International Humanitarian Law Series

International Law and Armed Conflict: Exploring the Faultlines

Essays in Honour of Yoram Dinstein

Edited by
Michael Schmitt and Jelena Pejic



Martinus Nijhoff Publishers

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International Humanitarian Law Series

VOLUME 15

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Professor Yoram Dinstein

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Michael N. Schmitt and Jelena Pejic

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Cover photo: Afghanistan, Khandahar. After a road bomb has destroyed an US Army vehicule, troops are patrolling the area to look for clues.
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Preface

On behalf of the contributors, we offer this Volume in friendship, respect and admiration for Professor Yoram Dinstein. No-one familiar with his wide-ranging work in the field can feel anything but awe for his contribution to the clarification and development of international law. To us, Yoram has also been a selfless, albeit – as anyone who knows him well understands – demanding, mentor, one who has sharpened our understanding of, and ability to think critically about, the law. Along with many others, we have also benefited over the years from his erudition on a range of subjects well beyond international law.

Yoram Dinstein's *opus*, while international in breadth and effect, is deeply rooted in his beloved Israel. Born in Tel-Aviv in 1936, he obtained his legal education at the Hebrew University in Jerusalem (where he graduated *summa cum laude*) and New York University. Professor Dinstein began his professional career in Israel's Foreign Service in which he served as Consul of Israel in New York City and with Israel's Permanent Mission to the United Nations. Even subsequent to becoming a full-time academic, Professor Dinstein represented his country in various international *fora*, ranging from the UN Commission on Human Rights and the International Conferences of the Red Cross and Red Crescent to Interpol. In 1986-1988, he also served as Counsel in the *Taba* Arbitration with Egypt.

It is as an educator and academic, however, that Professor Dinstein has left an indelible mark. In Israel, he was Professor of International Law, Dean of the Faculty of Law, Rector and President of Tel-Aviv University. While President, he also chaired Israel's Committee of Heads of Universities (VERA). Today, he holds the title of Yanowicz Professor of Human Rights at Tel-Aviv University.

But Professor Dinstein's influence extends far beyond the borders of Israel. Indeed, his international academic and teaching engagements are too numerous to be enumerated here. Suffice it to mention that he was twice appointed the Charles H. Stockton Professor of International Law at the United States Naval War College, was a Humboldt Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, and has been a Visiting Professor at the DePaul University in Chicago, the University of Toronto and New York University. The University of Buenos Aires, the University of Chile and the Hebrew Union College have conferred honorary doctorates on

him, while the National University of Mexico (UNAM) awarded him the title of Distinguished Professor.

His career is also marked by service in the development and dissemination of international law. Professor Dinstein serves as Vice-President of Israel's national branch of the International Law Association and of the Israeli United Nations Association, as well as a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy. He has also been active in many international research projects, including that which resulted in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Professor Dinstein presently directs an international experts' group drafting a similar manual on air and missile warfare.

In recognition of his contributions to the field of international law, in 1989 Professor Dinstein became a Member of the *Institut de Droit International* (Institute of International Law), a group of the world's leading international lawyers elected by cooptation for life.

While Professor Dinstein has explored many issues of international law in his scholarly research and writing, it may be said that the focal points of his work have been the *jus ad bellum* and the *jus in bello*. The former regulates when force may be used in international relations, whereas the latter governs how such force may be used and extends protection to both persons who are not or no longer participating in hostilities and to civilian objects. These areas of public international law are central to the way in which the world is ordered, for they deal – indirectly and directly – with questions of life and death.

Regrettably, the reasons wars are waged and the way in which they are conducted are so closely linked to national interests, or skewed perceptions thereof, that international law rules regulating force have too often been observed only in the breach. Partly as a result, international law has been famously condemned as existing only at the "vanishing point" of law. Professor Dinstein's lasting contribution to the field is that his writings on both the *jus ad bellum* and the *jus in bello* effectively and definitively dispel that claim.

It is unimaginable that anyone addressing such matters could do so without resorting to *War, Aggression and Self-Defence*, Professor Dinstein's classic work on the *jus ad bellum* (now in its fourth edition), *The Conduct of Hostilities under the Law of International Armed Conflict*, his recently published study of the *jus in bello*, or the *Israel Yearbook on Human Rights*, which he has edited for over three decades. Indeed, it may be fairly said that a scholarly work in the area which contains no "Dinstein cite" is, quite simply, incomplete. The logic, clarity and practical groundedness of his work, whether one accepts every tenet or not, make it an unavoidable and timeless body of reflection and analysis for international law scholars and practitioners alike.

This Volume honours Professor Dinstein by addressing both the *jus ad bellum* and the *jus in bello*. As a result of recent events on the international scene, no areas of international law are being debated today with greater fervor. New

prescriptive dilemmas, real or imagined, as well as old controversies repackaged as new ones, have burst onto center stage in discourse about whether and how the norms governing resort to force and armed conflict should be (re)ordered. Thus, our aim with this Volume has been to explore the faultlines that lie both between and within the *jus ad bellum* and the *jus in bello*.

A distinguished group of experts wholeheartedly agreed to express tribute to Professor Dinstein by contributing to the Volume. We sincerely thank each of them for their contribution. The authors include scholars and practitioners, a particularly appropriate combination in light of the intellectual depth and practical impact of Yoram's work. They cut across generations, from recognized authorities in international law to emerging thinkers, thereby reflecting the influence he has exerted on the international law community for decades, and which he will surely continue to exert in the time to come. It is a pleasure and an honour to commend this book to Professor Dinstein's, and others', attention.

Jelena Pejic
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Professor Yoram Dinstein

Curriculum Vitae

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Degrees:	M.Jur. (1958)	Hebrew University, Jerusalem (*summa cum laude*)
	LL.M. (1961)	New York University
	Dr.Jur. (1964)	Hebrew University, Jerusalem

Awards:
Arlosoroff Prize (1966)
Andrei Sakharov Fellowship (1990)

Academic Activities:

1958-1960	Assistant, Faculty of Law, Hebrew University, Jerusalem
1964-1966	Lecturer in International Law, Faculty of Law, Hebrew University, Jerusalem
1965-1966	Director, Course in Legal Administration (for African judges and lawyers), Faculty of Law, Hebrew University, Jerusalem
1970-1971	Senior Lecturer in International Law, Faculty of Law, Tel-Aviv University
1971-1974	Associate Professor of International Law, Faculty of Law, Tel-Aviv University
1974-2003	(Full) Professor of International Law, Faculty of Law, Tel-Aviv University
1976-1977	Visiting Professor, Faculty of Law, University of Toronto
1978-1980	Dean, Faculty of Law, Tel-Aviv University
Since 1980	Yanowicz Professor of Human Rights, Tel-Aviv University
1980-1985	Rector, Tel-Aviv University
1985-1987	Meltzer Visiting Professor, School of Law, New York University

1985-1990	Pro-Rector, Tel-Aviv University
1987	Distinguished Professor, Universidad Nacional Autonoma de Mexico
1991-1999	President, Tel-Aviv University
1983, 1995	Chairman, Israel's Committee of Heads of Universities (VERA)
1995	Honorary Doctorate, University of Buenos Aires
1995	Honorary Doctorate, University of Chile
1997	Honorary Doctorate, Hebrew Union College
1999-2000, 2002-2003	Stockton Professor of International Law, US Naval War College (Newport, RI)
2001-2002	Humboldt Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg
2003	Professor Emeritus, Tel-Aviv University
Since 2004	Project Director, International Humanitarian Law in Air and Missile Warfare, Program on Humanitarian Policy and Conflict Research, Harvard University
2006	Visiting Professor, Hague Academy of International Law

Non-Academic Activities:

1958-1959	Law Clerk, Supreme Court of Israel, Jerusalem
1959-1960	Cadet, Israel Ministry of Foreign Affairs, Jerusalem
1961-1962, 1966-1969	Adviser, Permanent Mission of Israel to the United Nations, New York
1962-1964	Deputy Head, Office of the Director General, Israel Ministry of Foreign Affairs, Jerusalem
1962, 1968-1971, 1973, 1975-1976, 1978	Alternate Representative and Observer of Israel, UN Commission on Human Rights, New York and Geneva
1962, 1967	Alternate Member and Observer of Israel, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, New York
1964, 1967	Observer of Israel, UN Economic and Social Council, Geneva and New York
Since 1965	Member of the Israel Bar
1966-1969	Alternate Representative of Israel, Third Committee, UN General Assembly, New York
1966-1970	Consul of Israel, New York

Since 1972	Vice-President, Israel United Nations Association
1974-1978	Chairman, Israel National Section, Amnesty International
1983-1989	Associate Member, *Institut de Droit International*
1986-1988	Counsel for Israel, Taba Arbitration with Egypt
1989-1992	Member, Executive Council, American Society of International Law
Since 1989	Member, *Institut de Droit International*
Since 1991	Vice-President, Israel Branch, International Law Association
Since 1993	Member, Council, San Remo International Institute of Humanitarian Law

Professor Yoram Dinstein

List of Academic Publications

I Books

1. *The Defence of 'Obedience to Superior Orders' in International Law,*
   (a) *In English* –
   Leyden, Sijthoff, xvi + 278 pp. (1965).
   (b) *In Hebrew* –
   Jerusalem, Magnes Press, 280 pp. (1965).
2. *International Law and the State,*
   Tel-Aviv, Schocken, 160 pp. (1971) (Hebrew).
3. *The Internal Powers of the State,*
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4. *International Treaties*,
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5. *International Claims*,
   Tel-Aviv, Schocken, 208 pp. (1977) (Hebrew).
6. *Non-State International Law,*
   Tel-Aviv, Schocken, 255 pp. (1979) (Hebrew).
7. *The Laws of War,*
   Tel-Aviv, Schocken, 312 pp. (1983) (Hebrew).
8. *War, Aggression and Self-Defence,*
   First Edition – Cambridge, Grotius, xxx + 292 pp. (1988).
   Second Edition – Cambridge University Press, xxxi + 325 pp. (1994).
   Third Edition – Cambridge University Press, xxviii + 300 pp. (2001).
   Portuguese translation, Manole (Brazil), xxxviii + 455 pp. (2005).
   Fourth Edition – Cambridge University Press, xxv + 349 pp. (2005).
9. *The Conduct of Hostilities under the Law of International Armed Conflict,*
   Cambridge University Press, xx + 275 pp. (2004).

