that a combination of mustard gas, sarin, and VX nerve agents were used.<sup>33</sup> Tens of thousands of Kurds were "permanently blinded, sterilized, disfigured and unnaturally prone to develop cancer."<sup>34</sup> Human Rights Watch estimates that between 50,000 and 100,000 were killed.<sup>35</sup> The long term effects of the attacks may linger for generations. For example, in the Kurdish city of Halabja, abnormal births are more common than normal births.<sup>36</sup>

Alarming, detection of such virulent materials is difficult. Many chemical and biological weapons components are "dual use"—that is, they have legitimate commercial applications in addition to use in weaponry.<sup>37</sup> In effect, this fact decreases the ease of detection while simultaneously increasing the ease of

27. Press Release, United Nations, Secretary-General, Addressing the Assembly on Terrorism (Oct. 1, 2001), U.N. Doc. SG/SM/7977, available at <http://www.un.org/News/Press/docs/2001/sgsm7977.doc.htm>.

28. See Schmitt, *supra* note 2, at 377.

29. Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 491-92 (1999).

30. See NAT'L SEC. COUNCIL, *supra* note 1, at 13.

31. BARRY E. CARTER ET AL., INTERNATIONAL LAW 1125 (2003).

32. Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 158 (2002).

33. *Id.* at 158-59.

34. *Id.* at 158.

35. *Id.* at 158.

36. *Id.*

37. See Carter, *supra* note 31, at 1126.



acquisition. For example, in 1995 a religious sect released a chemical agent in a Tokyo subway in an attack that killed twelve people and injured thousands.<sup>38</sup> More disturbing, the agent (sarin gas) used in the attack was manufactured by the sect itself.<sup>39</sup>

Chemical agents are not the only threat. Scholars have written volumes on the problem of nuclear weapon proliferation and the increasing opportunity for terrorists groups to obtain such a uniquely destructive capability. Currently, at least nine states are known, or thought, to possess nuclear weapons, and more may obtain the capability in the future.<sup>40</sup> The destruction from even a small nuclear device is nothing short of catastrophic. The Director of Harvard's Belfer Center for Science and International Affairs paints the picture of what might have happened on September 11<sup>th</sup>:

Had al-Qaeda attacked the World Trade Center . . . with a vehicle containing a nuclear device . . . [it] could create an explosive force of 10,000 to 20,000 tons of TNT, demolishing an area of about three square miles. Not only the World Trade Center, but all of Wall Street and the financial district, and the lower tip of Manhattan up to Gramercy Park would have disappeared. Hundreds of thousands of people would have died suddenly.<sup>41</sup>

While an actual nuclear weapon is difficult to obtain, access to basic radioactive materials could permit terrorist groups to create a "dirty bomb," in which radioactive "dust" is dispersed through a traditional explosive device.<sup>42</sup> Small and easy to conceal, a dirty bomb causes latent defects and cancers in exposed victims, even those safely out of the reach of the initial explosion. As a result, the attractiveness of a dirty bomb to terrorists is rooted in the bomb's ability to create a massive economic impact on the area surrounding the site of the explosion.<sup>43</sup> As of January 2004, experts unequivocally stated that terrorist groups possess the will to use such a weapon and that they are "doing everything they can" to acquire the materials.<sup>44</sup>

WMDs are not useful without the means to deliver them. However, terrorist organizations now possess delivery technologies previously available only to states. "Sensors, information processing, and precision guidance technologies" in "off-the-shelf" forms may be obtained by terrorists and those sympathetic to them for integration into their weapons systems.<sup>45</sup> Consider the U.S. Defense

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38. *Id.*

39. *Id.*

40. *Id.* at 961.

41. Graham Allison, *Could Worse Be Yet to Come?*, THE ECONOMIST, Nov. 2001, available at [http://www.economist.com/opinion/PrinterFriendly.cfm?Story\\_ID=842483](http://www.economist.com/opinion/PrinterFriendly.cfm?Story_ID=842483).

42. Associated Press, U.S. Terror Expert Warns of Dirty Bomb, February 8, 2004, available at <http://www.macon.com/mld/macon/7907695.htm>.

43. David Rose, *Iraq's Arsenal of Terror*, VANITY FAIR, May 2002, at 124.

44. See Associated Press, *supra* note 42.

45. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 6, available at <http://www.defenselink.mil/pubs/qdr2001.pdf>.

Department's guiding document, Joint Vision (JV) 2020,<sup>46</sup> which cautions against the side-effects of globalization, warning that militarily useful technologies "such as commercial satellites, digital communications [equipment], and the public Internet" are now in the hands of those who previously could not afford them.<sup>47</sup> Moreover, from a defensive perspective, the information revolution and the availability of computers and related equipment make detection of illicit materials (those used to construct such weapons) more difficult.<sup>48</sup> This fact increases the potential for miscalculation on the part of the victim state and makes more likely a surprise attack on the part of terrorist groups.<sup>49</sup> As the *National Security Strategy of the United States* released in 2002 evinces, "America is menaced less by conquering states than we are by failing ones . . . less by fleets and armies than by catastrophic technologies in the hands of the embittered few."<sup>50</sup>

### C. State Practice and the Current Standard of Imminence

The nexus of terrorism and WMDs thus creates a significant threat to the very global security the U.N. Charter intended to preserve. To meet this threat, the international community has, at times, responded preemptively.

For example, consider the U.S. led invasion of Afghanistan. Little, if any, international opposition to this campaign existed.<sup>51</sup> Indeed, most nations believed inherently that the United States had a right to act, and many nations communicated this belief by supporting the effort through the provision of military aid. When Operation Enduring Freedom began in Afghanistan on October 7, 2001, NATO and U.N. allies from around the globe contributed.<sup>52</sup> French, British, Australian, Canadian, and indigenous Afghan forces fought alongside American troops, while other nations, such as Russia and China, supplied logistical or public support.<sup>53</sup> Several nations opened airspace, Qatar and Kuwait allowed the use of airbases to American aircraft, and NATO aircraft patrolled the skies over the United States in order to alleviate the burden on American aircraft performing domestic defense and free them for operations in Afghanistan.<sup>54</sup> For the first time in history, NATO invoked Article 5 of its treaty, which considers an attack against any NATO nation an attack against them all.<sup>55</sup> The U.N. Security Council passed Resolution 1368 strongly condemning the terrorist attack, expressing its readiness to take "all necessary steps . . . to combat all forms of terrorism" in response, and affirming the "inherent right of individual or collective self-defense" pursuant to Article 51.<sup>56</sup> A collective war against the Taliban and Al-Qaeda had begun; and, in

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46. JOINT CHIEFS OF STAFF, JOINT VISION 2020 (2000), at 5, available at <http://www.dtic.mil/jointvision/jvpub2.htm>.

47. *Id.*

48. See Carter, *supra* note 31, at 1126.

49. *Id.*

50. See NAT'L SEC. COUNCIL, *supra* note 1, at 1.

51. See Carter, *supra* note 31 at 80.

52. *Id.*

53. *Id.* at 73.

54. *Id.*

55. *Id.* at 73.

56. U.N. Security Council Resolution 1368, available at

the name of self-defense, the international community was supportive.

But was Operation Enduring Freedom really about self-defense? Invading Afghanistan was not going to have any ameliorative or preclusive effects on the destruction caused on September 11, 2001.<sup>57</sup> The damage in New York, Washington, D.C., and Pennsylvania was already done. No amount of success by the international community in Afghanistan would lessen or assuage the harm.

Perhaps the invasion of Afghanistan was actually two-pronged: it was both an act of *reprisal* and an act of *preemption*—reprisal for acts which had already occurred, and preemption for acts to come.<sup>58</sup> Reprisal and preemption go hand in hand—indeed, they are flip sides of the same coin. Consider the permissibility of reprisals under customary international law according to the *Nauliaa* case decided by the special arbitration Tribunal established under the Treaty of Versailles.<sup>59</sup> The Tribunal stated, “[reprisals] seek to impose on the offending State reparations for the offense, the return to legality and *the avoidance of new offenses*.”<sup>60</sup> Moreover, in the famous *Nicaragua* case in 1986, the International Court of Justice “refrained from ruling that all armed reprisals are unlawful,” thereby implicitly approving of reprisals in certain instances.<sup>61</sup>

Thus, the world’s action in Afghanistan was, in part, preemptive. In addition to punishing the Taliban regime for its support of terrorism, the invasion was intended to prevent the regime and Al-Qaeda from endangering the citizens of the world in the future. Consider the impact of Operation Enduring Freedom. Far from the typical retaliatory “tit for tat” military strike, Operation Enduring Freedom was expansive—international forces invaded a foreign nation, removed its government, replaced it with one more friendly, and did this all with the approval of the “international community” and the United Nations. The world acted in retaliation for what had already been done *and* to preempt future acts of terrorism.

But why do some members of the international community condone one act of preemption (invasion of Afghanistan) and condemn others (the 2003 invasion of Iraq, arguably)? Political motivations aside, states condone preemption when the necessity of the action has been demonstrated to their satisfaction. In Afghanistan, the imminency of the threat posed by the Taliban and Al-Qaeda was incontrovertible (if not irrelevant), because the attacks of September 11<sup>th</sup> had already occurred. A similar campaign on September 10<sup>th</sup>, 2001 would likely not have received the same support. Thus, the real issue is not traditional (temporal) imminence at all, but rather necessity; *imminence being merely a measure of*

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<http://www.un.org/Docs/scres/2001/sc2001.htm>.

57. See Posteraro, *supra* note 32, at 202.

58. See generally *id.*

59. Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil des Cours 455, 458-460 (1952, vol. II), excerpted in 12 Whiteman, Digest of International Law 148-49 (1963).

60. *Id.* at 149 (emphasis added).

61. YORAM DINSTEIN, WAR, AGRESSION AND SELF-DEFENSE (3<sup>rd</sup> ed. 2001), excerpted in BARRY E. CARTER ET AL., INTERNATIONAL LAW 997 (2003).

*necessity*. If this is true, if necessity can be demonstrated before the attack, then a nation should not be required to wait to be attacked before it can defend itself, especially if the first blow is potentially devastating.

## II. ANALYSIS

### A. *The Sailors' Dilemma*

Professor Paul H. Robinson aptly illustrates the broad problems inherent in a temporal interpretation of imminence in his *Sailor's Dilemma*. Speaking primarily of the criminal context, he presents an illustrative conceptual hypothetical:

A slow leak is found by a crew of a seagoing vessel shortly after the ship leaves port for a long journey to a remote part of the ocean. The ship's Captain refuses to heed to the crew's pleadings to cancel the journey. The slow leak will take two days to sink the ship; thus, it poses no *immediate* risk. However, absent intervention, the leak poses a definite and certain *future* risk of sinking the ship. The dilemma: may the sailors mutiny to gain control of the ship now, while they are still close to shore and the chances of survival are high, or must the crew wait until the sinking is temporally imminent (immediate), even if waiting means they will be farther away from the shore and will have a decreased chance of survival?<sup>62</sup>

I contend that most rational persons would agree that, absent any special duty to obey the captain or go down with the ship, the crew should mutiny. After all, the Captain's actions are suicidal, both for himself and those under his command. This seems reasonable, since the sailors' right to self-preservation *should* outweigh the lack of immediacy. We must weigh the right to self-preservation against any margin of error in the certainty of the ship sinking. Therefore, if the future harm can be known with reasonable certainty, and waiting until that harm is immediate would increase the harm itself, one should be justified in acting early to prevent such harm. Building on Professor Robinson's model, I contend that terrorist tactics and technological advancements make a temporal standard particularly problematic in our age.

### B. *The "Time Gap" Problem*

Why are we so concerned with the temporal element of imminence? Because, we want states to exhaust all viable non-forceful measures before resorting to the use of force. Theoretically speaking, the current standard legitimizes the use of preemptive military force only when the state being attacked has no time for anything other than the use of force.

Such a definition, however, assumes a "time gap." That is, *the difference in time between the point at which a state becomes aware of a forthcoming attack and the point at which the impact of that attack is felt*. Under the current standard, a state may use preemptive force only when this "time gap" is sufficiently small. Sufficiently small traditionally meaning the "visible mobilization of armies"<sup>63</sup> referred to in the introduction.

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62. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §124(f)(1) (1984).

63. See NAT'L SEC. COUNCIL, *supra* note 1, at 15.

But the traditional standard of imminence assumes that this "time gap" is knowable. *What if, in the age of terrorism, the "time gap" is not adequately knowable?* We know that terrorists rely on surprise and deception; the attacks of September 11<sup>th</sup> demonstrated this reality.<sup>64</sup> Terrorists thrive on asymmetric warfare,<sup>65</sup> that is, striking the enemy using weapons, and in a manner, they least expect. Thus, one reason for the inadequacy of the current temporal interpretation of imminence is that it assumes the victim-state can discern the precise point in time at which *waiting to act* becomes *waiting too long*. Additionally, the proliferation of WMDs, and the willingness of terrorists to use them, may increase the *cost of waiting* to an unacceptable level. In weighing the right to self-preservation against the margin of error in the certainty of the attack, the extent of the damage, if an attack occurs, must also be considered.

The temporal standard of imminence is rooted in the year 1837, in an age of muskets and colonial militias. The "time gap" is less knowable now, or at least exponentially smaller, than it was in 1837. Further, the consequences of an attack are exponentially greater. Thus, a new standard is needed—a new standard that accounts for the diminished "time gap" resulting from terrorism and modern weaponry, but does not sacrifice the principle of necessity.

### C. Current Scholarship

The inadequacy of the current standard of imminence is acknowledged by scholars. For example, New York University's Thomas M. Franck asserts that technological transformation of weapons and delivery systems (specifically rocketry), "make obsolete" parts of the U.N. Charter's Article 51 provision.<sup>66</sup> He argues that new technology has blurred the line between what is and what is not an appropriate point at which to act preemptively. Consequently, requiring a state to await the initial attack before instituting countermeasures creates a *reductio ad absurdum*.<sup>67</sup> Inevitably, according to Franck, rational states respond by claiming a right to "anticipatory self-defense," a right, he contends, which is outside the literal interpretation of the Charter.<sup>68</sup> Moreover, the Charter envisioned a Security Council with a strong military police force capable of quelling disputes at its disposal; yet this never materialized.<sup>69</sup> Thus, in the absence of a powerful Security Council enforcer,<sup>70</sup> states behave rationally, in the interest of self-preservation, and exceed the delineations of the Charter. As Franck concludes, "common sense is often the best guide to international legal norms."<sup>71</sup>

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64. See Schmitt, *supra* note 2, at 383.

65. Asymmetric warfare is a military term referring to the leveraging of inferior tactical or operational ability against a stronger opponent's vulnerabilities with the aim of achieving a disproportionate effect.

66. THOMAS M. FRANCK, *RECOURSE TO FORCE* (2002), excerpted in BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 980 (2003).

67. *Id.*

68. *Id.*

69. *Id.* at 979.

70. *Id.* at 980.

71. THOMAS FRANCK, *RECOURSE TO FORCE* 98 (Cambridge University Press) (2002).

Professor Michael N. Schmitt also agrees that the current standard is outmoded in a world of WMDs, terrorists, and rogue States.<sup>72</sup> He does not blame the Charter's framers, however, adding that they could not have foreseen the capabilities of WMDs and the willingness of terrorists to use exceptionally violent means to influence governments.<sup>73</sup> Schmitt does proffer a potential solution. He recommends that states be allowed to take (preemptive) defensive actions only "during the last viable window of opportunity;" that is, the point, after which a "viable defense [would be] ineffectual."<sup>74</sup> Of course, the tricky part is the measurement of such a point. This is addressed in the proposed definition of imminence in Part III.

The inadequacies of the current standard, and resulting state recalcitrance, were seen before the events of September 11<sup>th</sup>. Stanford University's Abraham Sofaer wrote in 1989 of his concern that "respect for traditional doctrine is undermined when States are expected to accept too high a degree of risk of substantial injury before defending themselves."<sup>75</sup> On the other hand, Professor Mary Ellen O'Connell argues that so long as violation of international law is "treated as a violation, and not a movement toward a new customary rule, then the old law remains viable."<sup>76</sup> How can we reconcile these views?

If a new and different "twenty-first century threat environment"<sup>77</sup> truly exists, then legal changes may be necessary. If so, other fields of law, facing similar pressures to evolve, might provide useful insight.

#### *D. Imminence in Other Contexts*

In cases of battered women who kill in self-defense, criminal defense attorneys are currently battling for a practical definition of imminence.<sup>78</sup> Several cases exist in which battered women have killed their abusers at a non-confrontational moment;<sup>79</sup> that is, at a moment in which the threat was not temporally imminent. Here, as in the national defense context, the requirement for imminence has proven problematic for claims of self-defense.<sup>80</sup>

The two concepts of self-defense (self-defense claimed by battered women and self-defense claimed by states) are undoubtedly highly distinguishable. Yet, they are similar insofar as both fields wrestle with the apparent inadequacy of a traditional legal theory that fails to provide justification for an act of self-defense that seems intuitively and morally acceptable.<sup>81</sup>

72. See generally Schmitt, *supra* note 2.

73. See Posteraro, *supra* note 32, at 185.

74. See Schmitt, *supra* note 2, at 394.

75. Abraham D. Sofaer, *Terrorism, the Law, and National Defense* 126 Mil. L. Rev. 89, 97-98 (1989). Nothing is highlighted

76. MARY ELLEN O'CONNELL, *THE MYTH OF PREEMPTIVE SELF-DEFENSE* 15 (2002).

77. See Schmitt, *supra* note 9, at 513.

78. Jeffrey B. Murdoch, *Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome* 20 N. ILL. U.L. REV. 191 (2000).

79. *Id.*

80. *Id.*

81. *Id.* at 193.

In the case of a battered woman, we are uncomfortable with the law's inability to handle situations where a victim kills her batterer, seemingly justifiably, but at a non-confrontational time and place.<sup>82</sup> In the United States, a battered woman's self-defense claim will generally fail if the woman kills during a lull in the violence, such as while the aggressor's back is turned or when the woman has the opportunity to escape.<sup>83</sup> German civil law however applies a more progressive standard of imminence.<sup>84</sup> For example, in 1979, the German High Court (Bundersgerichtshof) held that an imminent danger *can endure prolonged periods of time*.<sup>85</sup> Similarly, in another case involving a false imprisonment claim, the German High Court vacated a lower court's judgment against the defendants by finding that "the perceived danger need not be immediate . . . it merely needs to be *ongoing, intermittent, or cyclical in nature*."<sup>86</sup>

The German standard should not be shocking; for if imminence can endure long periods of time, and if imminence can be found in the ongoing, intermittent or cyclical nature of the threat, then one can determine with adequate certainty that the threat still exists. Thus, the threat may still be imminent, even in the absence of an immediate attack. Could a potential model for the use of force in international disputes lie in the efforts to liberalize the "imminence" requirement for battered women acting in self-defense?<sup>87</sup> I believe it could—if the international community concludes, as the Germans did in the above cases, that the true importance of imminence is as a *yardstick* for necessity, not a *stopwatch*.

#### *E. What We Really Seek to Measure: Necessity*

In the national defense context, an analogous situation to the battered woman killing during a lull in the violence occurs when a state acts preemptively to neutralize a threat, but does so weeks (or even months) before the aggressor's attack would have taken place. This analogy only fits if the threat is on-going, intermittent, and cyclical. Yet, as I will demonstrate, such is the case with terrorism. Striking during a lull in the violence seems intuitively justifiable in both contexts; but they are, at once, illegal under the current interpretation of imminence. I believe this paradox is rooted in confusion over the relationship between "imminence" and "necessity."

The requirement for imminence is meant to assure the necessity of an act. That is, we want nations (and battered women) to exhaust other possibilities before

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82. *Id.*

83. See generally Danielle R. Dubin, *A Woman's Cry for Help: Why the United States Should Apply Germany's Model fo Self-Defense for the Battered Woman* 2 ILSA J. INT'L & COMP. L. 235, 240 (1995).

84. *Id.* at 257.

85. *Id.* at 261. See also Karl Lackner, STRAFGESETZBUCH MIT ERLAUTERUNGEN §34, at 214 (Beck 18<sup>th</sup> ed. 1989) (emphasis added).

86. See Dubin, *supra* note 83, at 263 (emphasis added).

87. See generally George P. Fletcher, *How Would the Bush Administration's Claims of Self-Defense, Used as Justifications for War with Iraq, Fare Under Domestic Rules of Self-Defense?* (Sept. 10, 2002), available at [http://writ.news.findlaw.com/commentary/20020910\\_fletcher.html](http://writ.news.findlaw.com/commentary/20020910_fletcher.html).

resorting to “self-help.”<sup>88</sup> For example, in the context of battered women, Professor Richard Rosen argues that imminence “has no significance independent of the notion of necessity.” Rather, he views imminence as a “translator” for necessity.<sup>89</sup> He contends that imminence is but one component of necessity, and, when the two conflict, imminence should yield to necessity, since the “purpose of making an inquiry regarding imminence is to determine if an action was necessary.”<sup>90</sup>

It makes sense to allow separation of the two concepts when required. One can think of cases when “self-help” is necessary, but the threat is not temporally imminent (e.g., the Sailors’ Dilemma). Similarly, situations exist where the threat may be imminent (i.e., near in time), but reasonable alternative courses of action still exist that would make the use of “self-help” inappropriate, despite the nearness of the threat.

In the battered women context, the violence usually occurs in a cycle: a heating-up period, an act of violence, followed by a respite, then a repetition.<sup>91</sup> In other words a temporary cessation in the violence does not mean the violence is over, only that a lull or break is taking place. Thus, if the temporal element is removed, what was once viewed as a cessation of violence from a temporal perspective can now be viewed as a stage in an on-going cycle of violence. Further, the respite would have no effect on the *likelihood* of a future attack, only on the *timing* of such an attack.

Similarly, in the national defense context, terrorists groups attack using intermittent, cyclical force. Consider Al-Qaeda. In addition to the more recent September 11<sup>th</sup>, Baja and Madrid attacks, the group was involved in the 1993 World Trade Center bombing, attacks on U.S. soldiers in Somalia and Yemen in 1993, the 1998 bombings of two U.S. Embassies, the attack on the U.S.S. Cole, a failed millennium celebration attack in Jordan, and failed assassination attempts of President Clinton and the Pope.<sup>92</sup> Such a pattern appears to be a one single campaign of intermittent violence. Like wife batterers, terrorists harm in a cyclical fashion, with “lulls” occurring between attacks. The time and place of the next attack is unknown, however the certainty of the attack, if left unchecked, may be reasonably knowable.

Moreover, the terrorists’ intentions are often expressly communicated. Consider Al-Qaeda’s public communications. In 1998, Osama bin Laden announced the formation of the World Islamic Front for Jihad against the Jews and the Crusaders.<sup>93</sup> The inaugural announcement declared “to kill and fight Americans and their allies, whether civilian or military, is an obligation for every

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88. See Schmitt, *supra* 9, at 530.

89. Richard A. Rosen, *On Self-Defense, Imminence, And Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993).

90. See Murdoch, *supra* note 78, at 193.

91. See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

92. See Schmitt, *supra* 9, at 535-36.

93. PETER L. BERGEN, JR., *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* 98 (2002).



Muslim who is able to do so in every country . . . abide by Allah's order by killing Americans and stealing their money anywhere, anytime, and whenever possible."<sup>94</sup> Taking the organization at its word, Al-Qaeda's intentions for an on-going terror campaign could hardly be clearer.

Thus, the problem faced by states who know they are on a terrorist's target list is the same problem faced by battered women who know their abuser will strike again. Should women or nations (or the ship's crew) be permitted *under law* to behave rationally and save themselves while they have the opportunity? Or, should they, as the current law would require, wait until the danger is near in time, but the chance of survival is substantially decreased? The traditional understanding of imminence creates this dilemma. In the national security context, the mire thickens with the possibility of terrorists using WMDs, since the terrorist's first strike could be debilitating. This is much like a battered woman, long abused by the fist or rod, who knows her aggressor has just acquired a gun, and possesses the will and knowledge to use it. A change in tactics and technology by the aggressor necessitates a change in how imminence should be viewed. As one writer put it, "when a theory yields results that seem counter-intuitive, then the theory itself must be examined to determine if it is the theory or our intuition that is flawed."<sup>95</sup> Following the German standard for cyclical violence, perhaps a liberalization of the imminent threat requirement for use of force is appropriate. But, what might such a non-temporal standard look like? And, could it be applied to aggressor states, as well as transnational terrorist organizations?

### III. AN ALTERNATIVE: A NON-TEMPORAL STANDARD OF IMMINENCE

Having established that imminence is merely a component of necessity, and proof of necessity is the true aim of the self-defense doctrine, an alternative non-temporal standard must effectively account for the primary components of necessity: certainty, severity, and the unavailability of other viable options.

As such, perhaps a new definition of "imminent danger" would be more appropriate: *Imminent danger is that which will occur with certainty, as determined by the on-going, intermittent, or cyclical nature of the danger and manifested through previous acts or statements of intent. Force may be used when the value of the damage likely to be prevented is greater than the value of the damage likely to be caused, and viable non-forceful options have been exhausted, to a "beyond a reasonable doubt" standard.*

This example is merely a starting point for a non-temporal standard. While it is certainly imperfect, it represents the main components that should be included in such a standard, namely: a high degree of certainty, the weighing of the impact of the preemptive strike on the recipient state against the impact of the strike it is intended to preclude, the exhaustion of non-forceful alternatives, and a standard to be applied.

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94. *Id.*

95. See Murdoch, *supra* note 78, at 191.

Since it may be easier to establish the cyclical, on-going nature of attacks from terrorist organizations than those of states, such a standard may only be applicable to terrorist entities. If, however, state belligerence creates a similar identifiable pattern, which satisfies the certainty requirement, it could, potentially, be applicable to states as well. In both cases, the burden of proof would be on the nation using preemptive military force. Moreover, the requirement for weighing the damage caused by a preemptive attack against that which would occur absent preemptive action is especially appropriate for terrorists who are planning the use of WMDs. In the case of a WMD attack, the damage on the victim state would be substantial. Therefore, if the potential victim-state uses force preemptively, even firm military force will be more than outweighed by the damage avoided. As a result, the new standard of imminence would permit greater latitude on the part of the state acting preemptively. However, it does so only in one element of the new standard; namely, the balancing of costs element. Thus, the possession of WMDs by one's opposition does not necessarily legitimize preemptive force; it merely tips the scales of one of the elements used to determine necessity. In so doing, the standard correctly weights the existence of WMDs by one party, without giving the other party a blank check to use force. The new standard, therefore, brings an attribute of flexibility which is absent from the traditional temporal standard of imminence.

#### *A. Potential Problems with a Non-Temporal Standard*

The first potential problem with a non-temporal standard is abuse. States may use this standard as a pretext for aggression, or gradually encroach beyond the standard's intended limits. This is particularly true with regard to the several "hot spots" around the world: China and Taiwan, N. Korea, India and Pakistan, Israel and Palestine, etc.

The risk of abuse, however, should not be cause to resist change. After all, the risk of abuse is present with any standard. For example, Nazi defendants at Nuremberg alleged they were acting in "self-defense;" they claimed that Germany attacked the Soviet Union, Norway, and Denmark for defensive reasons.<sup>96</sup> This claim was obviously unsuccessful, demonstrating the importance of effective checks and balances to preclude specious justifications. However, because it is less ambiguous, the components of a new, non-temporal standard of imminence actually make it less susceptible to abuse than the traditional temporal standard. Clarity, regardless of whether that clarity raises or lowers the bar for the use of force, is better than ambiguity for purposes of enforcement. The more nebulous a standard, the more potential for abuse—and the traditional standard is exceedingly nebulous. A new, non-temporal standard, consisting of the components mentioned above would be more precise than the existing standard, thus less subject to exploitation.

The second potential risk is that terrorist groups may attempt to preclude the forthcoming preemption; they may believe that they must use their WMDs or lose

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96. Michael J. Glennon, *Preemptive Terrorism: The Case for Anticipatory Self-Defense*, THE WKLY. STANDARD, Jan. 2002, at 2.

them. This argument rests on the assumption that a more definite standard for preemptive military force would actually give the terrorist notice as to when states may preemptively attack, thereby encouraging the terrorists to use weapons they might not have used otherwise.<sup>97</sup> However, one may assume that most terrorist groups do not yet have WMDs and/or delivery methods in sufficient configurations to use them (after all, they have demonstrated the will to cause catastrophic loss of life, but we have not yet seen substantial usage of WMDs). If this is the case, then providing a clear legal framework to govern the use of preemptive military force, and doing so urgently, is even more important. A non-temporal framework would provide a legal standard by which states could preemptively strike such terrorist groups now, before the most dangerous weapons become operable.

As Brent Scowcroft and Henry Kissinger cautioned, the use of preemptive force in an unstable world is highly complicated.<sup>98</sup> Thus, other, reasonable objections not mentioned here certainly merit consideration. Issues such as: Who determines the likelihood of a future terrorist attack, even one based on the cyclical or intermittent nature of past behavior? If the behavior is cyclical, how many cycles must occur before a cyclical "pattern" is established? Upon whose intelligence will such decisions be made, and how accurate will they be? Although more study is certainly needed, many of these are technical issues, pertinent only after the implementation of the new standard. After all, if one is in desperate need of lifesaving surgery, it would be foolish to die on the operating table because one questioned the physician's choice of a particular scalpel. From a legal standpoint, a non-temporal standard, which is discernable, measurable, and, most importantly, adhered to, is better than the traditional temporal standard of imminence.

### *B. Potential Benefits of a Non-Temporal Standard*

A primary benefit to this new interpretation is that the information required to satisfy the elements of this standard would simultaneously also satisfy the customary international law criteria of necessity and proportionality. For example, changing the understanding of imminence into one that does not emphasize a temporal component, but rather requires adequate evidence before striking preemptively, implicitly satisfies the necessity requirement. Furthermore, the requirement to weigh the damage done against the damage being prevented, by its nature, requires consideration of the proportionately criterion.

Second, a non-temporal standard requiring the "weighing of damages" discussed above would strengthen the legal right of smaller states. If the level of potential damage is considered in relation to a states ability to withstand that damage, and smaller states can withstand less damage than can stronger states, then smaller states are likely to benefit most from a non-temporal standard. An effects-based standard, rather than a temporal one, gives a smaller state more latitude to act preemptively to protect itself from an incapacitating blow—a risk that would be less likely to justify aggression from a stronger state. In this sense, a non-temporal standard is more equitable. The current standard does not account

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97. See Schmitt, *supra* note 9, at 513.

98. *Id.* at 514.

for this distinction.<sup>99</sup>

Most importantly, an understandable and rational standard will increase state adherence to the law. International law fails when it seeks to impose rules that are out-of-sync with the way states actually behave.<sup>100</sup> The laws governing the use of force are particularly susceptible to abuse. For example, in the years since the U.N. Charter's formation in 1945, two-thirds of the members of the United Nations, 126 states, "fought 291 interstate conflicts in which over 22 million people were killed."<sup>101</sup> Moreover, the twentieth century ended with 19 nations "flagrantly violating" the United Nations' Charter in NATO's Kosovo campaign.<sup>102</sup> With regard to the use of force, the International Community often imposes obligations reflective of positive law, but "out-of-sync" with normative behavior. Thus, the problem lies in failing to distinguish between *lex lata* and *lex ferata*; that is, the law as it actually is, and the law as we wish it to be.

A workable standard, one in touch with actual state behavior, would make control over the use of force more successful in the twenty-first century than it was in the twentieth. If the international legal community applies a workable standard, one to which states actually adhere, then state behavior becomes more predictable. Once behavior is predictable, then the process of gradually shifting the law from where it currently is to where we would like it to be can be realized. Without adherence, there is no law; and no reduction of the ugly consequences of war—the ultimate aim of the United Nations' Charter. International jurists want adherence to a standard of law. The first step in this direction is to change the current standard of imminence.

#### IV. CONCLUSION AND RECOMMENDATION

Since September 11<sup>th</sup>, and the resulting "War on Terror," the concept of imminence has received renewed attention from world leaders, international lawyers, governments, and scholars.

A change is needed to adjust to the emergence of terrorism. As previously demonstrated, many scholars recognize that the current standard is flawed. A temporal standard, rooted in the nineteenth century, is simply not sufficient to account for the twenty-first century warfare, technologies, and terrorist tactics. A standard forged when the aggressor held a musket is not applicable when an aggressor holds a "dirty bomb;" the consequences are far greater.

Historically, major acts of warfare have preceded changes in the international legal system: World War I ushered in the League of Nations and the Kellogg-Briand Pact; the United Nations flowed from WWII.<sup>103</sup> The attacks on September 11, 2001 are of sufficient magnitude to precipitate another, albeit more subtle, change. On September 11<sup>th</sup>, terrorists killed nationals of 83 countries, including

99. See *id.* at 534.

100. See generally *id.*

101. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POLY. 539, 540 (2002).

102. *Id.*

103. BARRY E. CARTER ET AL., INTERNATIONAL LAW 962 (2003).

many Muslims and more Americans than on any other day in U.S. history since the civil war.<sup>104</sup> The attack evinced a profound change in warfare. A commensurate change in the legal standard should follow.