II Monographs

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   Jerusalem, Institute for Legislative Research and Comparative Law, xiv + 89 pp. (1966).

2. *The Fundamentals of Law,*
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III Chief Editor

1. *Israel Yearbook on Human Rights*,
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2. *Models of Autonomy*,
New Brunswick/London, Transaction Books (1981).
3. *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne),*
Dordrecht/Boston/London, Nijhoff (1989).
4. *The Protection of Minorities and Human Rights*,
Dordrecht/Boston/London, Nijhoff (1992).
5. *War Crimes in International Law*,
The Hague/Boston/London, Nijhoff (1996).

IV Articles and Notes

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21 *Hapraklit* 317-332 (1965) (Hebrew).
2. 'Diplomatic Immunity in England and in Israel',
22 *Hapraklit* 5-12 (1966) (Hebrew).
3. 'Consular Immunity and Non-Consular Acts',
22 *Hapraklit* 190-197 (1966) (Hebrew).
4. 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*',
15 *International and Comparative Law Quarterly* 76-89 (1966).
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Also *reprinted* 2 *The Arab-Israeli Conflict* 158-174 (J.N. Moore ed., 1974).

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vol. 3
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International Law at a Time of Perplexity 103-116 (Essays in Honour of Shabtai Rosenne, Y. Dinstein ed., 1989).
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Das Menschen Recht zwischen Freiheit und Verantwortung 115-123 (Festschrift für Karl Josef Partsch, 1989).
76. 'Terrorism as an International Crime',
19 *Israel Yearbook on Human Rights* 55-73 (1989).
77. 'Freedom of Religion and the Protection of Religious Minorities',
20 *Israel Yearbook on Human Rights* 155-179 (1990).
Reprinted The Protection of Minorities and Human Rights 145-169 (1992).
78. 'Siege Warfare and the Starvation of Civilians',
Humanitarian Law of Armed Conflict: Challenges Ahead 145-152 (Essays in Honour of Frits Kalshoven, A. Delissen & G. Tanja eds., 1991).
79. 'The *Erga Omnes* Applicability of Human Rights',
30 *Archiv des Völkerrechts* 16-21 (1992).
80. 'Multinational, Federal and Confederal Arrangements',
17 *Tel-Aviv University Law Review* 231-285 (1992) (Hebrew).
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Chapter 1

A Revival of the Just War Theory?

Ivan Shearer

I Introduction

A new interest in just war theory has been prompted by pressures to justify, in legal terms, forms of armed attack or forcible intervention lying outside, or at the margins of, the uses of armed force in international relations allowed by orthodox interpretations of the United Nations Charter and customary international law.[1] Although we are concerned here principally with the *jus ad bellum,* there is a connection with the *jus in bello* in that one commonly accepted proposition of just war theory is that a use of force is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate.[2]

It is the position of the present writer that the orthodox interpretation of international law governing the use of armed force in international relations, which admits of no exceptions to the authorisations specified in chapter VII of the Charter, is by reason of that inflexibility no longer able to serve the interests of world order. As a result, certain states no longer seek to justify their uses of force in terms of international law. Those states look only to a political justification, or assert a doctrine of the supremacy of national law that is not subject to international law. This is a dangerous trend, subversive of the most basic principle of world order governed by law. It is argued here that, rather than to rail against such attitudes impotently, or worse still to accept them, it is better to seek principled guidance from just war theory and to accommodate that theory within an interpretation of the Charter that takes account of current realities and challenges. In that way, the ideal of a world order can be re-imagined for the 21st century and not stuck in the mould of 1945. It must be stressed that this approach

1 For orthodox interpretations of the UN Charter provisions on the use of force see I. Brownlie, *International Law and the Use of Force* (Clarendon Press, Oxford, 1963); S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001).

2 *The Responsibility to Protect: Research, Bibliography, Background.* Report of the International Commission on Intervention and State Sovereignty, Supplementary Volume (International Development Research Centre, Ottawa, 2001) 140-143.

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is intended not to "bring inside the tent" those who wish defiantly to live outside it, but is directed towards a more flexible reading of the Charter to allow for a principled and humanitarian use of force in certain grave situations which demand a forcible response. It is further argued that this may be achieved without amendment to the Charter; that, like other constitutional documents, the Charter is capable of development and response to changing needs and circumstances within legitimate margins of interpretation of the existing text.[3]

The writer was first prompted to these thoughts by the writings of Julius Stone.[4] They were reinforced by the publication, in December 2001, of the Report of the International Commission on Intervention and State Sovereignty.[5] That Report did not indeed propose the interpretation of the UN Charter and international law advanced by Stone, some other writers, and here; rather it urged the Security Council, in very strong terms, to live up to its responsibility to protect the victims of grave and systematic violence and injustice, such as genocide and "ethnic cleansing", putting aside irrelevant political considerations, and exercising its powers under chapter VII of the Charter. However, there are implications in the Report that point in the direction of imagining a justification for the use of force beyond the limits accepted by orthodox interpretation. Failure of the Security Council, whether its membership is re-designed in the future or not, to heed its responsibility would, according to the Commission send the following "messages":

> The first message is that, if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.
> The second message is that if, following the failure of the Security Council to act, a military intervention is undertaken by an ad hoc coalition or individual

3 For a discussion of the UN Charter as a constitutional text see W. Friedmann, *The Changing Structure of International Law* (Stevens, London, 1964) 153-154.

4 J. Stone, *Legal Controls of International Conflict* (Maitland, Sydney, 1959) 235; *Aggression and World Order* (Maitland, Sydney, 1958) 43, 95; *Of Law and Nations* (Hein, Buffalo NY, 1974) 2-3.

5 *The Responsibility to Protect.* Report of the International Commission on Intervention and State Sovereignty. (International Development Research Centre, Ottawa, 2001). The Report is also accessible on the website of the International Crisis Group: www.icg.org.

> state which *does* fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and it is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and the credibility of the UN itself.[6]

The references in these paragraphs to "precautionary principles" and "criteria" are to the sections of the Report that discuss at length six criteria for military intervention: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success.[7] These six criteria are but a modern restatement of just war theory (or of a version of that theory), even though the Commission refrains from so identifying their origin.

As this essay was being written there was a reminder too of the connection between just war theory and conscientious objection to service in a particular war. It is reported that an officer of the (British) Royal Air Force will face a court-martial over his refusal to return to duty in Iraq. He will argue that the attack on Iraq in March 2003 has been shown to have been illegal after the event and that he is justified by legal opinions to that effect to disobey what, to him, have become unlawful commands. It is said to be the first such recorded case.[8]

II The Origins of the Just War Theory

Yoram Dinstein has himself given a typically clear and concise account of the just war doctrine in the past.[9] In the western legal tradition, the doctrine began with the institution of the *collegium fetiale*, a college of priests who from early times until the advent of Imperial Rome administered the *jus fetiale*, the function of which was to judge whether there were sufficient grounds for Rome to go to war with an adversary.[10] Waging war without the approval of the college was unlawful; but as Dinstein wryly comments, the *fetiales* were likely to do the bidding of their political masters.[11]

The early Christians were pacifists, but after the Roman Emperor Constantine made Christianity the official religion of the Roman Empire in 330,

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6 Report, paras. 6.39, 6.40.

7 Report, paras. 4.15-4.43.

8 "RAF officer faces jail over 'illegal war'", *The Sunday Times* (London), October 16, 2005, page 1.

9 Y. Dinstein, *War, Aggression and Self-Defence* (4th ed., Cambridge University Press, Cambridge, 2005) 63-67.

10 As an aside it may be noted that "fetial law", as a synonym for the law of war, survived into the beginnings of the modern period of international law, as in the title of the treatise by R. Zouche, *Juris et Judicii Fecialis, sive Juris inter Gentes* (1650); Classics of International Law edition, 1964.