This change has already begun. Custom has permitted the use of preemptive force in spite of a lack of appreciable codification. *Opinio juris sive necessitates*, the expectation that a particular form of conduct will be repeated because it occurred in the past under similar circumstances, forms the foundation for customary international law.<sup>105</sup> The formation of such a custom, even in the case of non-temporal imminence, was evinced by the broad international support of (and participation in) Operation Enduring Freedom—a campaign that was, as demonstrated, *preemptive* in nature.

States will behave rationally. They will continue to apply preemptive force if they see it as necessary for their own survival. The United States has made public its rejection of the outdated temporal standard. President Bush, in his 2002 State of the Union Address, resolutely stated, "I will not wait on events . . . I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."<sup>106</sup> The new policy was repeated unequivocally in the 2004 State of the Union: "America will never seek a permission slip to defend the security of our country."<sup>107</sup>

Secretary-General of the United Nations, Kofi A. Annan, recently appointed a sixteen-member High-Level Panel of eminent persons with the following charter: "examin[e] the major threats and challenges the world faces in the broad field of peace and security, including economic and social issues insofar as they relate to peace and security, and mak[e] recommendations for the elements of a collective response."<sup>108</sup> It is my hope that the High-Level Panel will reconsider the existing legal standard for the use of preemptive military force. International law is important, and the true strength of the United Nations' Charter lies in the instrument's "capacity for adaptation through the interpretive practice of its organs and members."<sup>109</sup> Professor Mary Ellen O'Connell asserts that states should argue for new rules instead of ignoring the existing ones.<sup>110</sup> She is certainly correct: the United States, and all nations threatened by terrorism, should argue for a change in

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104. *Id.* at 63.

105. In class comment from Professor Ved P. Nanda, class discussion, International Law, University of Denver College of Law (Mar. 2004).

106. President George W. Bush, 2002 State of the Union Address (Jan. 29, 2002).

107. *Id.*

108. Press Release, Secretary-General of the United Nations, Secretary-General names High-Level Panel (Apr. 11, 2003), at <http://www.un.org/News/Press/docs/2003/sga857.doc.htm>.

109. THOMAS M. FRANCK, RECOURSE TO FORCE (2002), *excerpted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW 981 (2003).

110. MARY ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 15 (2002).

the rules—beginning with the current standard of imminence. A new, non-temporal standard of imminence would improve the law by allowing states to protect themselves against terrorist attacks, while also providing the accountability and transparency desired by the international community.

# PREEMPTIVE SELF-DEFENSE IN AN AGE OF WEAPONS OF MASS DESTRUCTION: OPERATION IRAQI FREEDOM

CHARLES PIERSON\*

*Facing clear evidence of peril, we cannot wait for the final proof, the smoking gun that could come in the form of a mushroom cloud.*

President George W. Bush<sup>1</sup>

## I. THE FIGHT OVER PREEMPTION

With the promulgation of the Bush Doctrine, President George W. Bush announced a U.S. policy of preemptive action against terrorist states.<sup>2</sup> President Bush had previously identified Iraq, together with Iran and North Korea, as part of an “axis of evil” bent on the acquisition of weapons of mass destruction (WMD).<sup>3</sup> The Bush Administration asserted that the danger of WMD in the hands of Saddam Hussein was so great that it justified a preemptive attack on Iraq before these weapons could be developed and used.<sup>4</sup>

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\* J.D., Duquesne University School of Law, 1998. The author extends warm thanks to the following who read and offered invaluable comments on drafts of this article: Samuel J. Astorino, Ph.D., J.D., Professor of Law, Duquesne University School of Law; Michla Pomerance, Emilio Von Hofmannstahl Professor of International Law, The Hebrew University of Jerusalem. The author assumes sole responsibility for the contents. This article is dedicated to the memory of my father, Charles Edward Pierson, Sr. (1917-1994).

1. See Transcript: *Confronting Iraq 'Is Crucial to Winning War on Terror,'* N.Y. TIMES, Oct. 8, 2002, at A12 (transcript of President Bush's October 7, 2002 speech in Cincinnati, Ohio) [hereinafter Cincinnati Speech].

2. In a commencement address at the U.S. Military Academy at West Point on June 1, 2002, President Bush declared: “We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.” See Commencement Address at the United States Military Academy in West Point, New York, 38 WEEKLY COMP. PRES. DOC. 944 (June 10, 2002), also available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (June 1, 2002) (transcript) (visited Oct. 4, 2004); David E. Sanger, *Bush to Outline Doctrine of Striking Foes First*, N.Y. TIMES, Sept. 20, 2002, at A1. The Bush Doctrine, of which pre-emptive strikes are only one part, has received its fullest exposition in the National Security Strategy released on September 17, 2002. See *National Security Strategy of the United States of America* (September 17, 2002) [hereinafter *National Security Strategy*], available at <http://www.whitehouse.gov/nsc/nss.pdf> (visited Oct. 4, 2004).

3. Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133 (Feb. 4, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (visited Oct. 4, 2004) [hereinafter “President's 2002 State of the Union Address”].

4. See David E. Sanger, *Bush Sees 'Urgent Duty' to Pre-empt Attack by Iraq*, N.Y. TIMES, Oct. 8, 2002, at A1; Judy Keen, *Bush: U.S. Can't Await 'Final Proof,'* USA TODAY, Oct. 8, 2002, at 1A;

The Administration made the case against Iraq in speeches by Vice President Dick Cheney on August 26, 2002,<sup>5</sup> by Secretary of State Colin Powell before the U.N. Security Council on February 5, 2003<sup>6</sup>, and in addresses by President Bush before the General Assembly of the United Nations on September 12, 2002<sup>7</sup> and on U.S. television on October 7, 2002.<sup>8</sup> Detailed charges against Iraq also are set out in the joint resolution for the use of military force drafted by the Administration and adopted by Congress.<sup>9</sup> Preemption supplants the containment strategy the United States had pursued against Iraq in the decade following the 1991 Persian Gulf War.<sup>10</sup>

“Preemption,” “preemptive self-defense,” and “anticipatory self-defense” traditionally refer to a state’s right to strike first in self-defense when faced with

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Elisabeth Bumiller and James Dao, *Cheney Says Peril of a Nuclear Iraq Justifies Attack*, N.Y. TIMES, Aug. 27, 2002, at A1; Elisabeth Bumiller, *U.S. Must Act First to Battle Terror, Bush Tells Cadets*, N.Y. TIMES (INTERNATIONAL), June 2, 2002, §1, at 1.

Contrary to popular misconception, Bush policy is not a radical break with the past. Regime change in Iraq has been the policy of the United States since the closing days of the Clinton Administration. See Iraq Liberation Act of 1998, 22 U.S.C.S. §2151(3) (1998); The President’s Radio Address, William J. Clinton, 34 WEEKLY COMP. PRES. DOC. 2514, (Dec. 28, 1998); BOB WOODWARD, PLAN OF ATTACK 10 (2004); KENNETH M. POLLACK, THE THREATENING STORM: THE CASE FOR INVADING IRAQ 91, 94 (2002); DILIP HIRO, IRAQ: IN THE EYE OF THE STORM 145 (2002).

5. In *Cheney’s Words: The Administration Case for Removing Saddam Hussein*, N.Y. TIMES, Aug. 27, 2002, at A8 (excerpts from Vice President Cheney’s August 26, 2002 speech before the Nashville convention of the Veterans of Foreign Wars) [hereinafter Nashville Speech].

6. *The Case Against Iraq*, N.Y. TIMES, Feb. 6, 2003, at A38.

7. In *Bush’s Words: On Iraq, U.N. Must Face Up to Its Founding Purpose*, N.Y. TIMES, Sept. 13, 2002, at A10 (transcript of President Bush’s September 12, 2002 address before the United Nations General Assembly) [hereinafter UN Speech].

8. Cincinnati Speech, *supra* note 1, at A12.

9. See Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002), 2002 U.S.C.C.A.N. 1498 [hereinafter Iraq Resolution]. The resolution describes Iraq’s breach of Security Council resolutions, including resolutions relating to disarmament and human rights violations against the Iraqi people and the Iraqi Kurds; the 1993 assassination plot against former President Bush; Iraq’s possession, development, and attempts to acquire weapons of mass destruction; Iraq’s support for and harboring of terrorist groups, including Al-Qaeda; and the danger that Iraq would transfer weapons of mass destruction to such terrorist groups. *Id.* The last items link war on Iraq to the war on terror and the September 11, 2001 terrorist attacks on the United States.

Charges against Iraq also appear in Security Council Resolution 1441. See S.C. Res. 1441, U.N. SCOR., 4644<sup>th</sup> Sess., U.N. Doc. S/RES/1441 (2002). All of the Security Council resolutions cited in this article are available on the web site of the United Nations at <http://www.un.org/documents/scres>.

10. Containment of Saddam rested on the five pillars of U.N. weapons inspections; U.S./U.N. sanctions on Iraq in the form of import/export controls; the imposition of “no-fly” zones over the north and south of Iraq; continuing sporadic limited military action, chiefly in the form of punitive air strikes; and a continued U.S. troop presence in the Persian Gulf region. See POLLACK, *supra* note 4, at x, xv-xxii. Vice President Dick Cheney argued that Saddam is no longer “containable” in a speech before the Veterans of Foreign Wars in Nashville on August 26, 2002. See Nashville Speech, *supra* note 5, at A8. Mr. Cheney said: “[C]ontainment is not possible when dictators obtain weapons of mass destruction and are prepared to share them with terrorists, who intend to inflict catastrophic casualties on the United States.” *Id.* According to Mr. Cheney, U.N. weapons inspections were insufficient to prevent Saddam’s obtaining weapons of mass destruction. *Id.* Accord Robert J. Lieber, *The Folly of Containment*, COMMENT., Apr. 1, 2003, at 15.



imminent attack—to beat an adversary to the punch.<sup>11</sup> Preemption remains relevant in the aftermath of Operation Iraqi Freedom as the Bush Administration contemplates preemptive military action to disarm Iran, Syria, North Korea, and Cuba. This article examines whether anticipatory self defense is permitted under international law and, if so, whether the invasion of Iraq was a legitimate exercise of anticipatory self-defense.

## II. DID IRAQ'S MATERIAL BREACH OF THE PERSIAN GULF WAR CEASE-FIRE PROVIDE AUTHORIZATION FOR WAR?

Before discussing the legality of anticipatory self-defense, this section looks briefly at the Administration's argument that Operation Iraqi Freedom was legal due to Iraq's material breach of the 1991 Persian Gulf War cease-fire agreement.<sup>12</sup> Iraq's invasion of Kuwait on August 2, 1990 triggered the right of individual and

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11. The three terms are used synonymously in this article. They are distinguished from preventive war which all commentators agree is condemned under international law. See Louis René Beres, *After the Gulf War: Israel, Pre-emption, and Anticipatory Self-Defense*, 13 Hous. J. INT'L L. 259, 264 n.11 (1991); Louis René Beres, *Striking "First": Israel's Post-Gulf War Options under International Law*, 14 LOY. L.A. L. REV. 1, 1 n.2 (1991). The difference between preemption and preventive war is:

Preemption is a military strategy of striking an enemy first, with the expectation that the only alternative is to be struck first oneself. A preemptive attack differs from a preventive attack, which is launched out of concern for long-term deterioration in the pertinent military balance, rather than fear of imminent hostilities. Thus, in a preemptive attack, the enemy's action is anticipated in a very short time, while in a preventive attack, the interval is considerably longer.

Beres, *Striking "First," supra*, at 1 n.2.

The Department of Defense defines a "preemptive attack" as "[a]n attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent." U.S. DEPT. OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 415 (12 Apr. 2001, As Amended Through 17 Dec. 2003), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) (visited Mar. 12, 2004). A "preventive war" is "[a] war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk." *Id.* at 419.

12. The material breach argument was included in President Bush's address to the nation delivered two days before the beginning of the war. See *Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave,'* N.Y. TIMES, Mar. 18, 2003, at A14 (transcript of President Bush's March 17, 2003 address) [hereinafter *Bush's Speech on Iraq*]; Peter Slevin, *Legality of War Is a Matter of Debate: Many Scholars Doubt Assertion by Bush*, WASH. POST, Mar. 18, 2003, at A16. The implied authorization argument had previously been set forth by William H. Taft IV, the Legal Adviser of the U.S. Department of State. See U.S. DEPT. OF STATE, *Taft: Bush Has Legal Authority to Use Force in Iraq*, available at <http://usinfo.state.gov/topical/rights/law/03032201.htm> (Mar. 21, 2003) (excerpt of remarks before the National Association of Attorneys General, March 20, 2003) (visited Oct. 19, 2003); William H. Taft IV & Todd Buchwald, *Agora: Future Implication of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003); Peter Slevin, *U.S. Says War Has Legal Basis: Reliance on Gulf War Resolutions Is Questioned by Others*, WASH. POST, Mar. 21, 2003, at A14. The material breach argument was subsequently presented to the United Nations Security Council. See *Letter Dated 20 March from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. DOC. S/2003/351 (Mar. 21, 2003), available at [http://www.un.int/usa/s2003\\_351.pdf](http://www.un.int/usa/s2003_351.pdf) (visited July 13, 2003). The United States' legal position was joined by the United Kingdom. See Attorney-General's Written Answer on 17 March 2003 Setting out His View of the Legal Basis for Use of Force Against Iraq, available at <http://www.fco.gov.uk/Files/KFile/AG%20Written%20Answer%20of%2017%20March%202003.pdf> (Mar. 18, 2003) (visited May 14, 2003).

collective self-defense under Article 51 of the United Nations Charter.<sup>13</sup> Shortly thereafter, in Resolution 678, the Security Council invoked Chapter VII of the U.N. Charter and authorized Member States to “use all necessary means to uphold and implement Res. 660” and “*all subsequent relevant resolutions.*”<sup>14</sup> One of those “subsequent relevant resolutions” was Resolution 687, the Gulf War cease-fire, which required Iraq to disarm and submit to weapons inspections.<sup>15</sup> Iraq’s material breach of the ceasefire revived Resolution 678’s authorization to use force.<sup>16</sup> This conclusion proceeds from a number of rationales. One is to treat Security Council Resolution 687 as analogous to a treaty.<sup>17</sup> Under the law of treaties, material breach of a treaty allows a “specially affected” party to suspend operation of the treaty.<sup>18</sup> Another rationale is that the cease-fire was expressly

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13. See Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISRAEL Y.B. HUM. RTS. 165, 165, 172 (2002).

14. S.C. Res. 678, Para. 2, U.N. SCOR, 2963rd Sess. (1990), (emphasis added). “All necessary means” is standard Security Council shorthand for military force. See MOHAMED AWAD OSMAN, *THE UNITED STATES AND PEACE ENFORCEMENT: WARS, TERRORISM AND DEMOCRACY* 52-54 (2002). While commentators routinely refer to Security Council Resolution 678 as the “authorization” for the Persian Gulf War the Council’s consent was not needed. As already stated, Desert Storm was a legal exercise of the right of individual and collective self-defense set out in U.N. Charter Article 51. See *supra* note 13 and accompanying text; U.N. CHARTER art. 51; Taft & Buchwald, *supra* note 12, at 558 n.4 and accompanying text; Wall, *supra* note 13, at 172, 175, 177-78. The United States went to the Security Council in 1991, as it did in 2003, for political reasons: to help build a coalition to act against Iraq. See Wall, *supra*, at 172, 177-78.

15. S.C. Res. 687, U.N. SCOR, 2983rd Sess. (1991)). See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003); Michael J. Matheson, REMARKS, in *Legal Authority for the Possible Use of Force against Iraq*, 92 AM. SOC’Y INT’L L. PROC. 136, 138 (1998); Frederic L. Kirgis, *Security Council Resolution 1441 on Iraq’s Final Opportunity to Comply with Disarmament Obligations*, AM. SOC’Y INT’L L. INSIGHTS (Nov. 2002), available at <http://www.asil.org/insights/insigh92.htm> (visited Oct. 7, 2004). Unlike a peace treaty, a cease-fire agreement only temporarily suspends, rather than terminates, hostilities. See Wall, *supra* note 13, at 180, 183. The state of war continues. *Id.* at 180, 182. For background on the Gulf War cease-fire, see *id.* at 178-183.

16. See Taft & Buchwald, *supra* note 12, at 557, 558; Yoo, *supra* note 15, at 567; Kirgis, *supra* note 15; Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq’s Weapons of Mass Destruction*, 92 AM. J. INT’L L. 724, 725-26 (1998). In his address on the eve of war President Bush said: “Under [Security Council] Resolutions 678 and 687, *both still in effect*, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction.” See *Bush’s Speech on Iraq*, *supra* note 12 (emphasis added).

17. See Kirgis, *supra* note 15. Professor Mary Ellen O’Connell objects that Security Council resolutions are not analogous to treaties because Council resolutions are binding even without the consent of states subject to them. See Mary Ellen O’Connell, *UN Resolution 1441: Compelling Saddam, Restraining Bush*, JURIST, available at <http://jurist.law.pitt.edu/forum/forumnew73.php> (visited Nov. 27, 2002) (text accompanying note 11). While this is true of most Security Council resolutions it is not true of S.C. Res. 687 which provided that it would come into effect only upon its acceptance by Iraq. See S.C. Res. 687 Op. Para. 33. The requirement of Iraqi consent makes S.C. Res. 687 resemble a treaty more than a typical Security Council resolution. See Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, *BUSH VS. THE BELTWAY: HOW THE CIA AND THE STATE DEPARTMENT TRIED TO STOP THE WAR ON TERROR* 164, 177-78 (2003). This is not surprising given the resolution’s origin as a cease-fire agreement negotiated in the field between the Iraqi and Coalition military commanders. See Wall, *supra* note 13, at 178-79. Iraq notified the Security Council of its acceptance on April 6, 1991. Wall, *supra* note 13, at 180.

18. See Kirgis, *supra* note 15; Yoo, *supra* note 15, at 568; Vienna Convention on the Law of

conditioned on Iraq's disarmament and compliance with inspections.<sup>19</sup> The Security Council found Iraq in material breach of the cease-fire on numerous occasions.<sup>20</sup>

The first President Bush relied upon the material breach argument to establish "no-fly" zones over northern and southern Iraq.<sup>21</sup> When the United States, Britain, and France bombed Iraq in January 1993 in order to enforce Iraqi compliance with weapons inspections they did not seek specific authorization from the Security Council.<sup>22</sup> Nevertheless, U.N. Secretary General Boutros Boutros-Ghali declared that the strikes were pursuant to Resolution 678.<sup>23</sup> President Clinton used the material breach argument to justify the December 1998 Operation Desert Fox bombing campaign against Iraq.<sup>24</sup>

Security Council Resolution 1441 reinforces the conclusion that the United States had authorization for the war on Iraq. Security Council Resolution 1441, passed unanimously on November 8, 2002, gave Iraq a "final opportunity" to disarm.<sup>25</sup> To that end Resolution 1441 provided for a resumption of weapon

Treaties, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 331, *reprinted in* 63 AM. J. INT'L L. 875 (1969), 8 I.L.M. 679 (1969), art. 60(2)(b) (concluded at Vienna, May 23, 1969, entered into force Jan. 27, 1980) [hereinafter "Vienna Convention"]. The Vienna Convention postdates the Charter and is nonretroactive in application. Vienna Convention art. 4. It is cited solely as evidence of the customary law of treaty interpretation. See *infra* note 48 and accompanying text. The United States is a "specially affected" state because it is the world's leading target of terrorism and presumably of any Iraqi WMD. See Kirgis *supra* note 15.

19. See Wedgwood, *supra* note 16, at 725-26.

20. Iraq was first found in material breach less than six months after the Gulf War ended. See S.C. Res. 707 Op. Para. 1 (Aug. 15, 1991); Wall, *supra* note 13, at 166 n.5. The Security Council would find Iraq in material breach repeatedly thereafter. See S.C. Res. 1060 Op. Para. 1 (June 12, 1996) ("clear violation"); S.C. Res. 1115 Op. Para. 1 (June 21, 1997) ("clear and flagrant violation"); S.C. Res. 1134 Op. Para. 2 (Oct. 23, 1997) ("flagrant violation"); S.C. Res. 1137 Op. Para. 1 (Nov. 12, 1997) ("continued violations"); S.C. Res. 1194 Op. Para. 1 (Sept. 9, 1998) ("totally unacceptable contravention of its obligations"); S.C. Res. 1205 Op. Para. 1 (Nov. 5, 1998) ("flagrant violation"); S.C. Res. 1441 Op. Para. 1 (Nov. 8, 2002). On six occasions between 1991 and 1992 the President of the Security Council declared that Iraq was in material breach of Resolution 687. See Yoo, *supra* note 15, at 569, 569 n.35 (2003). For brief histories of Iraq's breaches of the ceasefire, see Turner, *supra* note 17, at 173-77; Paul Schott Stevens, Andru E. Wall, and Ata Dinlene, *The Just Demands of Peace and Security: International Law and the Case against Iraq*, available at <http://www.fed-soc.org/War%20on%20Terror/iraqfinal—web.pdf>, at 8-12 (visited Feb. 17, 2004).

21. See O'Connell, *supra* note 17. Security Council Resolutions 678 and 687 were read together with Security Council Resolution 888, which condemned Iraq's repression of the Iraqi Kurds and Shiites. *Id.* Professor Mary Ellen O'Connell reluctantly concedes that owing to Security Council acquiescence the no-fly zones were "arguably permissible." *Id.*

22. See Wedgwood, *supra* note 16.

23. See Taft & Buchwald, *supra* note 12, at 559; Yoo, *supra* note 15, at 570; George Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, Jan. 19, 1993, 29 WEEKLY COMP. PRES. DOC. 67, 67 (Jan. 25, 1993) (quoting UN Secretary General Boutros Boutros-Ghali).

24. See William J. Clinton, Letter to Congressional Leaders on the Military Strikes Against Iraq, Dec. 18, 1998, in PUB. PAPERS OF WILLIAM J. CLINTON 2195, 2195-96 (1998); Matheson, *supra* note 15 at 137-38, 141-42. Mr. Matheson was Principal Deputy Legal Adviser of the U.S. Department of State during Operation Desert Fox.

25. S.C. Res. 1441 Op. Para. 2 (Nov. 8, 2002). The same language appeared in Security Council

inspections in Iraq interrupted since UNMOVIC inspectors left Iraq in 1998.<sup>26</sup> The resolution warned that Iraq's failure to submit to renewed inspections would lead to "serious consequences," understood to mean war.<sup>27</sup> Following adoption of Resolution 1441 U.S. Ambassador to the United Nations John Negroponte indicated that the United States did not consider Resolution 1441 to be a bar to unilateral U.S. action should the Security Council fail to act.<sup>28</sup>

### III. SELF DEFENSE PRIOR TO THE UNITED NATIONS CHARTER

The right of self-defense is set out in customary international law in the so-called *Caroline* doctrine. In 1837 a portion of Canada was in rebellion against the British Crown. The vessel *Caroline* was owned by a group of Americans who in 1837 were using her to ferry men and supplies to rebels on an island on the Canadian side of the Niagara River.<sup>29</sup> To cut off assistance to the rebels, British troops crossed into U.S. territory on December 29, 1837, loosed the *Caroline* from her moorings on the New York side of the river, set fire to the ship, and sent her over the Falls.<sup>30</sup> The resulting legal issue was whether the British had acted legitimately in self-defense. In an exchange of diplomatic correspondence with Lord Ashburton of Great Britain, Secretary of State Daniel Webster set forth the conditions of necessity and proportionality which came to be accepted as the customary law requirements for the exercise of self defense (the "*Caroline*

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Resolution 678 which authorized the 1991 Persian Gulf War. S.C. Res. 678 Op. Para. 1 ("one final opportunity"); Taft & Buchwald, *supra* note 12, at 558, 560.

26. S.C. Res. 1441. UNMOVIC stands for United Nations Monitoring, Verification and Inspection Commission established in 1999. S.C. Res. 1284 Op. Para. 1 (Dec. 17, 1999). UNMOVIC is the successor to the United Nations Special Commission on Iraq (UNSCOM). S.C. Res. 687 Op. Para. 9(b)(i) (Apr. 3, 1991).

27. S.C. Res. 1441 Op Para. 13. See Julia Preston, *Security Council Votes, 15-0, For Tough Iraq Resolution; Bush Calls It a 'Final Test,'* N.Y. TIMES, Nov. 9, 2002, at A1; Kirgis, *supra* note 15.

28. Ambassador Negroponte stated that "[O]ne way or another . . . Iraq will be disarmed." *The Rationale for the U.N. Resolution on Iraq, in the Diplomats' Own Words*, N.Y. TIMES, Nov. 9, 2002, at A8. Unidentified government sources asserted that in the event Iraq materially breached Resolution 1441 and the Security Council took no action the United States would be legally justified in proceeding to invade Iraq. See Preston, *supra* note 27, at A8 ("United States officials said that [Resolution 1441] gives Washington the legal basis to go to war unilaterally if the Council cannot agree how to respond to new violations by Baghdad."). Also significant is President Bush's statement after adoption of Resolution 1441 that: "The United States has agreed to discuss any material breach with the Security Council, but *without jeopardizing our freedom of action* to defend our country. If Iraq fails to fully comply, the United States and other nations will disarm Saddam Hussein." *Transcript of Bush's Remarks on the Security Council's Iraq Resolution*, N.Y. TIMES, Nov. 9, 2002, at A10 (emphasis added). Compare similar remarks made by President John F. Kennedy during the Cuban Missile Crisis: "This Nation is prepared to present its case against the Soviet threat to peace, and our own proposals for a peaceful world, at any time and in any forum—in the OAS, in the United Nations, or in any other meeting that could be useful—*without limiting our freedom of action.*" President John F. Kennedy, *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba* (Oct. 22, 1962), in PUB. PAPERS OF JOHN F. KENNEDY 806, 808 (1962); 47 DEP'T STATE BULL. 715, 718 (1962) [hereinafter *Radio and Television Report*] (emphasis added).

29. See Michael Byers, *Jumping the Gun*, LONDON REV. BKS 3 (July 25, 2002).

30. *Id.*; see also Frederic L. Kirgis, *Cruise Missile Strikes in Afghanistan and Sudan*, ASIL INSIGHT, Aug. 1998, available at <http://www.asil.org/insights/insigh24.htm> (last visited Sept. 24, 2004).

doctrine").<sup>31</sup> Necessity requires imminent "overwhelming" danger and exhaustion, unavailability, or futility of peaceful means to avert attack. The force employed must be proportional to the danger sought to be averted.<sup>32</sup> The British accepted Webster's criteria and agreed that the British attack had failed to meet them. Under *Caroline*, an actual armed attack was not required as the precondition for the use of force in self-defense.<sup>33</sup> Thus, the *Caroline* criteria permit both reactive and anticipatory self-defense so long as necessity and proportionality are observed.<sup>34</sup>

#### IV. DID ARTICLE 51'S DRAFTERS INTEND TO ELIMINATE THE CUSTOMARY RIGHT OF ANTICIPATORY SELF-DEFENSE? LESSONS OF THE *TRAVAUX PRÉPARATOIRES*

Article 51, the United Nations Charter's provision on self-defense, does not include the phrase "anticipatory self-defense." Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>35</sup>

The question of whether the customary law doctrine of anticipatory self-defense survives under the United Nations Charter is addressed by two schools.<sup>36</sup> "Restrictionists" argue that Article 51 eliminates the customary right of

31. See MOORE, 2 DIGEST OF INTERNATIONAL LAW 412 (1906). Secretary Webster wrote that a nation may employ force in self defense when there exists "[a] necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation." See THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 669 (K. Shewmaker, ed. 1983).

32. See Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, ASIL TASK FORCE ON TERRORISM, at 25-36, Aug. 2002, available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited Sept. 24, 2004); See I OPPENHEIM, INTERNATIONAL LAW 420 (R.Y. Jennings & Sir Arthur Watts, eds., 9th ed. 1990). According to Webster, proportionality requires "nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." *Id.*

33. See Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENSE 172 (1988); Louis René Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 75-76 (1992); Beres, *After the Gulf War*, *supra* note 11, at 266; Beres, *Striking First*, *supra* note 11, at 6; Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598 (1963).

34. Webster's criteria trace to Grotius, Vattel, and Pufendorf. See Beres, *Striking First*, *supra* note 11, at 6, citing HUGO GROTIUS, THE LAW OF WAR AND PEACE, bk. II, ch. I (1625); EMMERICH DE VATTTEL, THE LAW OF NATIONS, bk. II, ch. IV (1758); Louis René Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 125 (1993), citing SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 32 (Frank Gardner Moore trans., 1927) (1682).

35. U.N. CHARTER art. 51.

36. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 73 (1993).

anticipatory self defense set out in the *Caroline* doctrine and limits self-defense to the case of an actual armed attack. Restrictionists maintain that the intent of Article 51's drafters was to raise the standard of necessity required up until 1945.<sup>37</sup> Henceforth, the necessity to use force in self-defense would exist only "if an armed attack occurs." "Counter-restrictionists" believe that the customary right of anticipatory self-defense survives under the Charter.<sup>38</sup> The customary right allowed force to be used in advance of an armed attack so long as an attack was imminent.<sup>39</sup> The United States follows the counter-restrictionist position.<sup>40</sup>

Each school focuses on a different phrase in Article 51. Restrictionists emphasize the phrase "if an armed attack occurs." Counter-restrictionists focus on Article 51's opening sentence: "Nothing in the present Charter shall *impair the inherent right of individual or collective self defense . . .*"<sup>41</sup> Counter-restrictionists take "inherent right" to refer to the right of self-defense as it existed under customary law, including the right of anticipatory self-defense.<sup>42</sup> Counter-restrictionists insist that the language "if an armed attack occurs" must not be misread as "if and *only* if."<sup>43</sup> The phrase merely emphasizes what, in 1945, was considered to be the paramount, but not the sole, form of aggression without limiting self-defense to an "armed attack."<sup>44</sup> Significantly, the French text of

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37. See *cf.* MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 233, 235 (1961) (rejecting this position). Some restrictionists maintain that by 1945 customary international law already included a requirement that self-defense could be exercised only in the event of an armed attack. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 150 (1991); Oscar Schachter, *The Scope of Legitimate Self-Defense*, in *INTERNATIONAL LAW AND INTERNATIONAL SECURITY: MILITARY AND POLITICAL DIMENSIONS* 21, 22 (Paul B. Stephan III & Boris M. Klimenko, eds., 1991); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 274 (1963) (restrictions imposed by Article 51 may, by 1945, have become part of customary international law). Under this view Article 51 was intended to be merely declarative of then-existing customary law prohibiting anticipatory self-defense. This view cannot be accepted. As Professor Schachter remarks, if customary law by 1945 did require an armed attack as the precondition for self-defense then the words "armed attack" in Article 51 would be redundant. See Schachter, *supra*, at 21.

38. The two schools are also called the "restrictivists" and "expansivists," respectively. Richard G. Maxon, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense*, 25 *PARAMETERS* 55 (1995).

39. See Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 *WASH. Q.* 89, 91 (2003); McDougal, *supra* note 33, at 598.

40. See George K. Walker, *Anticipatory Self-Defense in the Charter Era: What the Treaties Have Said*, 31 *CORNELL INT'L L.J.* 321, 322 (1998).

41. UN CHARTER art. 51 (emphasis added); O'Connell, *supra* note 32, at 12.

42. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 86 (2000); Eugene v. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 *AM. J. INT'L L.* 506, 510 (1991) (Inasmuch as self-defense is an incident of sovereignty it cannot be limited or taken away—even by treaty) [hereinafter Rostow]; Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 *HARV. J.L. & PUB. POL'Y.* 539, 558 (2002) (This view was shared by U.S. Secretary of State Frank Kellogg during the negotiations over the Kellogg-Briand Pact outlawing war).

43. MCDUGAL & FELICIANO, *supra* note 37, at 237; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ 14 at 347-48 (June 27) (Jennings, dissenting); S.M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 *RECUEIL DES COURS* 411, 480 (1972, Vol. 2).

44. See AREND & BECK, *supra* note 36, at 73; Yoram Dinstein, *The Legal Issues of "Para-War"*

Article 51 refers not to the narrow concept of *attaque armée* ("armed attack") but to the broad concept of *aggression armée* ("armed aggression").<sup>45</sup> Inasmuch as international law scholars have not been able to agree on a definition of aggression in fifty years, it would be odd if Article 51 identified aggression with only one narrow contingency, an "armed attack," and restricted self-defense to that circumstance alone.<sup>46</sup> The International Court of Justice has not spoken to the legality of anticipatory self-defense. In the *Nicaragua* case the Court reserved judgment on whether an imminent threat of armed attack would pass Article 51 muster.<sup>47</sup>

Since the text, by itself, will not reveal whether the Charter permits anticipatory self-defense, reference must be had to Article 51's drafting history.<sup>48</sup> Counter-restrictionists contend that the Article 51 *travaux préparatoires* do not support a conclusion that anticipatory self-defense is illegal under the Charter.<sup>49</sup> Professor Timothy L. H. McCormack demonstrates that restrictionists offer only perfunctory analyses of the Article 51 *travaux préparatoires*.<sup>50</sup> Taking one example, Professor McCormack comments that Professor Louis Henkin provides no review of the *travaux préparatoires* to support his bald assertion that "Nothing in the history of its [Article 51's] drafting (the *travaux préparatoires*) suggests that the framers of the Charter intended something broader than the language implied."<sup>51</sup>

Counter-restrictionists assert that the purpose of Article 51 was not to eliminate anticipatory self-defense but to make plain—particularly to the Latin American delegations attending the San Francisco conference—that the Charter permits regional security organizations to act in self-defense without prior authorization from the U.N. Security Council ("individual or collective self-

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*and Peace in the Middle East*, in 2 THE ARAB-ISRAELI CONFLICT: READINGS 158, 160 (John Norton Moore, ed. 1977) (rejecting this view); Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 497 (1952, Vol. 2).