11 Dinstein, 64.

the Church had to reconsider its position. That position was articulated by Saint Augustine, Bishop of Hippo (354-430), in his book *The City of God* (ca. 412). As explained by Oliver O'Donovan,[12] St. Augustine founded his theory of just war (*bellum justum)* on the basis of the Christian command to love.[13] In that he was followed by St. Thomas Aquinas (1225-1274) and Francisco Suarez (1548-1617), both of whom located their discussion of the subject in sections of their writings devoted to charity. As O'Donovan comments, "In the context of war we find in its sharpest and most paradoxical form the thought that love can sometimes smite, and even slay."[14] Thus war is a loving judgment on evil doers. O'Donovan goes on to tantalise the reader with his interpretation of Augustine that survival as such was not a legitimate cause for war:

> To take survival as the bottom line is to revert to the antagonistic model of mortal combat, and so inevitably to retreat from the Gospel proclamation of the universal rule of Christ and from the praxis of loving judgment. When self-defence, of state, community, or individual has the last word, paganism is restored. Precisely for this reason a Christian witness to God's peace must always be acted out against the horizon of suffering and martyrdom …. Judgment … cannot possibly issue a licence to avoid defeat by all means.[15]

Nevertheless, the nuanced doctrine of Augustine was unlikely to be observed diligently. As though to illustrate the political subservience of just war theory to political exigencies, earlier noted by Dinstein of the *fetiales,* the four crusades from 1096 to 1204 were justified as wars to restore the right of pilgrimage to the

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12 O. O'Donovan, *The Just War Revisited* (Cambridge University Press, Cambridge, 2003) 9. O'Donovan is Regius Professor of Moral and Pastoral Theology, and Canon of Christ Church, Oxford.

13 Augustine's letter to Boniface treats the obligation of military action as an obligation of love towards one's neighbour. O'Donovan, 9. The motive of love is also stressed by the American theologian Paul Ramsey in his works *War and the Christian Conscience* (Duke University Press, Durham, 1961) and *The Just War: Force and Political Responsibility* (Scribners, New York, 1968). On Augustine and his just war theory see also C. McKeough, *Innocent Civilians: the Morality of Killing in War* (Palgrave, Basingstoke, 2002) 19-22.

14 Ibid. For another Christian reflection on the tension between pacifism and just war see T. Frame, *Living by the Sword: The Ethics of Armed Intervention* (University of New South Wales Press, Sydney, 2004), 108-127. Dr Frame is Anglican Bishop to the Australian Armed Forces.

15 O'Donovan, 9-10. What would Augustine have said about the (bare) majority advisory opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. 226 at para. 105(a)E. where the Court said that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake"?

Holy Lands, and protection of the holy places, although in reality for political and economic motives. The Fourth Crusade (1202-1204), however, went badly wrong after initially having been blessed as just by Pope Innocent III. The crusaders, instead of adhering to their mission, first attacked without any cause or offence whatsoever the city of Zara in order to amass loot to pay the Venetians for the ships provided for the voyage. Then they diverted from the authorised route to Jerusalem via Egypt to attack Constantinople in order to take sides in a succession dispute and, not irrelevantly, for plunder. The Pope placed the crusaders under sentence of excommunication, but, for the sake of morale, news of it was kept from the troops. The bloody success of the crusaders in subduing the Byzantine Empire and establishing a Latin Kingdom in the east under the Venetians and the French, thus temporarily undoing the Great Schism between Greek and Roman Christianity of 1054, eventually restored the crusaders to papal grace.[16]

St. Thomas Aquinas was the first to set out in detail the requirements of a just war. He proposed three conditions (echoes of which will be apparent in the Report of the International Commission on Intervention and State Sovereignty: "The Responsibility to Protect", to be discussed below). As summarised by Dinstein, for war to be just, in the opinion of Aquinas, the following three conditions had to be fulfilled: (i) the war had to be conducted not privately but under the authority of a prince; (ii) there had to be a "just cause" for the war; and (iii) it was not enough to have a just cause from an objective viewpoint , but it was necessary to have the "right intention" to promote good and to avoid evil. (Elsewhere, Aquinas stated that to promote good and avoid evil is the first principle of the natural law.)[17]

As Dinstein notes, the approach of Aquinas was followed and expanded by other canonists, and later writers, into catalogues of what would qualify as a "just war". This constitutes in a sense a perversion of the doctrine, since almost anything could – and did – form grounds for offence and thus for a just response in war. For example, although at first defending the rights of the indigenous inhabitants of South America, the Spanish Dominican theologian and lawyer Victoria came to justify the use of force by Spain in subduing them by reason of their resistance to the freedom of travel, trade, and the spread of Christianity.[18] (Shades here, perhaps, of the crusades.) O'Donovan makes a similar point in claiming that just war theory was never intended to be a legal code, but rather "a proposal".[19] Although just war theory came to be part of general international law, with the secularisation of that law from the time of the Peace of Westphalia

16 J. Phillips, *The Fourth Crusade and the Sack of Constantinople* (Viking, New York, 2004).

17 A.P. d'Entrèves, *Natural Law* (Hutchinson, London, 1951) 40-41.

18 F. de Victoria, *De Indis et jure belli relectiones* (1557) ; Dinstein, 65.

19 O'Donovan, 14.

(1648), embraced by Protestant as well as Catholic scholars, including notably Grotius,[20] the theory gradually became discredited and was abandoned. To the dismissive judgment of T.J. Lawrence in the 19th century, cited by Dinstein,[21] one could add that of Heffter, that discussions of the conditions under which a war would be just were "oiseuses".[22]

III Decline of the Just War Theory

Although it has been observed that the end of one century and the prospect of the next often leads to sudden bursts of energy on the part of politicians and statesmen in re-imagining the future, the Hague Peace Conferences of 1899 and 1907 did not attempt to define the circumstances in which recourse to armed force would be just, but rather sought, in the case of the First Conference, to establish alternatives to war as a means of settlement of disputes, and in the case of the second, to lay down detailed rules regarding the conduct of war (Hague Conventions I-XIII, 1907). Thus, attention was directed towards the *jus in bello* and away from the *jus ad bellum*. The sole immediate consequence for the right to wage war of the First World War 1914-1918 was the provision of article 227 of the Treaty of Versailles for the prosecution of Kaiser Wilhelm II. But that provision did not charge the Kaiser with authorising an unjust war, or the crime of aggression in the modern sense, but with "a supreme offence against international morality and the sanctity of treaties".[23] The avoidance of the language of international law in this provision may be taken as a reflection of the general scepticism of the time regarding the legal nature of international law.

Most self-serving of all declarations of the just causes of war at this time was that of Lenin. In expressing Soviet legal theory, he stated that war was justified if

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20 *De Jure Belli ac Pacis,* Book 2, Chapter 1, Section 1, headed "What causes of war may be called justifiable". Grotius avoided a detailed list, however. In Section 2, justifiable causes were said to include "defence, the obtaining of that which belongs to us or is our due, and the inflicting of punishment." Classics of International Law edition, Oxford, 1925, of the edition of 1646. McKeough, above n.16, at 105, holds that "the most important and lasting step taken by Grotius was to sever finally the link between *ad bellum* and *in bello* justice …. It was left to Grotius to make the decisive break and to reject outright the notion of collective guilt that was central to the established Augustinian justification of war ….To Grotius war was a method of settling disputes when all other methods fail."

21 Dinstein, 67.

22 A. Heffter, *Le droit international public de l'Europe (* 3rd ed., 1883), §113, cited by W.E. Hall, *A Treatise on International Law* (8th ed, Oxford, 1924) 82, n2.

23 Having been granted sanctuary by the Netherlands, which was not a party to the Versailles Treaty, the Kaiser was never brought to trial. He died in exile 1941, ironically in a country then under German occupation after an even more egregious act of aggression.

it "serves the interests of the proletariat and secures for it … liberation from the (capitalist) yoke … and freedom for struggle and development."[24]

The foundation of the League of Nations in 1919 marked the beginnings of the modern era of collective security through international institutions, thus in theory not only supplanting the right of unilateral action to wage war, but also providing a means whereby an injury committed by one state against another could be judged and remedied by peaceful means. It could be said to be implicit in the provisions of the UN Charter that criteria similar to those used in the just war era would be likely to be used in judging circumstances deserving of collective action. The Iraqi invasion of Kuwait in 1999 is an obvious example, where the use of force was authorised. The practice of apartheid in South Africa is an example of an affront to common humanity, where measures short of force (sanctions) were authorised. The essential point is that there is now, and has been since 1945, an international institution of practically universal membership capable of sitting in judgment on threats to, and breaches of, international peace and security.

For some, that is the end of the matter. If the United Nations – and especially the Security Council – fails to condemn, or take effective action against, grave offences against international peace and security, then that has to be accepted as preventing any state, or coalition of states, from taking the law into their own hands. By reason of the peculiar circumstances of 1945, each of the victorious powers of World War II was granted the right of veto over any enforcement action proposed by the Council. The exercise of the veto might be based on unmeritorious grounds, or in complete disregard of the justice of the matter at hand. Thus, while in theory there is an institution constituting the modern equivalent of the *fetiales,* it is a far from perfect instrument of justice. Nor is it a perfect judgmental body; an act in violation of the Charter might be the subject of a condemnatory resolution proposed to the Security Council, but be vetoed by a permanent member because its own conduct, or that of an allied state, is in question. Herein lies the dilemma.

IV The Use of Force under the UN Charter

The orthodox view among international lawyers is that it is lawful for a state to resort to the use of force in international relations only in two circumstances: (a) in self-defence against armed attack, as re-affirmed in article 51 of the UN Charter; and (b) when authorised by the UN Security Council as an enforcement measure under Chapter VII of the Charter.

The orthodox view has been justified and repeated on many occasions. A recent and compelling reading of the text of the Charter, especially article 2(4), in the light of the original intentions of the drafters at San Francisco, is given by

24 Cited by A. Nussbaum, *A Concise History of the Law of Nations* (Macmillan, New York, 1953) 287.

Thomas M. Franck.[25] Professor Franck points out that the original text of article 2(4) read simply:

> All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.