45. Timothy L. H. McCormack, *Anticipatory Self-Defense in the Legislative History of the United Nations Charter*, 25 ISRAEL L. REV. 1, 36 (1991); *Nicar. v. U.S.*, *supra* note 43, at 543 (Jennings, dissenting).

46. For a contrasting view that the Article 51 drafters did intend a narrow concept of "armed attack" see *infra* notes 59 – 62 and accompanying text.

47. *Nicar. v. U.S.*, *supra* note 43, at 103.

48. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §325(1) (1987). Terms of international agreements are to be interpreted according to their "ordinary meaning." Where a treaty's meaning can not be determined from its words alone recourse may be had to the treaty's *travaux préparatoires*: the treaty's drafting history. *Id.* at §325 comment e; Vienna Convention, *supra* note 18, art. 32(a). The Vienna Convention is cited solely as evidence of the customary law of treaty interpretation. See McCormack, *supra* note 45, at 4-7.

49. See McCormack, *supra* note 45, *passim*; MCDUGAL & FELICIANO, *supra* note 37, at 235-36.

50. See McCormack, *supra* note 45, at 3.

51. *Id.*, quoting LOUIS HENKIN, HOW NATIONS BEHAVE 141 (2d ed. 1979) (brackets in original). Professor McCormack might also have quoted Professor Brownlie's similarly perfunctory assertion that the drafting history of Article 51 reflects "a presumption against self-help and even action in self-defense within Article 51 was made subject to control by the Security Council." See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275 (1963).

defense").<sup>52</sup> The wording of Article 51 follows closely the wording of Part I of the Act of Chapultepec which required an armed attack in order for signatories to respond in self-defense.<sup>53</sup> Professor McCormack suggests that the Article 51 drafters imported the words "armed attack" unreflectingly from the Act of Chapultepec.<sup>54</sup> Had Article 51's purpose been to change existing customary law, this would have been a change so momentous that it would have been extensively debated in the drafting sessions.<sup>55</sup> But the *travaux préparatoires* show that this issue was not discussed.<sup>56</sup>

#### V. DOES ARTICLE 51 REQUIRE A STATE TO "ABSORB" THE FIRST BLOW?

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic weapons are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.<sup>57</sup>

President John F. Kennedy

Section IV argued that the drafters of Article 51 did not intend to cut down the customary right of self-defense by limiting its exercise to the occurrence of an "armed attack." Other writers maintain that the drafters intended just that; Professor Michael J. Glennon observes that in 1945, so great was the fear that states would use self-defense as a pretext for aggression that the Article 51 drafters decided to impose a "bright line" test: self-defense would be allowed only in the

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52. U.N. CHARTER art. 51 (emphasis added); see SCHACHTER, *supra* note 37, at 150; LELAND M. GOODRICH, EDVARD HAMBRO, & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 342-44 (3d rev. ed. 1969); MCDUGAL & FELICIANO, *supra* note 37, at 235; McCormack, *supra* note 47, at 8, 25-27; Schwebel, *supra* note 43, at 480; Waldock, *supra* note 44, at 497.

The Latin American nations feared Communist penetration. See STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 66, 175, 180 (2003). Would the Security Council protect them or would the Council be blocked by a Soviet veto? *Id.* at 175. As insurance against possible Security Council ineffectiveness the Latin American states insisted that regional defense organizations be included in the Charter. The episode is significant for showing that even from the beginning doubts existed as to whether the Security Council would be able to perform its assigned function of protecting international peace and security. See *infra*, § VII.

53. See McCormack, *supra* note 45, at 33; Inter-American Reciprocal Assistance And Solidarity (Act of Chapultepec), reprinted in U.S. DEPT. OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, VOL. III: MULTILATERAL 1931-1945 1024 (1968). The Act of Chapultepec was a mutual defense pact concluded among Latin American states and the United States towards the end of World War Two. The Act of Chapultepec was the forerunner of the Inter-American Treaty of Reciprocal Assistance of 1947 ("Rio Treaty") which established the Organization of American States.

54. McCormack, *supra* note 45, at 35, 36.

55. *Id.* at 7-8.

56. *Id.* at 8, 35.

57. See Radio and Television Report, *supra* note 28, at 807.



event of an "armed attack."<sup>58</sup>

Neither Article 51 nor the rest of the U.N. Charter defines "armed attack."<sup>59</sup> In the view under examination the drafters of Article 51 intended a narrow conception of "armed attack" which included only trans-border attacks by army, navy, or air forces.<sup>60</sup> Prime examples would be the Nazi invasion of Poland in 1939 or the Japanese attack on Pearl Harbor. This mode of aggression was vivid in the experience of the Charter drafters. Confronted with the threat of invasion, Article 51 would allow a target state to mass its forces at the border prepared to meet the invaders. But not until the invaders crossed the frontier would an armed attack have occurred and the target state be allowed to respond with force.<sup>61</sup>

In contrast, counter-restrictionists refuse to impose a purely technical requirement that an enemy army first set foot across the border.<sup>62</sup> Counter-

58. Professor Glennon writes:

The new requirement narrowed significantly the circumstances in which force could be used. And it set out a readily identifiable and, it was thought, objectively verifiable event to trigger defensive rights. Phony defensive justifications would be less plausible and war be less frequent, thereby vindicating the first great purpose of the Charter—"to maintain international peace and security."

Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD 24 (Jan. 28, 2002). The final phrase quotes the Charter. U.N. CHARTER Preamble and art. 1(1). As Professor Glennon's title indicates, he believes the Charter design is no longer adequate. See also Glennon, *supra* note 42, at 546. Accord HENKIN, *supra* note 51, at 142 (The "armed attack" requirement was imposed because an "actual armed attack" is "clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."); J. E. S. Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 RECUEIL DES COURS 347, 361 (1961-II).

59. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 668, 669 (Bruno Simma ed., Oxford University Press 1994); Andru E. Wall, *Lawfully Defending the Peace: The Bush Doctrine and the Global War on Terrorism*, 4:2 ENGAGE 95, 97, 98 (2003), available at [www.fed-soc.org/Publications/Engage/oct%2003.pdf](http://www.fed-soc.org/Publications/Engage/oct%2003.pdf) (visited Apr. 27, 2004); Krzysztof Skubiszewski, *The Postwar Alliances of Poland and the United Nations Charter*, 53 AM. J. INT'L L. 613, 620 (1959). State practice since 1945 has defined "armed attack" broadly. See Wall *supra*, at 96. Thus, the Administration of the first President Bush argued that attacks on American military and civilian personnel in and around the Panama Canal Zone constituted an "armed attack" allowing U.S. intervention. See Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUMBIA J. TRANSNAT'L L. 609, 609, 619-21 (1991). The Clinton Administration justified its 1993 air strikes on Baghdad with the claim that a failed Iraqi assassination attempt against former President Bush constituted an "armed attack" on the United States. See John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L L. & COMP. L. REV. 241, 252, 271 (1994). These are examples of reactive, rather than anticipatory, self-defense; in both cases the United States' position was that an "armed attack" had already occurred. *Id.* at 252, 258, 260; Wedgwood, *supra*, at 609, 619-21.

60. Cf. *National Security Strategy*, *supra* note 2, at 13; AREND & BECK, *supra* note 36, at 97.

61. Harold Stassen, one of the U.S. negotiators on the Charter, and later a perennial Presidential candidate, gave the example of an enemy fleet approaching the United States. The United States may send an opposing fleet to meet the enemy fleet. But until the enemy fleet has entered U.S. territorial waters the U.S. may not respond with force. See Thomas M. Franck, *When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL'Y 51, 58-59 (2001). Counter-restrictionists reject this approach as unworkable in an age of weapons of mass destruction. By contrast, Professor Dinstein has argued that the U.S. could legally have interdicted the Japanese fleet as it was on its way to Pearl Harbor. See *infra*, text accompanying note 72.

62. See JULIUS STONE, *THE MIDDLE EAST UNDER CEASE-FIRE 4* (1967), cited in Amos Shapira,

restrictionists insist that the critical factor is an enemy's *intent* to imminently attack: the Charter drafters imposed the "armed attack" requirement only as the best index then available for determining imminent hostile intent.<sup>63</sup>

Still, when the discussion is limited to a conventional attack there is something to be said for the "armed attack" criterion. Faced with a conventional attack waiting may be advisable: postponing the use of force gives diplomacy a chance to defuse tensions and possibly avert conflict.<sup>64</sup> There is less chance that force will be used by mistake. But in the case of a non-conventional attack, a literal adherence to Article 51 may spell national suicide. Whatever the intent of Article 51's drafters, in an age of weapons of mass destruction, a state which waits for an "armed attack" before defending itself may be ensuring its own annihilation.<sup>65</sup> In the case of nuclear missiles or other WMD it is absurd—indeed, lethal—to require a state to first absorb an attack before responding.<sup>66</sup> WMD radically foreshorten response time and can occasion massive destruction in a single stroke. In order to avoid this outcome states need the right to pre-empt the aggressor—to defend themselves *before* the first blow is struck.<sup>67</sup> A state which does not anticipate the first blow is, in Professor Myres McDougal's memorable

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*The Six-Day War and the Right of Self-Defense*, in *THE ARAB-ISRAELI CONFLICT*, VOLUME II: READINGS 205, 215 n.24 (John Norton Moore, ed. 1975); Waldock, *supra* note 44, at 498 ("Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it was not passed the frontier."). Thus, counter-restrictionists conclude, Israel acted legally by striking preemptively against Egyptian and Syrian armies gathering on its frontier in June 1967. *See infra* § VI.

63. *See* Glennon, *supra* note 58, at 26. Whether "armed attack" is still the best gauge of hostile intent is open to question. *See infra* note 190 and accompanying text.

64. Recall that as part of necessity *Caroline* required that alternatives to force would have to be either unavailable or exhausted ("no choice of means"). *See supra* note 31 and accompanying text.

65. Under the principle of *rebus sic stantibus*, materially changed circumstances allow operation of a treaty such as the United Nations Charter to be suspended in whole or in part. The materially changed circumstances must have been unforeseen at the time the treaty was entered into; must strike at the basis upon which the parties gave consent; and must fundamentally alter the parties' future obligations under the treaty. *See* Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, ASIL INSIGHTS (June 2002), available at <http://www.asil.org/insights> (visited July 28, 2002); Vienna Convention, *supra* note 18, Art. 62; RESTATEMENT (THIRD), *supra* note 48, §336. The advent of WMD constitutes materially changed circumstances suspending Article 51's "armed attack" requirement.

66. *See* Schwebel, *supra* note 43, at 481. As Israel argued before the Security Council after its attack on Iraq's Osiraq nuclear reactor: "[T]he concept of [self-defense] took on new and far wider application with the advent of the nuclear era." *See* U.N. SCOR 36th Sess., 2288th mtg. at 9, U.N. Doc. S/PV.2288 (June 19, 1981) (Israel).

67. *See* Louis René Beres, *Israel and Anticipatory Self Defense*, 8 ARIZ. J. INT'L & COMP. L. 89, 93 (1991). Professor Beres argues that the "customary right of anticipatory self defense articulated by the *Caroline*" survives into the Charter system in order to avoid the absurd result of requiring a state to absorb the first blow. *Id.* Beres forcefully concludes: "International law is not a suicide pact." *Id.* at 90. President Bush has echoed Professor Beres' words. President Bush has said of terrorists and terrorist states such as Iraq: "[R]esponding to such enemies only after they have struck first is not self-defense, it is suicide." *See Bush's Speech on Iraq*, *supra* note 12, at A10, col. 4. The International Court of Justice has left open the question whether a state may launch a preemptive nuclear attack if its very existence were at risk. *See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266 (July 8, 1996).

phrase, a "sitting duck."<sup>68</sup> Former Secretary of State John Foster Dulles' judgment that the Charter was a "pre-atomic age" document reflects how Article 51's "armed attack" requirement fails to cope with the new technology of mass destruction.<sup>69</sup>

Some restrictionists attempt to sidestep the need for anticipatory force by declaring that an attack occurs at the moment it is launched.<sup>70</sup> Professor Dinstein takes the view that had the United States attacked the Japanese fleet as it was heading towards Pearl Harbor this use of force would not have been anticipatory.<sup>71</sup> By the same token, if missiles are fired towards the United States, the United States may respond before the missiles hit; this is not anticipatory action.<sup>72</sup>

It is difficult not to think that in adopting such logic, restrictionists have taken a long step toward becoming counter-restrictionists. The incoherence of the restrictionist position is apparent when we ask: At what point has an armed attack begun? Under the restrictionist reading of Article 51, the right of self-defense is not activated until the exact instant an armed attack has begun.<sup>73</sup> Some commentators have sought to distinguish "armed attack" from "preparations for armed attack."<sup>74</sup> Response to armed attack is self-defense (allowed under Article 51), while force initiated against preparations for armed attack is anticipatory self-defense (prohibited by Article 51). But the line between actual attack and preparations for attack is an artificial one and cannot be drawn in practice.<sup>75</sup> How do we isolate the instant at which preparations end and an armed attack begins?<sup>76</sup>

68. MCDUGAL & FELICIANO, *supra* note 37, at 236; McDougal, *supra* note 33, at 601. Even Professor Louis Henkin, a restrictionist, recognizes that it may be necessary to allow a "small and special exception [to the "armed attack" requirement] for the special case of the surprise nuclear attack." See HENKIN, *supra* note 51, at 144.

69. See John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 39 A.B.A. J. 1063, 1066 (1953).

70. See DINSTEIN, *supra* note 33, at 178.

71. Professor Dinstein calls this a response to "incipient attack." See Dinstein, *supra* note 44, at 161; O'Connell, *supra* note 32, at 8-9, 12, quoting YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 172 (3d ed. 2001). Professor Mary Ellen O'Connell accepts Dinstein's conclusion so long as the hostile intent of the Japanese fleet was clear. *Id.* at 9.

72. See HENKIN, *supra* note 51, at 142 ("In all probability, then, only an actual take-off by Soviet planes or missiles would cause the United States to strike, and in that case the United States is not 'anticipating' an armed attack, for the attack would have begun."). Accord Dinstein, *supra* note 44, at 160-61.

73. See DINSTEIN, *supra* note 33, at 176.

74. MCDUGAL & FELICIANO, *supra* note 37, at 240.

75. *Id.*

76. MCDUGAL & FELICIANO, *supra* note 37, at 240; SCHACHTER, *supra* note 37, at 151 ("Just when an armed attack may be said to begin cannot be determined by an *a priori* rule."). Some writers have suggested irrevocability or irreversibility as the line of demarcation. When an attack can no longer be recalled, then it has "occurred" within the meaning of Article 51 and response in self-defense is permitted. See MCDUGAL & FELICIANO, *supra*, at 239-40, citing Nagendra Singh, *The Right of Self-Defense in Relation to the Use of Nuclear Weapons*, 5 INDIAN Y.B. INT'L AFF. 3 (1956). Accord DINSTEIN, *supra*, at 179 ("[A]n armed attack may precede the firing of the first shot. The crucial question is who embarks upon an irreversible course of action . . ."). But, as Professors McDougal and Feliciano point out, irrevocability is an unworkable criterion for determining when an armed attack begins because a state which launches an intercontinental missile may abort the missile until almost up the point of impact. See MCDUGAL AND FELICIANO, *supra*, at 240. Thus the proposed

And why should we? If an armed attack “occurs” the instant a missile is launched why not the instant before the firing button is pushed? Or the day before? Or a week? Isn’t this a formalistic requirement?<sup>77</sup> And could a state time its action with this degree of exactitude? “Don’t shoot until you see the whites of their eyes” is ill-adapted to the nuclear age.

## VI. STATE PRACTICE AND ANTICIPATORY SELF-DEFENSE

When states acquiesce to conduct new customary international law is formed.<sup>78</sup> Counter-restrictionists argue that state practice has been to acquiesce to anticipatory self defense.<sup>79</sup> The leading examples are the 1962 U.S. blockade of Cuba, Israel’s pre-emptive attack on Egypt, Syria, and Jordan in 1967, the Israeli bombing run on Iraq’s Osiraq nuclear reactor in 1981, and the 1986 U.S. air strikes against terrorist camps in Libya.<sup>80</sup>

### *The Cuban Missile Crisis*

The Kennedy Administration avoided justifying the Cuban “quarantine” either in terms of the customary principle of anticipatory self defense or as an application of Article 51 of the U.N. Charter.<sup>81</sup> The Administration’s public

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irrevocability/irreversibility test translates into a requirement that the defender must absorb the first blow. (Professor Dinstein undercuts his own irreversibility argument two paragraphs earlier by asserting that it does not matter if the missile can be aborted before impact. See DINSTEIN, *supra* note 33, at 179). Finally, irreversibility/irrevocability fails as a criterion because the target state may be in no position to tell whether an attack can be aborted.