However, following an amendment proposed by Australia, and unanimously adopted, the words "against the territorial integrity or political independence of any member state" were inserted after the word "force".[26] Franck comments that the drafters thereby "unintentionally created an opening for some, later, to argue that the prohibition against force did not extend to 'minor' or 'temporary' invasions that stopped short of actually threatening the territorial integrity of the victim state or its independence. Such a reading of article 2(4) is utterly incongruent, however, with the evident intent of the sponsors of the amendment."[27]

Perhaps Franck had in mind such actions as the rescue mission mounted by Israel at Entebbe Airport in 1976. Although in the Security Council the US representative did make reference to "a temporary breach of the territorial integrity of Uganda", the main justification given by both Israel and the United States was the exercise of the right of self-defence, which was argued to include the right to protect nationals situated abroad from attack.[28] With respect, Franck's comment rather trivialises the issue. It is not a question of *de minimis* violations of territorial integrity or political independence, but rather whether there is room in the text to allow for a use of force motivated by objectively non-aggressive reasons, such as to save lives, that transcends considerations of territorial integrity or political independence. Franck himself recognizes that there is a certain tension in the Charter between the desiderata of perpetual peace and perfect justice.[29] More fundamentally, he like many others seems to conceive of the Charter's regulation of the use of force in inflexible terms, not open to interpretation in the light of changing circumstances and needs. In the analogous context of constitutional law, he would be accounted an "originalist", not a "constructionist".

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25 T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks,* The Hersch Lauterpacht Memorial Lectures (Cambridge, 2002) 11-19.

26 Although not noted by Franck, these words were taken from Article 10 of the Covenant of the League of Nations.

27 Franck, 12.

28 The Security Council debates are collected in 15 *International Legal Materials* 1224 (1976). See comment by M. Akehurst, 5 *International Relations* 3 (1977). For Dinstein's approval of the Entebbe mission, and his conditional – not open-ended – acceptance of the rescue of nationals abroad as a species of self-defence, see *War, Aggression and Self-Defence,* 233-234.

29 Franck, 14-19.

Is there a way out of the dilemma posed? Must law always triumph over justice where they find themselves in opposition, such as in the face of a threatened genocide where the perpetrator is a friend of a permanent member of the Security Council?

Writing of the US and allied invasion of Iraq in March 2003, and referring back also to other interventions not authorized by the Security Council, such as in Kosovo in 1999, Carsten Stahn proposes two methodologies for responding to the challenges posed by forcible intervention. Option 1, as he terms it, is to carve out an exception to the prohibition of the use of force, as understood in the orthodox interpretation of the Charter. This exception, presumably, would be created through stretching the words of article 2(4), or – as the present writer prefers – by finding the seeds of the exception already there. Option 2 is to hold all such interventions illegal, but where there are extenuating circumstances and altruistic or humanitarian motives, to tolerate them and not attach legal sanctions against the states conducting them.[30] In other words, humanitarian or other actions from disinterested motives may be "illegal but justifiable".

Stahn is not alone in this view. It has many adherents. It appears to have had its origin in the contribution of Ian Brownlie to a study of humanitarian intervention in 1973. His article, memorably entitled "Thoughts on Kind-Hearted Gunmen", [31] proposed that certain illegal actions might be "mitigated" by reason of the circumstances. An analogy was drawn by Brownlie to the case of mercy-killing under domestic law where, in certain cases, a prosecutor may exercise a discretion not to prosecute, or where a person, convicted of a mercy killing, might receive a nominal or light sentence. It is, with respect, an odd notion when applied to the case of states and in a context of international peace and security. One is reminded, also in a context of domestic law, of the case of the "ticking bomb scenario" discussed by the Supreme Court of Israel, where the view was expressed by Chief Justice Barak that the use of torture, which remained at all times absolutely prohibited, might exceptionally be justified if it was likely to lead to the discovery of the bomb in sufficient time to save lives. But in such a case the person committing torture must be charged and put on trial; only then could extreme necessity be considered as a possible defence.[32] However, the difference between the use of torture in order to locate the ticking bomb and humanitarian intervention, for example, is that, ultimately, in the first case there is the possibility, albeit very narrow, of finding a *legal* justification. In the latter, if Stahn, Brownlie,

30 "Enforcement of the collective will after Iraq", 97 *AJIL* 804, 816 (2003). For Stahn, Iraq was not such a case in 2003 because the motives for the intervention were "visibly shaped by economic interests."

31 In R.B. Lillich (ed), *Humanitarian Intervention and the United Nations* (University Press of Virginia, Charlottesville, 1973) 139.

32 *Judgment Concerning the Legality of the General Security Service's Interrogation Methods,* Supreme Court, September 6, 1999, per President Barak at para.38; reproduced in 38 *ILM* 1471 (1999).

Chesterman, Franck and others are right, there is a glaring contradiction between the law and morality which can be resolved only at the *political* level.

Nevertheless, the theory of mitigation has been endorsed by so many writers since then that Stahn may be correct in declaring that it "seems safe to state … that option 2 is developing into a more widely recognized model of dealing generally with forcible interventions and particularly with operations to enforce the collective will."[33]

The fear obviously motivating those who adhere to a strict and unbending reading of the Charter is that to admit exceptions to the prohibition of the use of force is to enter upon a slippery slope of interpretation and to compromise fatally the integrity of the Charter's prime purpose – the substitution of collective security for the unilateral resort to armed force.[34] This proposition demands further consideration.

Article 2(4) of the UN Charter reads as follows:

> 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 Principles of the United Nations.

It is a curiously worded paragraph. It owes much to the drafting proposals of Australia's foreign minister, Dr. H.V. Evatt, at the San Francisco Conference in 1945. Why did it not say simply "No Member shall threaten or use force against any other state except as expressly allowed by the Charter"? (This is indeed how in substance the first draft was worded).[35] Most authorities on the Charter maintain, on the authority of the *travaux préparatoires,* that this was in fact the intention of the delegates to the Conference. But it has to be conceded, at least on the face of it, that the words following "force" would then be mere verbiage. If, however, those words were not seen by the drafters as mere verbiage or surplusage, but were intended to clarify the meaning of the first part of the sentence, then the additional words can at least as well be read as words of qualification. Thus it can be postulated – as a pure matter of textual interpretation separated from intention – that if a threat or use of force were aimed not at territorial integrity or political independence (as would be the case of naked aggression, invasion, annexation or occupation), but were instead intended to right a manifest illegal-

33 Stahn, 816, citing O. Schachter, *International Law in Theory and Practice* (1991) 126, and the authorities collected by S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001) 226-229. See also Franck, 174-191.

34 This is the fear of B. Simma, "NATO, the UN and the use of force: legal aspects", 10 *EJIL* 1-22 (1999). See also the review essay by N. Krisch, "Legality, morality and the dilemma of humanitarian intervention after Kosovo", 13 *EJIL* 323-335 (2002).

35 Franck, 12.

ity or injustice, where peaceful methods had failed, it would not be prohibited by the Charter. This more elastic reading of article 2(4) is favoured by a number of scholars, albeit a minority, as allowing for uses of force otherwise than in self-defence, including forcible intervention in order to prevent grave and widespread abuses of human rights, such as genocide.[36] The scholars who support this position include Julius Stone,[37] Derek Bowett,[38] and Anthony D'Amato.[39] A justification for the intervention by NATO in Kosovo in 1999, based on article 2(4), was also advanced by Belgium in the case brought by Yugoslavia against NATO members before the International Court of Justice.[40]

V The Attack on Iraq, 2003

Taking the orthodox view, the attack by the US and its allies against Afghanistan in 2001 was lawful, and the attack against Iraq in 2003 was unlawful. The attack on Afghanistan was a lawful measure of self-defence because, following the events of 11 September 2001, which were quickly attributed to Al-Qaeda and not denied by that organisation, the Taliban government of Afghanistan was called on to hand the group's leaders over to the US. The Taliban refused. They not only refused, but made statements supportive of Osama bin Laden, the leader of Al-Qaeda, thereby endorsing his actions. Thus the attack by the US and allied forces was made after due warning and an opportunity for the Taliban to avoid the use of force against it.

It is not necessary for the Security Council to authorise actions in self-defence. This is acknowledged by the Charter to be an inherent right of states; and one, moreover, that may have to be exercised immediately and with no time to refer the situation to the Security Council. But actions in self-defence must be reported to the Security Council, which may then authorise subsequent measures, including, if applicable, a finding that the purported action in self-defence

36 These views are critically discussed by Chesterman, above n.1, at 47-57.

37 J. Stone, *Aggression and World Order* (Stevens, London, 1958) 43.

38 D. Bowett, *Self-Defence in International Law* (Manchester University Press, Manchester, 1958) 152.

39 A. D'Amato, *International Law: Process and Prospects* (Transnational, Dobbs Ferry NY, 1987) 57-73.

40 "Donc ce n'est pas une intervention dirigéee contre l'integrité territoriale, l'indépendance pour l'ex-République de Yougoslavie, c'est une intervention pour sauver une population en péril, en détresse profonde. C'est la raison pour laquelle le Royaume de Belgique estime que c'est une intervention humanitaire armée qui est compatible avec l'article 2, paragraphe 4, de la Charte qui ne vise que les interventions dirigées contre l'integrité territoriale et l'indépendance politique de l'Etat en cause." *Case Concerning the Legality of the Use of Force* (Yugoslavia v. Belgium), Verbatim record, 10 May 1999, oral pleading of Mr. Rusen Ergec, counsel for Belgium, accessed at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.

was not justified in the circumstances. In the case of Afghanistan, the Security Council, through its subsequent resolutions, has in effect validated the US and allied actions.

It is otherwise in relation to Iraq. The build-up to the invasion of March 2003 was marked by extreme recalcitrance on the part of Saddam Hussein in his refusal to cooperate with the weapons inspections mandated by the Security Council. It is sometimes forgotten in the "told-you-so" condemnations of the invasion following the failure to find the suspected weapons of mass destruction (WMDs), that Iraq, for a long period between 1991 and early 2003, behaved as though it had something to hide. It was playing a very dangerous game. That alone might not have been sufficient to warrant a conclusion that an armed attack by Iraq on the US and its allies was about to occur, warranting immediate action in self-defence, although it was indeed offered by President Bush in broad justification.

What is disappointing to an international lawyer is that the United States, unlike its allies the United Kingdom and Australia, did not find it necessary to declare the legal grounds for its actions in terms of the UN Charter. It offered only the political justification that the regime of Saddam Hussein and his possession of WMDs constituted a threat to itself and to the rest of the world.

The United States Administration's attitude towards international law in this instance was expressed by John Bolton, then Under-Secretary for Arms Control and International Security at the State Department, and now US Ambassador to the UN. In a speech to the National Lawyers' Convention, sponsored by the Federalist Society, on 13 November 2003, he effectively dismissed international law as a necessary element in the justification of foreign policy. He sees the basis of state power as lying in the consent of the people governed, expressed through *national* not international law:

> Indeed, there's a fundamental problem of democratic theory for those who contend, implicitly or otherwise, that the proper operation of America's institutions of representative government are not able to confer legitimacy for the use of force. Make no mistake: not asserting that our constitutional procedures themselves confer legitimacy will result over time in the atrophying of our ability to act independently.…This has been fundamentally misunderstood in the UN system. Many in the UN Secretariat and many UN member governments in recent Security Council debates have argued directly to the contrary. Increasingly, they place the authority of international law, which does not derive directly from the consent of the governed, above the authority of national law and constitutions.

It is difficult for international lawyers to engage with opinions of this kind. It has to do with deep-seated reservations in US government circles, transcending party

loyalties, regarding the relevance of international law. [41] Belatedly, and in a law journal, not an official government pronouncement, the Legal Adviser to the US State Department gave a legal opinion[42] essentially based on the text of Security Council Resolution 1441 which had threatened Iraq with "serious consequences" if weapons inspections continued to be frustrated. Nearly all international lawyers have found this basis for action seriously deficient, not least because the Security Council remained seized of the matter and intended that a further resolution was required before enforcement action was taken. This was made clear from statements made in the Council at the time.

The United Kingdom government sought the opinion of its Attorney-General as to the legality of the attack prior to it.[43] It will be remembered that the UK had urged the US before the invasion to attempt to gain specific Security Council endorsement. When, however, it had become clear that China, France and Russia would veto any such resolution, and the matter was as a consequence not put to the vote, a legal opinion became of crucial importance. The United States did not appear to require a legal opinion, at least for public consumption. In a similar opinion to that of the UK Attorney-General, the Australian Government was advised (Campbell QC and Moraitis)[44] that a basis for the invasion lay in the pre-existing Security Council Resolution 1441, which threatened Iraq with "serious consequences" if it failed to allow UN weapons inspectors to complete their work without hindrance.

The present writer has argued elsewhere[45] that these are not convincing legal opinions. As will appear, he prefers to locate legal authority for the use of force in circumstances other than self-defence, such as law enforcement (as in the case of Iraq) or humanitarian intervention (as in Kosovo), in article 2(4) of the Charter, which imposes, in his view, only a qualified prohibition of the use of force. To this

41 For a balanced review of these attitudes see J.F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, Cambridge, 2004). For a more polemical review see P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane, London, 2005). See also M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, Cambridge, 2005).

42 W.H. Taft IV and T.F. Buchwald, "Pre-Emption, Iraq and International Law", 97 *AJIL* 557-563 (2003).

43 "Legal Basis for the Use of Force against Iraq": Statement from 10 Downing Street, March 2003, based on the Opinion of Lord Goldsmith, Attorney-General of the United Kingdom. http://www.labour.org.uk/legalbasis. The full Opinion, originally classified Secret and de-classified only on 28 April 2005, is to be found at http://www.comw.org/warreport/fulltext/0303goldsmith.html (accessed 7 December 2005).

44 Joint Opinion, 12 March 2003, 24 *Australian Yearbook of International Law* (2005) 415-418.

45 "In Fear of International Law", 12 *Indiana Journal of Global Legal Studies* 345-378 (2005).

will be added that in exercising such a limited discretion to act, those using force must be guided by modern just war principles.[46]

VI Pre-Emptive Self-Defence

Much has been made of the alleged promotion by the US government of a novel doctrine of "pre-emptive attack". It is necessary to examine exactly what has been said in relevant documents. What the US has announced – which might be regarded as new doctrine – is that it may take pre-emptive action against *terrorists*. It is not expressed as an extension of the right of self-defence against *states*. In *The National Security Strategy of the United States of America* (2002), published by the White House after the 9/11 attacks, it is stated thus:

> We will disrupt and destroy terrorist organizations by … defending the US, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country ….The US will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression …. We will always proceed deliberately, weighing the consequences of our actions ….

This statement was clarified in January 2003 by the Legal Adviser to the State Department:

> The US, or any other nation, should not use force to pre-empt every emerging threat or as a pretext for aggression. We are fully aware of the delicacy of this situation we have gotten into. After the exhaustion of peaceful remedies, and after careful consideration of the consequences, in face of overwhelming evidence of an imminent threat, though, a nation may take pre-emptive action to defend its nationals from catastrophic harm.[47]

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46 C. Enemark and C. Michaelsen consider the invasion of Iraq against these principles: "Just war doctrine and the invasion of Iraq", 51 *Australian Journal of Politics and History* 545-563 (2005). While willing to give the US and its coalition the benefit of doubt on "right intention", and conceding the criteria of reasonable prospect of success and proportionate cause might just arguably be satisfied, they conclude that it was clearly unjust against the criterion of last resort.

47 Speech to the Foreign Policy Association, "Pre-emptive Force: When Can it be Used?", accessed at www.fpa.org.

Note the prudential character of the words "overwhelming", "imminent" and "catastrophic". Although not stated to be in accordance with international law, the proposition is consistent with a conservative reading of the right of self-defence in an era of weapons of mass destruction, whether we are speaking of actions against terrorists as such, or against hostile states.

In the case of actions against terrorists operating from bases (as they must) within sovereign states, in the first place one should rely on the adherence of those states to the international conventions prohibiting various forms of terrorism,[48] including the obligation to extradite or prosecute offenders against international criminal law, and the rule of customary law that forbids a state from allowing its territory to be used in order to launch attacks on other states. Where that reliance proves ineffective, there is highly persuasive force in the proposition that victim states may resort to a species of self-defence described by Yoram Dinstein as "extraterritorial law enforcement".[49] (Dinstein locates this notion within self-defence, and thus article 51 of the Charter. The present writer prefers to find it in article 2(4) of the Charter, for the reasons stated above.) Dinstein considers that where a terrorist, has committed criminal acts in one state and is found in another, the authorities of the latter state are to be called on by the victim state to surrender, or itself prosecute, the terrorist in accordance with international law. If that state is unwilling, or through weakness is unable, to take these measures of law enforcement, then the victim state may itself undertake the task of capturing the terrorist, or destroying the terrorist base, as the case may be. Clearly, the doctrine cannot be applied unless the state from which the terrorist attack has been launched or directed has been given sufficient opportunity to enforce the law itself. And it must be exercised only with the utmost care for observance of the rules of international humanitarian law, especially for the protection of innocent civilian lives and property.

Much was made, at the time, of this doctrine of pre-emption as a novelty. The present writer does not regard it as such. It has been expressed in highly prudential terms. Australia, moreover, was linked to this doctrine through some remarks attributed to Australia's Prime Minister, John Howard, that Australia could be regarded as the "Deputy Sheriff" in the region of South East Asia and the Pacific. This caused unnecessary alarm in countries like Indonesia and Malaysia. The badge of "Deputy Sheriff" has been disavowed by the Australian Government. And it is inconceivable that Australia would launch pre-emptive strikes against terrorists, or any other threats, in the region without warning. Any

48 Despite the lack of progress made in the UN on a comprehensive definition of terrorism, there is a sufficient range of instruments available to make criminal, and mandate international cooperation, most acts of terrorism. What is holding up a comprehensive definition of terrorism is the insistence of a number of Arab states on excluding from the definition acts directed against "foreign occupation".

49 Dinstein, 244-247.

enforcement action would necessarily be carried out in full cooperation with the governments concerned.