77. See Terrence Taylor, *Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defense*, at <http://www.crimesofwar.org/expert/bush-taylor.html> (August 20, 2002) (last visited Sept. 9, 2002).

78. See Turner, *supra* note 17, at 165-66; Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L L. & COMP. L. Q. 401, 409-10, 410 n.46 (2002). See also RESTATEMENT (THIRD), *supra* note 48, at §102 Comment b (“Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights.”). This is because international law rests on state consent. What states consent to may change over time. State practice provides evidence of what states consent to.

State practice may also be looked to for interpretation of a treaty; for instance, to determine what meaning parties attach to terms such as “armed attack.” See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 31(3)(b), reprinted in 25 ILM 543 (1986). Accord RESTATEMENT (THIRD), *supra* note 48, §325(2).

79. See David B. Rivkin, Jr., Lee A. Casey, & Darin R. Bartram, *Remember the Caroline*, NAT’L REV. 17, 18 (July 1, 2002).

80. *Id.*; Thomas Franck, *Iraq and the “Bush Doctrine” of Pre-emptive Self-Defense*, available at <http://www.crimesofwar.org/expert/bush-franck.html> (August 20, 2002) (visited September 8, 2002). Consider also Tanzania’s invasion of Uganda, the use of force by the Economic Community of West African States (ECOWAS) in the Liberia and Sierra Leone civil wars, and Israel’s raid on Entebbe, Uganda. While not instances of anticipatory self-defense these actions are relevant to determining the legitimacy of anticipatory self-defense. Tanzania, ECOWAS, and Israel did not seek prior approval from the Security Council for the use of force. Yet none of these applications of force was censured by the Security Council. See Rivkin, et al, *supra* note 79, at 18; Franck *supra*. This demonstrates that the use of force without prior Security Council approval is not absolutely prohibited. Professor Thomas Franck argues that the Security Council, in a “creative adaption” of the Charter, has come to perform a “jurying function” whereby the Council evaluates the justice of pre-emptive attack on a case by case basis. See Franck *supra*. I suggest that this practice may represent a partial return *sub rosa* of just war theory.

81. See HENKIN, *supra* note 51, at 294; Abram Chayes, *The Legal Case for U.S. Action on Cuba*,

statements, for example the President's national address of October 22, 1962, spoke merely of "defense."<sup>82</sup> The Kennedy Administration's official legal basis for the quarantine was regional peacekeeping under the OAS Charter.<sup>83</sup> The regional peacekeeping argument, however, fails because a regional organization cannot do what none of its members would be allowed to do individually.<sup>84</sup> The deficiencies of the regional peacekeeping argument have led scholars to justify the Cuban "quarantine" on the basis of anticipatory self defense.<sup>85</sup>

*Restrictionists maintain that the quarantine did not meet the strictures of Article 51. There was no imminent threat of, much less an actual, armed attack on the United States.<sup>86</sup> The United States was confronted with no more than a potential threat.*

However, there are good reasons for not applying Article 51's "armed attack" requirement literally. First is the advent of nuclear weapons.<sup>87</sup> Second is the failure of collective security and of the Security Council to maintain the peace. The Charter strictures on the use of force must be relaxed because the Security Council

47 DEP'T STATE BULL. 763, 764 (Nov. 19, 1962). Chayes was Department of State Legal Adviser during the crisis so this may be taken as an official statement.

82. See Radio and Television Report, *supra* note 28, at 807 ("in the defense of our own security and of the entire Western Hemisphere"); Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba (Oct. 23, 1962), in PUBLIC PAPERS OF JOHN F. KENNEDY 809, 810 (1962) ("to defend the security of the United States").

83. See Minutes of the 507th Meeting of the National Security Council (Oct. 22, 1962), reprinted in THE CUBAN MISSILE CRISIS, 1962: SELECTED FOREIGN POLICY DOCUMENTS FROM THE ADMINISTRATION OF JOHN F. KENNEDY, JANUARY 1961-NOVEMBER 1962 209, 209 (2001) ("Secretary Rusk stated that the best legal basis for our blockade action was the Rio Treaty. The use of force would be justified on the ground of support for the principles of the United Nations Charter, not on the basis of Article 51, which might give the Russians a basis for attacking Turkey."); HENKIN, *supra* note 51, at 290; ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 51, 121 (1969); Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOR'N AFF. 550, 554 (1963); Chayes, *supra* note 81, at 764; Inter-American Treaty of Reciprocal Assistance of 1947 Articles 6, 8, reprinted in 17 DEP'T STATE BULL. 565 (Sept. 21, 1947) [hereinafter Rio Treaty]. The OAS resolution authorizing the quarantine is reprinted at 47 DEP'T STATE BULL. 722 (Nov. 12, 1962) and in KENNEDY, *supra* at 143. The United Nations Charter allows regional security arrangements under Chapter VIII.

84. See Rostow, *supra* note 42, at 515. Collective self-defense is subject to the same Article 51 strictures as individual self-defense. *Id.* Moreover, Article 3 of the Rio Treaty, like Article 51 of the UN Charter, requires an armed attack as the precondition for the unilateral use of force in self-defense. Rio Treaty, *supra* note 83, at art. 3. Where a threat falls short of an armed attack, the OAS Organ of Consultation may authorize the use of force. *Id.* at art. 5, 8. This raises a difficulty: whether the force employed constitutes an "enforcement action" under U.N. Charter Article 53. See Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 558-59 (1963). Enforcement actions cannot be undertaken absent Security Council approval. U.N. CHARTER art. 53; see Richard N. Gardner, *Neither Bush Nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585 (July 2003), reprinted in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT 33, 35-36 (2003). The Organ of Consultation is the inter-American system's equivalent of the United Nations Security Council.

85. See HENKIN, *supra* note 47, at 294.

86. See Rex J. Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, 19 CASE W. RES. J. INT'L L. 129, 131 (1987) (no imminent threat of attack); Rostow, *supra* note 42, at 515.

87. See *supra*, § V.

is no longer effective, if it ever was, in safeguarding the peace.<sup>88</sup> Faced with a Security Council deadlocked by the veto, regional organizations like the OAS are a good substitute for the Charter system of collective security.<sup>89</sup> The collective decision-making engaged in by regional organizations, the forum they provide for deliberation, and their built-in checks and balances are safeguards against the use of force for aggression.<sup>90</sup>

Furthermore, in a larger sense the imminence requirement was preserved, although, in an expansion of the law, the meaning of imminence expanded to include not just an imminent attack but an imminent shift in the balance of power occasioned by a rogue state's imminent acquisition of the capacity to attack.<sup>91</sup> Soviet missiles ninety miles from Florida would have radically reduced U.S. response time to a nuclear attack, heightening U.S. vulnerability.<sup>92</sup> The world acquiesced in this change in the law.<sup>93</sup>

### *The Six Day War*

On June 5, 1967 Israeli air strikes hit air bases in Egypt, Syria, and Jordan.<sup>94</sup> The strikes were justified under theories of both reactive, and anticipatory, self-defense: reactive self-defense against the Egyptian blockade of the Straits of Tiran<sup>95</sup> and anticipatory self-defense to forestall an imminent attack from Egyptian and Syrian armies massing on Israel's frontier.<sup>96</sup> Statements from the Arab nations

88. See Chayes, *supra* note 83, at 556. This argument is developed in depth in sec. VII *infra*.

89. *Id.*

90. See Chayes, *supra* note 81, at 765.

91. See Wedgwood, *supra* note 16, at 732.

92. *Id.* at 733; Myres S. McDougal, *supra* note 68, at 601.

93. See Rostow, *supra* note 42, at 515; Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 596 (1963). State acquiescence to a change in the law forms new customary law. See *supra* note 74 and accompanying text. A draft Soviet resolution condemning the quarantine was vetoed in the Security Council. See 22 U.N. SCOR (1351<sup>st</sup> mtg.) at 5, U.N. Doc. S/7951. Rev. 1 (1967), cited in Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 205, 205 n.114 (1984). An additional argument for the legality of the Cuban Quarantine, that the quarantine fell outside UN Charter Article 2(4)'s general prohibition on the use of force, is considered *infra* at text accompanying notes 143 – 45.

94. See MARTIN GILBERT, *A HISTORY OF THE TWENTIETH CENTURY, VOLUME THREE: 1952-1999* 366 (1999). For a brief account of the Six-Day War, see GILBERT, *supra*, at 365-68; Amos Shapira, *The Six-Day War and the Right of Self-Defense*, in *THE ARAB-ISRAELI CONFLICT* 205, 205-08 (John Norton Moore, ed. 1975); Charles W. Yost, *The Arab-Israeli War: How It Began*, 46 FOREIGN AFFAIRS 304 (1967/68).

95. On May 22, 1967 Egypt announced that it would blockade the Straits of Tiran in the Gulf of Aqaba against Israeli ships. GILBERT, *supra* note 94, at 365; Shapira, *supra* note 91, at 207; Yost, *supra* note 94, at 315. Israel contended that the Egyptian blockade constituted an act of war against which it was entitled to act in self-defense. See MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 100 (2002); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112-13 (2000); Michael Byers, *Terror and the Future of International Law*, in *WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER* 118, 124 (Ken Booth & Tim Dunne, eds. 2002); Yost, *supra* note 94, at 316 (citing May 23, 1967 statement of Israeli Prime Minister Levi Eshkol).

96. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 233 (1986) ("all indications supported the imminence of this attack"). Accord Wall, *supra* note 59, at 100; Polebaum,

convinced Israel that it was in imminent danger.<sup>97</sup> The most ominous was the May 26, 1967 statement of Egyptian President Gamal Abdul Nasser that: "Our basic objective will be to destroy Israel."<sup>98</sup>

Why did Israel act without Security Council authorization? One explanation is the failure of the Security Council in the crisis.<sup>99</sup> The Security Council's initial failure was its inability to halt El Fatah terrorist raids on Israel conducted from Syria. The raids led to escalating tension between Israel and the surrounding Arab states and finally war.<sup>100</sup> The danger to Israel was exacerbated by U.N. Secretary General U Thant's withdrawal of the United Nations Emergency Force (UNEF) from Sinai.<sup>101</sup> The withdrawal of UNEF removed the buffer between Egypt and Israel and left Israel exposed.<sup>102</sup> The earlier Soviet veto of the resolution against Syria demonstrated that Israel could not expect a U.N. enforcement action in her defense. The United Nations had made clear that Israel was on her own.

The legality of Israel's preemptive use of force was further bolstered by U.N. acquiescence to Israel's preemptive attack.<sup>103</sup> Following the end of the war the Soviet Union introduced no fewer than three resolutions in the Security Council condemning Israel. All were rejected.<sup>104</sup> While the Security Council fell short of endorsing the doctrine of anticipatory self-defense, significantly, there was no

*supra* note 93, at 192-94.

97. See Dinstein, *supra* note 44, at 161.

98. See GILBERT, *supra* note 94, at 366.

99. See ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 233 (1986); Ruth Lapidoth, *The Security Council in the May 1967 Crisis: A Study in Frustration*, 4 ISRAEL L. REV. 534, 545-50 (1969). The argument that the Charter restrictions on the use of force were premised upon Security Council effectiveness is discussed *infra* at sec. VII.

A not inconsiderable factor in Israel's decision to preempt was the fact that four-fifths of Israel's army was composed of civilians. See RANDOLPH S. CHURCHILL & WINSTON S. CHURCHILL, THE SIX DAY WAR 53 (1967). With the bulk of Israel's population mobilized to defend the nation by the end of May Israeli farms and factories were virtually at a standstill. The Arab nations, with their far greater populations, could afford to outwait the Israelis. Israel faced a choice between attacking first and economic collapse. *Id.*

100. See Yost, *supra* note 94, at 304-05 (on the El Fatah raids). See Draft Resolution, U.N. Doc. S/7575/Rev. 1 (3 Nov. 1966); Lapidoth, *supra* note 99, at 549 (A proposed Security Council resolution calling on Syria to restrain El Fatah was introduced by Argentina, Japan, the Netherlands, New Zealand, Nigeria, and Uganda on November 3, 1966. It was vetoed by the Soviet Union the following day.).

101. See 1967 U.N.Y.B. 177. The 1956 Suez Crisis ended with Israeli occupation of the Sinai Peninsula, Egyptian territory. See GILBERT, *supra* note 94, at 365 (Israel's withdrawal from Sinai was brokered by the United Nations in exchange for the placement in Sinai with Egyptian consent of a peacekeeping force, the United Nations Emergency Force (UNEF). The UNEF was created by UN Secretary General Dag Hammarskjöld pursuant to resolutions of the UN General Assembly.); G.A. Res. 998, U.N. GAOR, 11<sup>th</sup> Sess., U.N. Doc. A/3299 (1956); G.A. Res. 1000, U.N. GAOR, 11<sup>th</sup> Sess., U.N. Doc. A/3301 (1956); FREDERICK H. FLEITZ, JR., PEACEKEEPING FIASCOS OF THE 1990S: CAUSES, SOLUTIONS, AND U.S. INTERESTS 37-47 (2002).

102. See Lapidoth, *supra* note 96, at 536 n.9 (1969) (Egypt requested UNEF to withdraw on May 16, 1967); Yost, *supra* note 91, at 311, 313 (UNEF withdrew on May 18).

103. See Schwebel, *supra* note 43, at 481; Dinstein, *supra* note 44, at 162.

104. See Draft Soviet Security Council Resolutions S/7951, S/7951/Rev. 1, S/7951/Rev. 2. All three resolutions were rejected on June 14, 1967. See Shapira, *supra* note 94, at 219, 219 n. 32; Polebaum, *supra* note 93, at 193 n.38.

consensus in the Security Council against it.<sup>105</sup> Professor Louis René Beres concludes that the Security Council's failure to condemn Israel constituted "implicit approval" of Israel's preemptive strike.<sup>106</sup>

The Soviet bloc fared no better in the General Assembly where another four resolutions condemning Israel were rejected.<sup>107</sup> Inasmuch as there is no veto in the General Assembly the General Assembly's refusal to condemn Israel is an even more reliable gauge of world approval of Israel's preemptive strike.

### *Osiraq*

Paradoxically, although it was unanimously condemned in the Security Council,<sup>108</sup> Israel's June 7, 1981 air attack on Iraq's Osiraq nuclear reactor provides support for the right of anticipatory self defense.<sup>109</sup> Consider the following:

(1) *Security Council condemnation of the Israeli raid must be discounted because no sanctions were imposed on Israel.*<sup>110</sup> Political considerations may require that the international community condemn what it secretly approves.<sup>111</sup> Security Council condemnation of the raid should not be accepted at face value because no sanctions were attached.<sup>112</sup> Failure to attach sanctions amounted to state acquiescence in Israel's conduct.<sup>113</sup>

(2) *Condemnation of the raid does not indicate a rejection of the doctrine of anticipatory self-defense but at most a finding that the requirements for anticipatory self-defense were not met in this particular case.* Less than half of the delegations condemned anticipatory self-defense outright.<sup>114</sup> Statements by other delegates held out the possibility that they might have approved preemption under different circumstances.<sup>115</sup> These delegates applied *Caroline* but thought that

105. See Arend, *supra* note 39, at 95. This would hold true with regard to the Security Council's response to Israel's June 7, 1981 raid on Iraq's Osiraq nuclear reactor. See *infra* note 116 and accompanying text.

106. See Beres, *supra* note 67, at 93. Accord JULIUS STONE, THE MIDDLE EAST UNDER CEASE-FIRE 6, 10 (1967), cited in Shapira, *supra* note 94, at 219-20, 220 n.33.

107. See Draft Soviet General Assembly Resolution A/L519 and Draft Albanian General Assembly Resolutions A/L521, A/L524, and A/L525. All four of these resolutions were rejected on July 4, 1967. See Shapira, *supra* note 94, at 219, 219 n.32.

108. See S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., UN Doc. S/RES/487 (19 June 1981).

109. See Rivkin, Casey, and Bartram, *supra* note 79, at 18; and Louis René Beres & Col. Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMPLE INT'L & COMP. L.J. 437 (1995). For background on the Israeli strike see RODGER W. CLAIRE, RAID ON THE SUN: INSIDE ISRAEL'S SECRET CAMPAIGN THAT DENIED SADDAM THE BOMB (2004).