The prudential character of the doctrine of pre-emption, and its lack of novelty, are emphasized by a former Legal Adviser to the US State Department, Abraham D. Sofaer. In terms reminiscent of the just war theory, applied to the specific question of the pre-emptive use of force, Sofaer proposes four criteria for determining the necessity of such a use of force: (1) the nature and magnitude of the threat involved; (2) the likelihood that the threat will be realized unless pre-emptive action is taken; (3) the availability and exhaustion of alternatives to using force; and (4) whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements.[50] Although applying the first three of these criteria to an interpretation of article 51 of the UN Charter, Sofaer also refers to the margin of appreciation inherent in article 2(4) in his exposition of the fourth criterion. In the particular case of Iraq, the entire history of international efforts to disarm Iraq of weapons of mass destruction and cease its egregious violations of human rights must be taken into account.

VII Humanitarian Intervention

A great disappointment at the UN Summit held in September 2005 was the failure to adopt a set of principles based on the notion of the responsibility to protect. The origins of this idea came out of the need to protect the Kurds in the north of Iraq after the First Gulf War in 1991, the experience of genocide in Rwanda, a failed state in Somalia, and ethnic cleansing in Kosovo. All of these, and many other examples, are cases where international law has been struggling to re-imagine the Charter in face of the reality that most humanitarian disasters, and grave abuses of human rights, occur within the borders of sovereign states, traditionally protected by the doctrine of state sovereignty against intervention by other states. This doctrine is reflected in article 2(7) of the UN Charter. Although that doctrine became subject to the interpretation that what is "inherently" a matter of domestic jurisdiction depends on the development of human rights law – as the actions by the UN against apartheid in South Africa showed – there was no agreement on when forcible intervention to stop grave harm *should* be regarded as lawful. The US and its NATO allies intervened in Kosovo in 1999 to stop ethnic cleansing by Serbia. No authorisation was given by the Security Council because of a threatened veto by Russia (which would probably have been supported by China also). What was the legal justification?

At the time the UK offered a legal justification in terms of pre-existing UN resolutions which, it stated, gave the necessary, if only implied, authority (rather as in the later case of Iraq). Prime Minister Tony Blair was more forthright. He

50 "On the necessity of pre-emption", 14 *EJIL* 209, 220-224 (2003).

stated that "we intervened in Kosovo because it was right to do so". That is, morally right. The US offered no specific legal justification.

Humanitarian intervention was not a ground of justification for the intervention in Iraq, although it has been proffered on several occasions by President Bush as a secondary ground or desirable by-product. No-one defends the regime of Saddam Hussein or fails to acknowledge the horrific abuses of human rights inflicted by his regime on the people of Iraq. Whether the invasion could have been justified on that ground alone involves weighing up a number of factors, including the prudential considerations outlined above. Almost certainly the intervention would not have met those tests. But for the future it is enough to say that humanitarian intervention as an exception to the prohibition of the use of force under the Charter has inevitably demanded renewed consideration, following events in Somalia, Rwanda, Kosovo, Sierra Leone, the Democratic Republic of the Congo, and East Timor, among others.

Many legal commentators criticised the intervention in Kosovo, though in terms less strident than later in relation to Iraq. In his study *Just War or Just Peace? Humanitarian Intervention and International Law,*[51] Simon Chesterman argues that forcible intervention, no matter how humanitarian the motives, is illegal in the absence of authorisation by the Security Council. He is able to cite many authorities in support of his view. But what if the Security Council considers the situation, as it did in relation to Kosovo, but one or more of the Permanent Members casts, or threatens to cast, a veto? Or what if the Council acts too little and too late, as it did in relation to Rwanda? Must the rest of the international community stand by and do nothing? Chesterman admits the moral problem, and answers it by saying that in exceptional circumstances such intervention would be "illegal but excusable". This point of view has already been discussed above.[52]

This gap was sought to be filled by the Report of the International Commission on Intervention and State Sovereignty, co-chaired by former Australian foreign minister Gareth Evans and Ambassador Mohamed Sahnoun of Algeria. That Report, sponsored and published by the Canadian Government in 2001, makes a powerful case for humanitarian intervention, but as a responsibility, not a right. The Report stresses the need to base humanitarian enforcement actions on Chapter VII of the Charter, and calls upon the Security Council to exercise its powers and duties responsibly and on an objective view of the facts of each case. Nevertheless, the Report does envisage, even while deploring the prospect of, actions by states or coalitions of states intervening where the Security Council fails to act owing to a veto cast for unmeritorious reasons.[53]

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51 Oxford University Press, Oxford, 2001.

52 For a consideration of the subject measured against just war theory see C.A.J. Coady, *The Ethics of Armed Humanitarian Intervention,* Peaceworks No.45 (United States Institute of Peace, Washington D.C., 2002).

53 Report, above, n.5, paras. 6.28-6.40.

Whether directed only at the Security Council's responsibility to protect, or applied also to a liberal view of the scope of article 2(4) of the Charter, the International Commission's specification of the precautionary conditions for taking action to intervene gives valuable guidance. These are principally: right intention, last resort, proportional means, and reasonable prospects of success.

VIII The Responsibility to Protect and the Just War Theory

The Report of the International Commission on Intervention and State Sovereignty identifies six criteria for military intervention for human protection purposes.[54] These are:

- right authority;
- just cause;
- right intention;
- last resort;
- proportional means;
- reasonable prospects.

To the first of these criteria the Report devotes an entire chapter,[55] since it is necessary to discuss at length the role of the Security Council as the supreme body to authorize the use of force (otherwise than in immediate self-defence). In that chapter, the responsibility of the Security Council to act in a principled manner, objectively weighing the evidence, is stressed, as mentioned above.

Just cause is set forth as a threshold criterion. "In the Commission's view, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert large scale loss of life … which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."[56]

Right intention is discussed as being satisfied where the primary purpose of the intervention is to halt or avert human suffering. "Overthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection …". The Report sees greater evidence of right intention where the intervention takes place on a collective or multilateral basis. The intervention must also be supported by the people for whose benefit the intervention is intended.[57]

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54 Report, para 4.16.

55 Report, paras. 6.1-6.40.

56 Report, para. 4.19.

57 Report, paras. 4.33-4.34.

Last resort means that "every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored."[58]

Proportional means is defined in terms of the scale, duration, and intensity of the intervention as being the minimum necessary to secure the humanitarian objective. International humanitarian law will apply to the operation, but since such operations are "more narrowly focused and targeted than all out warfighting, an argument can be made that even higher standards should apply in these cases.[59]

Reasonable prospects refers to reasonable prospects of success. There is no point in engaging in a humanitarian intervention operation if the likelihood is that the situation will become worse, or might provoke a wider conflict.[60]

The Report is refreshingly candid and practical in its analysis and recommendations. For example, in relation to the last criterion – reasonable prospects – the Report deals directly with the problem of the practical impossibility of interventions against powerful states, or states with powerful friends. Is there a danger of double standards? The answer is yes, but "the reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case."[61] There is also the problem of finding "coalitions of the willing" ready to undertake such interventions at a time of compassion fatigue and overstretch of capabilities.

Although nowhere in the Report is there reference to just war theory or similar doctrines of the past, there is no doubt that the concepts, and the terminology used, are strikingly similar. It is a document that deserves greater attention than it has received. It is not irrelevant in that connection to note that the Report was published only three months after the terrorist attacks on the United States of September 11, 2001, and was overshadowed by those events.

IX Conclusion

Although the more elastic interpretation of article 2(4) of the UN Charter endorsed by the present writer has been criticised as unsupported by academic opinion and past state practise, the question now is whether such an interpretation *should* be admitted in order to give to individual states (preferably acting in coalition with other states) the necessary legal basis under the Charter to do what is morally right, where the Security Council has failed in its duty to assess a situation objectively and dispassionately. It is a general legal principle that a document, be it a contract, a statute, or a treaty (as here the UN Charter), is open to

58 Report, para. 4.37.

59 Report, paras. 4.39-4.40.

60 Report, paras. 4.41-4.42.

61 Report, para. 4.42.

purposive interpretation in order to respond to new circumstances or needs, so long as that interpretation can fairly be regarded as within the meaning of the words of the document. The fact that a more restrictive interpretation may have been given in the past is not an insuperable obstacle. Moreover, the UN Charter should be viewed similarly to a constitution. To adhere to rigid interpretations or to be unwilling to allow growth and development in understanding is to render the instrument brittle and may lead to rupture, defiance and disillusion. In the present writer's view a wider interpretation must be given to article 2(4) in order to make the Charter relevant to the present and foreseeable future needs of the international community.

In adopting that view it is necessary to apply to it the precautionary conditions set out in the Report of the International Commission on Intervention and State Sovereignty as giving valid guidance as to the occasions on which forcible interventions are justified, not only in relation to the Security Council's responsibility to protect, but also to those states willing to act for the common good where the Security Council is prevented from acting. These conditions are principally: right intention, last resort, proportional means, and reasonable prospects of success. Intervention should not be embarked upon for self-seeking reasons, or where the remedy would likely be worse than the disease. The just war approach, or "proposal", inherent in these conditions, has regained a worthy place in international relations.

Chapter 2

Rethinking Collective Security

Thomas Franck

I Why Rethink Collective Security?

One of the many seminal insights Professor Yoram Dinstein has brought to the field of international law is his linking of the law pertaining to war with the law of human rights. In essence, the enterprise established in the opening line of the United Nations Charter – "to save succeeding generations from the scourge of war" – has its footing not only in the *jus ad bellum*, but also in the then barely nascent law of human rights.