110. See Rivkin, Casey, and Bartram, *supra* note 79, at 18; Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584, 586 (1983); Beres & Tsiddon-Chatto, *supra* note 109, at 447, 439-40; Beres, *supra* note 67, at 93.

111. *Id.* at 586.

112. See D'Amato, *supra* note 110, at 586.

113. *Id.*

114. See U.N. SCOR 36th Sess., 2280th mtg. at 16, U.N. Doc. S/PV.2280 (12 June 1981) (Algeria); U.N. SCOR 36th Sess., 2286th mtg. at 4-5, U.N. Doc. S/PV.2286 (17 June 1981) (Somalia); U.N. SCOR 36th Sess., 2287th mtg. at 2, U.N. Doc. S/PV.2287 (17 June 1981) (Nicaragua).

115. See, e.g., U.N. SCOR 36th Sess., 2288th mtg. at 58-60, U.N. Doc. S/PV.2288 (1981) (United



Israel had failed to meet the *Caroline* criteria.<sup>116</sup>

Some delegates accused Israel of having failed to demonstrate that Iraq had an intent to produce bombs arguing that capacity to build bombs is not the same thing as intent to build.<sup>117</sup> Astonishingly, the Council brushed aside the inescapable conclusion that Iraqi animosity was implied by Iraq's record of hostile acts toward Israel.<sup>118</sup>

And although some delegates scolded Israel for not approaching the Security Council before using force,<sup>119</sup> conveniently passed over was the Security Council's earlier failure before and during the 1967 war to ensure Israel's security. The law does not require a futile gesture and Israel had good reason to believe the Security Council would not block future aggression towards Israel.

There was no consensus in the Security Council as to the legitimacy of anticipatory self-defense.<sup>120</sup> Osiraq leaves the door open to a conclusion that anticipatory self-defense may be legal under some circumstances. The Security Council's condemnation of the raid seems not to indicate a rejection of the right of anticipatory self-defense but merely a conclusion that the requirements for anticipatory self-defense were not met in this case. With the benefit of hindsight the Security Council very probably would reach a different conclusion.<sup>121</sup> Iraq's post-Osiraq conduct—its instigation of the Iran-Iraq war and invasion of Kuwait, its violation of numerous Security Council resolutions,<sup>122</sup> and its use of poison gas against the Iraqi Kurds—have forced a reevaluation of the 1981 raid. Could Saddam have been ousted from Kuwait if Israel had not prevented Saddam from developing nuclear weapons?<sup>123</sup>

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States) ("[O]ur judgment that Israeli actions violated the United Nations Charter is based *solely* on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute.") (emphasis added).

116. Other than the delegate from Israel, only the delegate from Uganda referred to *Caroline* by name and expressly identified the factors invoked as derived from the *Caroline* doctrine. U.N. SCOR 36th Sess., 2282nd mtg. at 6, U.N. Doc. S/PV.2282 (1981). Sierra Leone's delegate quotes Webster's formula without identifying it as the *Caroline* doctrine. U.N. SCOR 36th Sess., 2283rd mtg. at 57, U.N. Doc. S/PV.2283 (1981).

117. U.N. SCOR 36th Sess., 2281st mtg. at 7, U.N. Doc. S/PV.2281 (1981) (League of Arab States).

118. A better test for intent has been formulated by Professor Ruth Wedgwood. See *infra* note 190.

119. U.N. SCOR 36th Sess., 2288th mtg. at 11, U.N. Doc. S/PV.2288 (19 June 1981) (Mexico); U.N. SCOR 36th Sess., 2284th mtg. at 3, U.N. Doc. S/PV.2284 (16 June 1981) (Philippines); U.N. SCOR 36th Sess., 2283rd mtg. at 15, U.N. Doc. S/PV.2283 (15 June 1981) (Sierra Leone).

120. See AREND & BECK, *supra* note 36, at 79 (lesson of Osiraq is that there is no international consensus for or against anticipatory self-defense).

121. See CLAIRE, *supra* note 109, at 240 (quoting Cheney); Wall, *supra* note 59, at 100 (quoting U.S. Secretary of State Colin Powell approving Osiraq raid); George F. Will, *The F-16 Solution*, WASH. POST., Nov. 1, 2001, at A35 (quoting opinion of Dick Cheney, Secretary of Defense during Operation Desert Storm, that the Israeli raid on the Osiraq reactor made the coalition's task easier); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON J. INT'L L. 3, 18 (1999) (consensus of scholars approves of Osiraq raid); Louis René Beres, *After the Scud Attack: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 75, 99 (1992).

122. See *supra* note 20.

123. See CHRISTOPHER HITCHENS, *A LONG SHORT WAR: THE POSTPONED LIBERATION OF IRAQ* 54

### *1986 U.S. Air Strikes on Libya*

On April 14, 1986, the United States bombed targets in Libya.<sup>124</sup> The raid was in response to a bomb explosion on April 5, 1986 in a West Berlin discotesque which killed one American serviceman and wounded other persons.<sup>125</sup> The United States placed responsibility for the bombing on Libyan terrorists.<sup>126</sup>

In a national television address following the raid, President Ronald Reagan justified the attack as self-defense under Article 51 of the United Nations Charter.<sup>127</sup> While the impetus for the raid was the West Berlin bombing, the Libyan air strikes were a forward looking—thus, preemptive—measure<sup>128</sup> designed, in the President's words, to "diminish Colonel Qadhafi's capacity to export terror."<sup>129</sup> The President characterized the U.S. attack as a "preemptive action"<sup>130</sup> and stated that the purpose of the raid was "to *deter* acts of terrorism by Libya."<sup>131</sup>

Even if the raid failed to meet the strictures of either Article 51 or custom, the Security Council, notably, failed to condemn the attack.<sup>132</sup> While international opinion at the time was critical of the 1986 Libya raid,<sup>133</sup> a scant seven years later the very similar 1993 U.S. air strike on Iraq attracted generally favorable world reaction.<sup>134</sup> This may signal a shift internationally from a restrictionist to a counter-restrictionist reading of Article 51 in the years following the 1986 Libya

(2003); Beres & Tsiddon-Chatto, *supra* note 110, at 439. A further argument for the legality of the Osiraq raid, that the raid fell outside U.N. Charter Article 2(4)'s general prohibition on the use of force, is discussed *infra* at nn. 139-145.

124. President's Address to the Nation, United States Air Strike Against Libya, 1986 PUB. PAPERS 491 (April 14, 1986) [hereinafter *Reagan Address*]. President Ronald Reagan described the targets as "headquarters, terrorist facilities and military installations that support Libyan subversive activities." Letter from President Reagan to Congress, 1986 PUB. PAPERS 499 (April 16, 1986) [hereinafter *Reagan Letter*].

125. *Reagan Address*, *supra* note 124.

126. *Id.*

127. *Id.* The President said: "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter." The raid was also described as self-defense under Article 51 in President Reagan's letter to Congress. See *Reagan Letter*, *supra* note 124.

128. See Glennon, *Preempting Terrorism*, *supra* note 58, at 25.

129. *Reagan Address*, *supra* note 124.

130. *Id.*; *Reagan Letter*, *supra* note 124.

131. *Id.* (emphasis added). According to President Reagan, the United States action would "provide [Qadhafi] with incentives and reasons to alter his criminal behavior." See *Reagan Address*, *supra* note 124.

132. Draft S.C. Res. Condemning 1986 Libya Strike, UN Doc. S/10784. The resolution won the nine votes needed to pass but was vetoed by the United States, France, and the United Kingdom. Australia and Denmark also voted against the resolution. U.N. SCOR 41st Sess., 2682nd mtg. at 43, U.N. Doc. S/PV.2682 (Apr. 21, 1986), 40 U.N. Y.B. 254 (1986). A resolution condemning the attack did pass in the United Nations General Assembly. See G.A. Res. 41/38 (XII) (20 Nov. 1986), 40 U.N. Y.B. 257-58 (1986). The General Assembly resolution passed 79-28-33. 40 U.N. Y.B. at 258.

133. See Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 105-06 (1994).

134. *Id.* at 103; Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27:2 FLETCHER FORUM 35, 36 (2003).

air strikes and a more accommodating international attitude toward the unilateral use of force.<sup>135</sup>

## VII. THE FAILURE OF THE SECURITY COUNCIL AND ITS CONSEQUENCES FOR LAW ENFORCEMENT

Longing to wed with Peace, what did we do?—

Sketched her a fortress on a paper pad

—Edna St. Vincent Millay<sup>136</sup>

Has the Security Council failed? Abram Chayes has observed that “[e]vents since 1945 have demonstrated that the Security [Council] . . . was not a wholly viable institution. The veto has largely disabled it from fulfilling its intended role in keeping the peace.”<sup>137</sup> The 291 interstate conflicts fought since the United Nations’ founding attest to the Council’s ineffectiveness.<sup>138</sup>

The Charter rules prohibiting force, chiefly Articles 2(4) and 51, were premised upon an effective Security Council.<sup>139</sup> In a world in which the Security Council fulfilled its role of preserving peace there would be no need for anticipatory self-defense. But if the Security Council cannot—or will not—maintain peace, it is senseless to demand that states strictly adhere to Articles 2(4) and 51.<sup>140</sup> The burden of self-defense thus falls largely on each individual state

135. See Baker, *supra* note 133, at 110-13.

136. EDNA ST. VINCENT MILLAY, *MAKE BRIGHT THE ARROWS*: 1940 NOTEBOOK 57 (1940).

137. See Abram Chayes, *Law and the Quarantine of Cuba*, 41 *FOR’N AFF.* 550, 556 (1963). See also McDougal, *supra* note 33, at 599 (assessing the “continuing ineffectiveness of the general community organization to act quickly and certainly for the protection of states”). For the veto held by the Security Council’s five Permanent Members—the United States, United Kingdom, Russia, China, and France—see U.N. CHARTER art. 27, para 3.

138. See Glennon, *supra* note 42, at 540. See also Franck, *supra* note 61, at 51 (referring to Charter’s “fundamental promise to provide an effective system of collective measures to protect states against violators of the peace. This promise, unfortunately, has not been kept.”).

139. See JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 96-98 (1958). The Charter itself arguably recognizes that the Security Council may prove ineffective and provides for that contingency. Article 51 specifies that a state may act in self-defense “until the Security Council has taken measures necessary to maintain international peace and security.” U.N. CHARTER art. 51. This implies that if the Security Council adopts measures which do not maintain international peace and security then the defending state remains seized of the matter. See I OPPENHEIM’S *INTERNATIONAL LAW* 423 (Sir Robert Jennings and Sir Arthur Watts, ed., 9th ed. 1992); Rostow, *supra* note 42, at 511; Fawcett, *supra* note 58, at 361-62; Waldock, *supra* note 44, at 498 (“inadequate” United Nations action).

140. Professor Louis René Beres notes: “The argument against the restrictive view of self defense is reinforced by the apparent inability of the Security Council to provide collective security against an aggressor.” See Beres, *supra* note 67, at 93. *Accord* *Nicar. v. U.S.*, *supra* note 43, at 543-44 (Jennings, dissenting); WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 260 (1964) (“[I]n the absence of effective international machinery the right of self-defense must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.”). Recall that fundamentally changed circumstances permit deviation from the terms of a treaty, including the United Nations Charter. See Kirgis, *supra* note 65.

with anticipatory self-defense as an indispensable tool for national survival.<sup>141</sup>

Anticipatory self-defense should not be seen as incompatible with the purposes of the United Nations Charter. U.N. Charter Article 2(4) is not a blanket prohibition on all unilateral use of force but only a prohibition on force which impairs another state's "territorial integrity or political independence" or which is "in any other manner inconsistent with the Purposes of the United Nations."<sup>142</sup> Since the purpose of the United Nations is to "maintain international peace and security,"<sup>143</sup> preemption is legal under Article 2(4) if it advances these goals.<sup>144</sup> A careful reading reveals that preemption is built into the Charter. Professor Robert F. Turner points out that one of the purposes of the United Nations is to prevent threats *before* they mature.<sup>145</sup> By acting in the Security Council's stead the United States and its coalition partners were merely fulfilling a responsibility the Security Council had abdicated. President Bush has stressed that a major purpose of Operation Iraqi Freedom was to enforce Security Council resolutions mandating Iraqi disarmament.<sup>146</sup> The Security Council could not bring itself to take action, instead preferring to give Saddam an unending string of toothless warnings to disarm.<sup>147</sup>

Far from being unlawful *per se*, preemption may be "law-enforcing."<sup>148</sup>

141. See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 319 (1989) ("In a world arena in which authoritative and effective power remains largely unorganized and decentralized, various lesser communities can hardly be expected to achieve even minimum security . . . if they are denied appropriate capabilities and measures of response.").

142. See STONE, *supra* note 139, at 95; D'Amato, *supra* note 110, at 584-86. Article 2(4) provides: "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 other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

143. U.N. CHARTER art. 1.

144. Thus, according to Professors McDougal and Feliciano: "[P]ermitting defense against an imminently expected attack does not, any more than permitting defense against an actual current attack, impair or dilute the 'authority and responsibility' of the organized community 'to maintain or restore international peace and security.'" See MCDUGAL & FELICIANO, *supra* note 37, at 237. As Professor McDougal writes elsewhere: "[T]he 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." McDougal, *supra* note 33, at 600.

145. See Turner, *supra* note 17, at 168; U.N. CHARTER art. 1, para. 1 (purpose of United Nations is "prevention and removal of threats to the peace") (*emphasis added*).

146. See *Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave'*, N.Y. TIMES, Mar. 18, 2003, at A14 (col. 1); UN SPEECH, *supra* note 7. The Joint Congressional Resolution of October 16, 2002 lists enforcement of UN resolutions and U.S. self-defense as the rationale for the authorization for the use of military force against Iraq. See Iraq Resolution, *supra* note 9, § 3(a).

147. See *supra* note 18. Compare the Security Council's comparable success in coping with the threat posed by the Taliban. From 1998 through mid-2001 the Council repeatedly demanded that the Taliban surrender Osama bin Laden and cease its support for international terrorism. See Wall, *supra* note 59, at 101-02, 106 n.36. The result we know.

148. See Beres, *After the Gulf War*, *supra* note 11, at 266; Beres & Tsiddon-Chatto, *supra* note 109, at 440. Beres and Chatto write: "In the absence of a centralized enforcement body, international law relies upon the willingness of individual states to act on behalf of the entire global community." *Id.* at 439. Individual law enforcement action is consistent with Article 24(1) of the Charter which gives the

Thus, Israel's 1967 preemptive strikes against Egypt and Syria, and her 1981 strike on the Osiraq nuclear reactor were in harmony with the purposes of the United Nations. The strikes protected a member state from aggression. By the same token the Cuban quarantine was not "inconsistent with the Purposes of the United Nations" because it defused Soviet aggression.<sup>149</sup> It was Cuba and the Soviet Union, not the United States, who violated Article 2(4) by the threat of force implicit in their attempt to install Soviet missiles in the Western Hemisphere.<sup>150</sup>

Some writers go further and assert not merely that the Charter rules have been relaxed but that the Charter rules prohibiting the use of force are dead.<sup>151</sup> Under the principle of desuetude, a treaty provision, such as Articles 2(4) and 51 of the U.N. Charter may lose its force through long-term disuse or nonobservance.<sup>152</sup> We have already cited Michael Glennon's reference to the 291 interstate conflicts fought since the United Nations' founding.<sup>153</sup> Glennon also refers to the concept of *non liquet*. A *non liquet* ("it is not clear") occurs when the legal norms in an area of the law are so internally contradictory or confused that we cannot articulate the law.<sup>154</sup> Under the rule in *The S.S. Lotus* states may do as they please unless a restriction has been established by treaty or customary law.<sup>155</sup> Glennon concludes that since the Charter no longer works to maintain peace there is currently no law which restricts how states may use force. The U.S. attack on Iraq was legal because: "[T]here was no international law forbidding it. It was therefore impossible to act unlawfully."<sup>156</sup>

To be worthy of the name, a system of law must be capable of disciplining nonconforming elements. And when a legal system consists largely of nonconforming elements, we ought to suspect that "system" is dead. Law is a system of norms which describes, predicts, and controls the conduct of actors in the system. But the Charter rules on force do not describe how states behave. The

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Security Council "primary" not *exclusive* responsibility for maintaining international peace and security. See Turner, *supra* note 17, at 179, 184; U.N. CHARTER art. 24, para. 1.

149. See Eustace Seligman, *The Legality of the U.S. Quarantine Action under the United Nations Charter*, 49 A.B.A. J. 142, 142 (1963).

150. The Charter prohibits not only force but threats of force. U.N. CHARTER art. 2, para. 4.

151. For commentators taking this view, see, e.g., Arend, *supra* note 40; Glennon, *supra* note 42; Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* (A. Cassese ed., 1986); Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970).

152. See Michael J. Glennon, *Why the Security Council Failed*, 82 FOR'N AFF. 16, 22 (2003); RESTATEMENT (THIRD), *supra* note 48, §102 reporter's note 4.

153. See *supra* note 135 and accompanying text. As Professor Glennon observes: "So many states have used force with such regularity in so wide a variety of situations that it can no longer be said that any customary norm of state practice constrains the use of force." See Glennon, *supra* note 151, at 554. For a brief catalog of uses of force conducted without Security Council authorization, see Arend, *supra* note 151, at 100.

154. See Glennon, *supra* note 151, at 555 n.49 ("*non liquet* refers to an insufficiency in the law, to the conclusion that the law does not permit deciding a case one way or the other").

155. See Glennon, *supra* note 152, at 23. This is the holding of the Permanent Court of International Justice in *The S.S. Lotus*, (1927) P.C.I.J. Reports, Ser. A, No. 9, at 18.

156. See Glennon, *supra* note 152, at 24. The larger conclusion is that we are now living in a post-Charter era.

rules neither constrain nor punish violators. And the rules do not predict how states will act (to the contrary, the best prediction is that states will ignore the rules whenever expedient). Instead, the Charter prohibitions on the unilateral use of force are “paper rules”: they have no real force.<sup>157</sup>

Restrictionists, naturally, dispute that the Charter prohibitions on force are dead. Restrictionists cite dictum from the International Court of Justice to the effect that when states depart from the Charter rules these departures are not state practice supporting new legal norms—they are violations of international law.<sup>158</sup> These departures are not state practice supporting the emergence of new norms because *opinio juris* is lacking.<sup>159</sup> Restrictionists find support in the fact that states do not publicly repudiate the Charter rules.<sup>160</sup> But as Michael Glennon points out, states do not openly repudiate the rules because states avoid “needless confrontation.”<sup>161</sup> What is more, to require express repudiation is to presuppose the existence of a rule under which an international norm ceases to be binding only once it is openly repudiated.<sup>162</sup> But such a “rule” finds no support in state practice.<sup>163</sup>

#### VIII. MUST AN ATTACK BE IMMINENT?

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157. *Id.* at 31.

158. See Nicaragua case, at para. 186 (“instances of state conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule”), quoted in O’Connell, *supra* note 32, at 14.

159. *Opinio juris sive necessitatis* is the subjective component of customary international law. *Opinio juris* is defined as states’ conviction that they engage in, or refrain from, particular conduct because doing so is legally required rather than a matter of convenience. RESTATEMENT (THIRD), *supra* note 48, § 102 cmt. c (1987). New customary law requires both state practice and supporting *opinio juris*. *Id.* § 102(2).

160. See O’Connell, *supra* note 32, at 15. Thus, Professor O’Connell points out that the Bush Administration has not publicly repudiated the Charter rules. *Id.* at 15. Professor O’Connell maintains that in the past the United States has consistently opposed preemption. *Id.* at 12-13, 15-17 (e.g., Eisenhower Administration opposed preemption by Britain, France, and Israel during the 1956 Suez Crisis).

161. See Glennon, *supra* note 152, at 24.

162. *Id.* at 23-24.

163. *Id.* at 24. Some critics argue that the Bush Administration *has* repudiated the Charter rules. At a news conference on the eve of the Iraq war President Bush was asked whether an invasion without Security Council authorization would violate the United Nations Charter. President Bush answered: “[W]hen it comes to our security if we need to act we will act. And we really don’t need the United Nations’ approval to do so. . . . [W]hen it comes to our security, we really don’t need anybody’s permission.” See *Excerpts from Bush’s News Conference on Iraq and Likelihood of War*, N.Y. TIMES, Mar. 7, 2003, A1, at 12. One commentator concluded that “It’s hard to see this remark as anything other than a repudiation of the framework of international law governing the use of force, as set out in the United Nations Charter.” See Anthony Dworkin, *Would War Be Lawful Without Another U.N. Resolution?*, at <http://www.crimesofwar.org/onnews/news-iraq2.html> (Mar. 10, 2003) (visited Mar. 15, 2004) (emphasis added). Professor Thomas M. Franck also maintains that the United States has repudiated the Charter restrictions on the use of force. See Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT’L L. 607, 617 (2003), reprinted in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT 55, 65 (2003). On the other hand, the President’s comment may merely reflect the belief that Operation Iraqi Freedom was justified under Article 51 of the Charter, in which case Security Council “permission” to use force would not be needed.

The foregoing demonstrates that an actual armed attack is not a precondition for the exercise of self-defense. According to most scholars, the customary right of self-defense—which subsumes anticipatory self-defense—requires only that an attack be imminent.<sup>164</sup> Does the requirement of an imminent attack present an insuperable objection to the legality of Operation Iraqi Freedom? The Bush Administration never suggested that Iraq was about to attack in a week or a month. Even former CIA analyst Kenneth M. Pollack, a leading advocate of invasion, admitted prior to the invasion that Saddam was not an imminent threat.<sup>165</sup> Instead of characterizing Iraq as an imminent threat, the White House argued that the United States needed to act at once because waiting would only allow Iraq to become stronger.<sup>166</sup>

Some commentators believe that the Bush Administration is seeking to expand the law.<sup>167</sup> Privately, some Administration supporters have admitted that they seek an extension of the law.<sup>168</sup> The National Security Strategy argues for the need to “*adapt* the concept of imminent threat to the capabilities and objectives of today’s adversaries.”<sup>169</sup> The President’s 2003 State of the Union address seemed to suggest abandonment rather than adaptation of the customary requirement of an imminent attack.<sup>170</sup>

If the Administration is seeking to expand the law, there is good reason for so doing. Nuclear weapons and other WMD call into question the customary requirement of an imminent attack just as forcefully as they call into question the

164. See Zedalis, *supra* note 86, at 129. Under *Caroline*, anticipatory force in self-defense may be used where there is “no moment for deliberation.” See *supra* note 31.

165. See Pollack, *supra* note 5, at 148 (“Saddam is . . . probably several years away from being an irremediable danger.”)

166. The President said: “If we know Saddam Hussein has dangerous weapons today, and we do, does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?” Cincinnati Speech, *supra* note 1. The President added: “Some have argued we should wait, and that’s an option. In my view it’s the riskiest of all options because the longer we wait, the stronger and bolder Saddam Hussein will become.” *Id.* The same argument was made by Vice President Cheney in his Nashville speech. The Vice President assailed opponents of immediate action against Iraq as taking the position that “We just need to let [Saddam] get stronger before we do anything about it.” See Nashville Speech, *supra* note 5.

167. See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 179-83 (2003); Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT’L & COMP. L.Q. 401, 410 (2002).

168. See William Galston, *Perils of Preemptive War*, THE AM. PROSPECT, Sept. 27, 2002, at 24.

169. NATIONAL SECURITY STRATEGY, *supra* note 2, at 15 (emphasis added). Elsewhere, the NSS speaks of the need to pre-empt “emerging threats before they are fully formed,” phraseology which suggests action before threats become imminent. *Id.*, in President Bush’s Introduction.

170. The President said: “Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?” President George W. Bush, State of the Union Address (Jan. 28, 2003) (transcript available at <http://www.gpoaccess.gov/sou>). A year earlier the President had made clear that he was not suggesting Iraq posed an imminent threat. In his 2002 State of the Union address President Bush described the Iraq threat not as imminent, but as a “grave and growing danger.” See President’s 2002 State of the Union Address, *supra* note 3. Later that year, before the United Nations General Assembly, the President called Iraq “a grave and gathering danger.” See UN SPEECH, *supra* note 7.

Charter requirement of an “armed attack.”<sup>171</sup> States confront a radically different environment than existed before Hiroshima. The National Security Strategy observes that in the past an imminent threat was “most often [signaled by] a visible mobilization of armies, navies, and air forces preparing to attack.”<sup>172</sup> These conventional threats took time to develop. Today, a terrorist state which acquires WMD can go practically overnight from posing no threat to posing an imminent threat. Indeed we can never know when an attack is imminent.<sup>173</sup> U.S. intelligence has had a mixed record in detecting emerging nuclear arsenals.<sup>174</sup> The greatest danger is that we will not know that an attack is imminent until it is too late. As Deputy Secretary of Defense Paul Wolfowitz and others have asked: When was 9/11 imminent?<sup>175</sup>

In reality, the Administration has been knocking at a door that is already open. We have observed that state practice is to acquiesce in acts of preemption well in advance of an imminent threat of attack.<sup>176</sup> In the Cuban Missile Crisis imminence was recast from imminent attack to an imminent change in the balance of power.<sup>177</sup>

Furthermore, the restrictive rule set out in *Caroline* is inapplicable in the context of Iraq.<sup>178</sup> *Caroline* set out a highly restrictive standard for the anticipatory use of force. Under the circumstances, this restrictive view made sense.<sup>179</sup> *Caroline* involved two friendly countries: the United States and Great Britain. The United States, the target of Great Britain’s preemptive attack, was not responsible for the incursions into Canada; in fact, the United States was willing and able to

171. See Condoleezza Rice, *The President’s National Security Strategy*, in THE NEOCON READER 79, 82 (Irwin Stelzer, ed., 2004) (“new technology requires new thinking about when a threat becomes ‘imminent’”).

172. NATIONAL SECURITY STRATEGY, *supra* note 2, at 15.

173. See DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR 34 (2003) (need to balance the danger of striking too soon with waiting too long); Louis René Beres, *Preserving the Third Temple: Israel’s Right of Anticipatory Self-Defense under International Law*, 26 VAND. J. TRANSNAT’L L. 111, 124 (1993) (difficulty of distinguishing imminent from more remote threats).

174. See Henry Sokolski, *The Wrong Culprit*, WKLY. STANDARD, Feb. 16, 2004, at 19.

175. See *The Imminence Invention*, WALL ST. J., Aug. 5, 2003, at A8; François Heisbourg, *A Work in Progress: The Bush Doctrine and Its Consequences*, 26 WASH. Q. 75-76, 87, n.2 (2003) (quoting remarks of Deputy Secretary of Defense Paul Wolfowitz); Bill Keller, *The Sunshine Warrior*, N.Y. TIMES MAG., Sept. 22, 2002, 48, 50. As Professor Ruth Wedgwood urges: “In a world of nuclear danger, we may wish to permit anticipatory self-defense against overwhelming threats to national safety, even where the threat is not immediate.” See Wedgwood, *supra* note 59, at 619 n.40.

176. See *supra* sec. VI. Lawrence F. Kaplan and William Kristol write that “the legal basis for preemption has become so broad that it permits acts of anticipatory self-defense well before an attack becomes imminent.” See LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM’S TYRANNY AND AMERICA’S MISSION 85-86 (2003). See also Wall, *supra* note 59, at 99 (state practice departs from *Caroline* criteria); Abraham Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214 (2003), available at <http://ejil.org/journal/Vol14/No2/art1.pdf> (last visited Jan. 10, 2003).

177. See Zedalis, *supra* note 86, at 131.

178. See Sofaer, *supra* note 176, at 214.

179. *Id.*



restrain the Americans who were aiding the Canadian rebels.<sup>180</sup> Given these facts, Great Britain would have needed to employ anticipatory force only in extraordinary circumstances: only, as Secretary Webster wrote, where there existed "[a] necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>181</sup> The situations in which preemptive self-defense has been used in the modern era are entirely different from the facts in *Caroline*. Cuba and the Soviet Union in 1962, the Arab states in 1967, Iraq in 1981, Libya in 1986, and Iraq again in 2003—all these cases involved rogue states. Rogue states have no desire to restrain their aggression against the West or to restrain terrorist groups taking refuge within their borders.<sup>182</sup>

To cope with the danger presented by rogue states a more flexible standard is required than the one set out in *Caroline*.<sup>183</sup> The standard remains that of necessity and proportionality but necessity must be analyzed in terms of the totality of the circumstances, that is to say, reasonableness.<sup>184</sup> Reasonableness in any particular case may or may not include a temporally proximate threat of attack.

Professor McDougal assessed the totality of the circumstances surrounding the Cuban Missile Crisis and concluded that the U.S. quarantine was necessary, hence legal.<sup>185</sup> Judge Sofaer suggests that the factors relevant to determining the necessity for exercising preemptive self-defense are: (1) the nature and magnitude of the threat;<sup>186</sup> (2) the likelihood of the threat being realized;<sup>187</sup> (3) exhaustion of alternatives;<sup>188</sup> and (4) whether under the circumstances preemption would be consistent with the Purposes of the United Nations Charter.<sup>189</sup> He concludes that Operation Iraqi Freedom passes muster under this test. Saddam's track record of aggression both against his neighbors and his own people as well as his personal psychopathology made it highly likely that Saddam would commit aggression again.<sup>190</sup> For ten years following the Persian Gulf ceasefire Saddam consistently

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180. *Id.* at 214, 219, 220.

181. THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, *supra* note 31.

182. Judge Sofaer explains the limited scope of the *Caroline* doctrine: "[Webster's] exacting standard is valid, if anywhere, only where the action considered is to be undertaken in the territory of a state that is not responsible for the threat involved, and that is both able and willing to suppress it." Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10.

183. Sofaer, *supra* note 176, at 214, 220. Professor McDougal observes that "a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies." See McDougal, *supra* note 33, at 598.

184. Sofaer, *supra* note 176, at 212; McDougal, *supra* note 33, at 597. Reasonableness is the standard accepted by the United States government. See Sofaer, *supra*, at 213 n.18 and accompanying text.

185. See McDougal, *supra* note 33, at 601-03.

186. Sofaer, *supra* note 176, at 220.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 222-23. Compare Professor Ruth Wedgwood's test for hostile intent which similarly takes into account the subject's past aggression. Professor Wedgwood suggests that intent may be implied given: (1) a dictator or human rights violator; (2) who has a history of aggression; and (3) who is attempting to acquire or develop WMD. See *Attacking Iraq: Is Preemptive Self-Defense Lawful?*, AMERICAN SOCIETY OF INTERNATIONAL LAW BRIEFING SERIES (Oct. 29, 2002) (*available at*

violated Security Council resolutions demanding that he disarm.<sup>191</sup> Operation Iraqi Freedom was consistent with the purposes of the United Nations because it enforced Security Council resolutions and eliminated a major threat to international peace and security.<sup>192</sup>

## IX. CONCLUSION

The Bush Administration has offered two arguments for the legality of Operation Iraqi Freedom. First, the Administration has argued that Iraq's material breach of Security Council Resolution 687, the Gulf War ceasefire, reactivates the authorization of force made in Security Council Resolution 678.

However, the argument which has received the most public attention is that Operation Iraqi Freedom was justified as preemptive self-defense. Pre-Charter customary law allowed preemption given satisfaction of the requirements of necessity and proportionality. Necessity signified an imminent attack and the unavailability of alternative, peaceful means to forestall the attack. Whether the customary right of anticipatory self-defense survives under the Charter is a matter of controversy. On its face the Charter presents a blanket prohibition on the use of force with only two exceptions: force authorized by the Security Council and, under Article 51, self-defense if an armed attack occurs.

Counter-restrictionists present four main arguments against literal application of Article 51's "armed attack" requirement: (1) the wording and drafting history of Article 51 indicate that the Charter drafters did not intend to cut down the customary right of anticipatory self-defense; (2) literal application of Article 51's "armed attack" requirement would require states to absorb the first blow in an attack; (3) state practice has acquiesced in acts of anticipatory self defense; and (4) the Charter prohibitions on the use of force were premised upon an effective Security Council but the Security Council has proven ineffective in maintaining international peace. These considerations necessitate the conclusion that self defense must, perforce, fall to individual states and coalitions of the willing.

While it is apparent that an actual armed attack is no longer required for permissible self-defense, what of the customary law requirement that self-defense is allowed only where an attack is imminent? As no one in the Bush Administration claimed that an Iraqi attack was imminent it might seem that Operation Iraqi Freedom preempted a merely potential, not imminent, threat. However, state practice supports a broad reading of what constitutes an imminent attack. Moreover, the *Caroline* doctrine, which established the imminence requirement, dealt with friendly states. A more flexible standard for self-defense is needed in today's struggles with terrorist groups and with rogue regimes. Finally, it may be that the Bush Administration is seeking to extend the law. If other nations acquiesce in the coalition's invasion of Iraq, new law will be formed which

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<http://www.sais-jhu.edu/mediastream/debl.ram> - recorded debate at the John Hopkins University School of Advanced International Studies) (visited Mar. 22, 2003).

191. See Sofaer, *supra* note 176, at 223.

192. *Id.* at 223-24; Michla Pomerance, *The Legality of the Iraq War*, at <http://www.ajiac.org.au/review/2003/284/legal-iraq.html> (Apr. 2003) (visited Feb. 18, 2004).

allows pre-emptive attack under circumstances akin to Operation Iraqi Freedom.