In World War I, ten million people died. In World War II, with advances in both fanaticism and technology, sixty million died.[1] Since then, human rights have developed exponentially and, in the growing *corpus* of human rights, the right to life surely takes pride of place. It follows that, since the greatest threat to life, everywhere, comes from war – whether from civil wars, wars between states or the religious-cultural wars waged by terrorists – the law limiting recourse to military force has become the cornerstone of the law of human rights and *vice-versa*. In an age of weapons of mass destruction, the threat of war can now be seen in terms of fatal casualties potentially measurable in the hundreds of millions. The prospect of such massive deprivation of the right to life forces all of us to examine the *jus ad bellum* in human rights terms.

In an effort to fulfill its central mission, the UN Charter establishes as the organization's first Purpose (Art. 1(1)) "To maintain international peace and security, and to that end: to take effective collective measures...." The design of this new system for the prevention of war is new and also clear: nations were to renounce the "threat or use of force" (Art. 2(4)) except when actually attacked (Art. 51). In return, the members of the UN, upon a determination of "the existence of a threat to the peace, breach of the peace, or act of aggression", shall take the collective measures necessary "to maintain or restore international peace and

1 Paul Heinbecker, "The Way Forward," in *Irrelevant or Indispensable? The United Nations in the 21st Century,* Heinbecker and Goff eds., 183 (CIGI Publications, Waterloo, 2005).

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security" (Art. 39). These measures may include "action by air, sea, or land forces" if less draconian measures fail to maintain or restore peace (Art. 42).

This, then, was the design of a regime for collective measures that would make unilateral state recourse to force unnecessary. Right from its inception, however, the design evinced serious flaws. These have been exaggerated by critics, and the successes have been excessively discounted. In the words of Canada's longtime Ambassador to the UN:

> The UN gave birth to a body of international law that stigmatized aggression and created a strong norm against it. Although the Cold War saw international law breached by both sides, the norm against aggression was much more respected than not, as was the legal force of the Charter. There were fewer interstate wars in the second half of the twentieth century than in the first half, despite a nearly four-fold increase in the number of states. While the Cold War destroyed the post-war consensus, hobbling the security vocation of the UN for many years, and the prevention of World War III owed at least as much to nuclear deterrence and collective defence through NATO, there is no doubt that the world would have been a much bloodier place in the last fifty years without the world body.[2]

Nevertheless, the flaws can no longer be ignored. Collective security under UN auspices is a weak reed upon which to rely in return for states' renunciation of the right to use force unilaterally to protect their security and advance their national interest.

II Weaknesses of UN Collective Security

The first flaw to appear in the Charter's design was the failure of member states to give effect to Article 43, by which they had undertaken "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces... necessary for the purpose of maintaining international peace and security."

That the members failed in their obligation to give the Security Council stand-by military forces was partly obscured by the Cold War, which, anyway, would have made it virtually impossible to deploy any such forces by reason of the frequent recourse to the veto by the Soviet Union. However, such recurrent use of the veto, then and now, by one or more of the five permanent members of the Council entitled in this way to halt any proposed collective action (Art. 27(3), has constituted a second flaw in the Charter's design which, understandably, makes nations very cautious about abjuring recourse to force to protect their security and national interest.

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2 Id. p. 184.

These considerable flaws in the original design have been somewhat mitigated but not cured by various ingenious improvisations. Peace-keeping operations were invented to keep parties to a conflict from resuming it after establishment of a cease-fire.[3] These contingents have served, with varying degrees of success, on the Israeli-Syrian, Lebanese, Indo-Pakistani and Egyptian borders, in the Congo, Cyprus, Namibia, Cambodia, Mozambique, Haiti, Liberia, Sierra Leone, the Ivory Coast, Kosovo, Somalia, Rwanda, and in the Former Yugoslavia. While the forces thus deployed were, in each instance, made up of troops volunteered *ad hoc* by member states, they operated under United Nations mandates and, in some instances, under UN command. Nevertheless, they were forces which took considerable periods of time to put together and they operated mostly with the consent of the states in which they were deployed. Only in the instance of the invasions of South Korea[4] and Kuwait[5] has the Council actually used its powers to authorize collective military action to rescue a state from invasion. Even in those two instances, the force had to be constituted *ad hoc* from contingents volunteered by member states.

While the failure of the Charter system to establish a standing force ready to act at short notice has undoubtedly weakened states' willingness to entrust their security to the collective processes of the UN, a more serious factor in this reluctance is the looming omnipresence of the veto. Every government is aware that the UN's capacity to come to its defense is limited not only by actual veto of collective measures but by the mere threat that such a veto would be used to prevent action even when a coalition of the willing is available to undertake it. This has led such willing states – usually neighboring states in the region – to undertake action without seeking prior Security Council authorization as required by

3 See, for example: UNTSO established by S.C. Res. 50 of 29 May 1948; UNEF established by G.A. Res. 1000 and 1001 of 5 and 7 Nov. 1956; UNFICYP established by S.C. Res. 186 of 4 March 1964; UNTAG established by S.C. Res. 435 of 29 Sept. 1978; UNTAC established by S.C. Res. 745 of 28 Feb. 1991; ONUMOZ established by S.C. 797 of 16 Dec. 1992; UNMIH established by S.C. Res. 867 of 23 Dec. 1993; UNSMIH, established by S.C. Res. 1063 of 28 June 1996; UNTMIH established by S.C. Res. 1123 of 30 July 1997; MIPONUH established by S.C. Res. 1141 of 28 Nov. 1997; MINUSTAH established by S.C. Res. 1542 of 30 April 2004; UNOMIL established by S.C. Res. 866 of 22 Sept. 1993; UNMSIL established by S.C. Res. 1181 of 13 July 1998; MINUCI established by S.C. Res. 1479 of 13 May 2003; UNOCI established by S.C., Res. 1528 of 27 Feb. 2004; UNMIK established by S.C. Res. 1244 of 10 June 1999; UNOSOM I established by S.C. Res. 751 of 24 April 1992; UNITAF authorized by S.C. Res. 794 of 3 Dec. 1992; UNOSOM II authorized by S.C. Res. 814 of 26 March 1993; UMOMUR established by S.C. Res. 846 of 22 June 1993; UNAMIR established by S.C. Res. 872 of 5 Oct. 1993; UNPROFOR established by S.C. Res. 743 of 21 Feb. 1992.

4 S.C. Res. 82 of 25 June 1950.

5 S.C. Res. 678 of 29 Nov. 1990.

Article 53 of the Charter. Action by ECOMOG states in Liberia and Sierra Leone, as well as NATO action with respect to Kosovo, illustrate the problem.

III Overcoming the Weakness of Collective Security

It is apparent that the design concept of collective security embodied in the U.N. Charter is most deeply flawed by the actuality and threat of the veto. Unless this problem is addressed, the flaw will cause the principal purpose of the system to fail. Collective security is impossible without addressing the problem of the veto. Unless the system can provide a sustainable faith in collective security, states cannot be expected to surrender their right to use force at their own discretion. While this is most readily demonstrable in the context of threats emanating from weapons of mass destruction, it is by no means limited to that extreme contingency.

It is not difficult to illustrate the problem hypothetically. Thus, let us suppose that the Security Council is convened in response to a complaint by state A that state B is training dissident elements to engage in terrorist attacks against A's territory and civilians. In response, the Security Council invokes its power to take collective measures. It demands that state B stop these subversive cross-border activities. It also appoints a commission to investigate and report on B's compliance, threatening "additional enforcement measures" if such compliance is not forthcoming. After a period during which the Council's inspectors seek to carry out their mandate while encountering obdurate obstruction, they report back to the Council that there has been no compliance and that there is little prospect of any change in this respect. At this point, negotiations begin among Council members to draft a resolution that would initiate the use of force against B. It soon becomes apparent, however, that, while there is virtual unanimity among Council members, one permanent member has decided to block any recourse to collective force.

This scenario illustrates the flaw in the design. While it prohibits state A from using force because there has been no armed attack on it by state B, the Charter system cannot provide the alternative of collective security because of the veto.

This scenario suggests three possible alternative remedies for such institutional stasis. One is to redefine "armed attack" within the meaning of Article 51, so as to include the sort of threat posed by terrorists in State B. Thus, the threat posed by terrorists in state B could be attributed to that state, thereby permitting action by A and its allies against B under the aegis of "self-defence" as permitted by Article 51 even without prior Council authorization. The Security Council moved in the direction of encouraging this interpretative move when, after the attacks on New York on September 11, 2001, it recognized the "inherent right of individual and collective self-defence" of the victim and stressed that those responsible for "aiding, supporting or harbouring the perpetrators, organizers and

sponsors of these acts will be held accountable....”[6] By recognizing “harbouring” as creating a form of constructive agency, the UN has acknowledged that, for purposes of a state’s self-defese, the armed attacks of the harbored terrorists become those of the state from which they are allowed to operate.

Another important recent redefinition of Article 51’s right of self-defense has come from the High Level Panel appointed by the Secretary General, which has stated that prevalent practice under the Charter now permits “a threatened State” to “take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”[7] Both of these expansive reinterpretations of Article 51’s right of self-defense – a right exercisable unilaterally by the threatened state and its allies – constitute a laudable effort to keep the Charter from becoming obsolete by making it responsive to states’ need to retain their freedom of action when, as has happened too frequently, collective measures have not been taken, or have been taken too late, to deter a credible threat to their security or to the security of a large part of their populations.[8]

A second alternative for overcoming institutional stasis is to recognize the right of regional organizations and “coalitions of the willing” to take collective measures for the protection of an imminently threatened state, even without the requisite prior authorization of the Security Council[9] if its approval by the majority is blocked by the threatened or actual veto of one permanent member. In such situations, effectively retroactive Council approval has been secured subsequently, on a showing of overwhelming necessity. Such retrospective validation may be read into the Council’s actions vis-a-vis the ECOMOG actions in Sierra Leone[10] and Liberia[11] as well as the NATO action in Kosovo.[12] That a regional organization should act *in extremis,* if necessary even without prior Council authorization, is also recognized by the new Constitutive Act of the African Union.[13]

A third alternative, as yet little canvassed, is for the permanent members of the Security Council to attempt to place some voluntary restraints on the threat

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6 S.C. Res. 1368 of 12 Sept.2001.

7 *A More Secure World: Our Shared Responsibility*, Report of the Secretary General’s High level Panel on Threats, Challenges and Change, para. 188 (2004).

8 The problem does not arise only in situations of a threat of external armed attack, but also in situations like that in Rwanda during the genocidal massacre of 800,000 Tutsis.

9 Such approval is required by a strict reading of Charter Art. 53.

10 Presidential Statement, SC/6481, 26 Feb. 1998. This commends ECOWAS’ role.

11 S.C. Res. 788 of 19 Nov. 1992. This “commends” ECOWAS for its unauthorized actions.

12 The possible retroactive validation in this instance came in the form of the overwhelming defeat of the proposed Russian resolution censuring NATO. SCOR (LIV), 3989th Meeting, 26 March 1999 at 6. Only Russia, China and Namibia voted in favor of the censure.

13 Constitutive Act of the African Union, 11 July 2000, art. 4(h).

or use of the veto. Admittedly, this will not be easy to accomplish. Certainly it cannot be expected to happen through Charter amendment, since this cannot be accomplished without the consent of the permanent members. In any event, it would be counter-productive to propel the Council into collective military measures over the obdurate opposition of its most powerful members. The objective should be to modulate, not to override, such opposition in the most urgent instances in which the Council is called upon to defend the security of a member state.

The modality for accomplishing this objective might be a side-bar agreement among the permanent members. For example, all permanent members – or, initially, as many as were willing – might agree among themselves not to invoke the veto, or threat of a veto, to bar recourse to collective military measures in a situation such as that illustrated by the preceding hypothetical, that is, when a state has demonstrably failed to respond to a mandatory order of the Security Council, made under Article 39, and that failure has been certified by those authorized to report to the Council on compliance.

Such an agreement would not deprive permanent members of their right to prevent action by the Security Council. Rather, it would require them to signal their real intention before, not after, the Council has determined that a threat to the peace has arisen and that those responsible must take remedial action. At worst, this would discourage the hypocrisy of permanent members agreeing to order compliance with remedial measure but then blocking all attempts to enforce them. At best, it would discourage non-compliance by the state from which the threat emanates, a defiance now too often facilitated by the malfeasor's confident reliance on the veto of a patron able to block any genuine effort to enforce the Council's orders.

There is a precedent for such a side-bar agreement altering the way permanent members exercise their Charter powers. The San Francisco Four Power Agreement, later adhered to by France, established a practice that came to be known as the "double veto."[14] It is a reciprocal agreement among some members, binding only *inter se,* obliging them not to exercise an explicit power under certain defined circumstances. The same procedural device could be used to set out agreed circumstances in which the veto would not be used to block enforcement against a scofflaw state in circumstances previously designated by the Council as a threat to the peace. It is difficult to see how a permanent member could justify an insistence upon an absolute right to block any implementation of the Charter's promise of collective security, no matter how urgent the circumstances, how persuasive the evidence, and how willing all other states might be to take the action promised by the Charter to remedy the situation.

14 The Five-Powers San Francisco Declaration on the veto power. San Francisco, 7 June 1945. UNCIO Doc. 852, III/1/27(1), vol. II UNCIO, pp. 711-14.

IV Is Reform Possible?

However long the road to Charter reform, it is inevitable that the Security Council will eventually be enlarged. This will make the situation herein described either much better or much worse, depending, first, upon whether there will be new permanent members and, second, upon whether these will be accorded the power of the veto. That suggests that the time may now be ripe to negotiate the sort of sidebar agreement here envisaged as an inducement to new members either to forgo the veto altogether or to accept it only in accordance with the sidebar agreement's limitations. New permanent members might be induced not to insist on veto rights in the context of progress being made towards reducing abuses of the veto by the five original permanent members.

The system conceived at San Francisco in 1945 has had a good run under extremely difficult circumstances. It is not realistic to expect it to survive another sixty years without further adaption. At its heart is a bargain between sovereign states and the community they established, a bargain that calls for effective collective measures. That compact limits states' discretion to protect their national interest in return for an undertaking by the community to protect each state's national security. Evidently, the bargain is no longer perceived by states – and not only the most powerful ones best able to look after their own interest – as providing, reliably, the promised benefit.

Failure would not be the fault of the bargain, itself, which is a sound one and an inevitable part of any regime intended to protect succeeding generations from the scourge of war. Rather, failure would be the consequence of an irresponsible unwillingness to adapt to evident new realities. If there are to be succeeding generations, and if their most fundamental human right to life is to be protected, such failure cannot be contemplated.

Chapter 3

Topographies of Force

Dino Kritsiotis

I Introduction

It is a special pleasure to have been invited to participate in this volume that honors Yoram Dinstein for the seminal contributions he has made to international law in the fields of the *jus ad bellum*, the *jus in bello* and human rights and whose scholarship is known to us from (amongst other works) *War, Aggression and Self-Defence*, first published in 1988 and now in its fourth edition,[1] and *The Conduct of Hostilities under the Law of International Armed Conflict*, published in 2004.[2] Both of these works have become leading authorities in their respective fields and serve as fitting testaments to Professor Dinstein's academic craft, his intellectual skill and, of course, his passionate commitment to these aspects of the international law canon. In truth, neither of these volumes ever seem able to remain long enough on the shelf – either because they are in active service instructing or clarifying on particular points of law or because they will once again inspire and inform the classroom deliberations for the day.

While it is the task of each of these volumes to comb through the vast terrain of history and detail that constitute the modern corpuses of the *jus ad bellum* (*War, Aggression and Self-Defence*) and the *jus in bello* (*The Conduct of Hostilities under the Law of International Armed Conflict*), it is rarely the case that full consideration is given to how these corpuses actually relate to one another, or how concepts *within* each of these corpuses interact with each other.[3] In a previous age, we would have relied on the concept of war as the unifying frame of refer-

1 Yoram Dinstein, War, Aggression and Self-Defence (4th ed., 2005). The second edition of this work appeared in 1994, the third in 2001 – but all references which follow shall be to the fourth edition.

2 Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004).

3 *See* Rosalyn Higgins, *Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 37 British Yrbk. Int'l Law 269 (1961).

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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ence for both the *jus ad bellum* and the *jus in bello*, evidenced by such refrains as 'recourse to war', or 'measures short of war' or 'the laws (and customs) of war'. For international law, the concept of war – that is, an official state of war or war as a legal condition – became the central prism through which we viewed and governed the physical might or 'violence' of states.[4] Yet, as is well known, this common conceptual denominator was found to be ailing and failing to the point where, in the immediate wake of the Second World War, a new normative dispensation was issued for the *jus ad bellum* (the concept of force) by the 1945 United Nations Charter and for the *jus in bello* (the concept of armed conflict) by the 1949 Geneva Conventions.

Taking the concept of force as the frame of reference of this essay, we shall therefore begin a provisional enquiry into the configurations which exist between the concepts that comprise this dispensation – that is to say, in Part II, we shall reflect upon the relationship between the concepts of 'force' and 'war', or, as Philip Allott has pointedly written, its 'hypocritical periphrasis' of 'armed conflict'.[5] Our intention will be to examine the extent to which these concepts (or conceptual vocabularies) share common substantive ground – essentially to give some sense of the possible delineations between the *jus ad bellum* and the *jus in bello*. We shall then proceed, in Part III, to explore the conceptual vocabularies of the *jus ad bellum*, whether they have formed part of its traditional corpus (such as the concept of aggression)[6] or – much like the concept of force itself – are more recent inventions or innovations (such as the concept of armed attack). How are these concepts meant to relate to one another? What are their intended functions within the *jus ad bellum*? Do they represent different legal coda for identical phenomena or are they intended to depict *different* phenomena within international law?

Throughout our navigation of the finer contours of this dispensation, we will focus on what might be called the *topographies of force*, or the broader normative landscape that constitutes 'force' within international law. To this end, Part IV of the essay engages the concept of intervention – a concept of much longer stand-

4 On this designation, see, specifically, Necati Polat, *International Law, the Inherent Instability of the International System and International Violence*, 19 Ox. J. Legal Studies 51, 53 (1999) (referring to 'institutionalized' violence within the international system: *see* H. Bull, *The State's Positive Role in World Affairs*, 108 Daedalus 111, 115 (1979)).

5 Philip Allott, Eunomia: New Order for A New World (rev. ed., 2001), 266 (§15.16).

6 Art. 6 (a) of the Nuremberg Charter identified 'crimes against the peace' as one of the crimes within the jurisdiction of the International Military Tribunal, which it defined as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. *See*, also, *infra* note 180.

ing within the discipline but one that has been so frequently neglected – in order to determine points of co-ordination and comparison within the 'law' concerning force. By regular recourse to a burgeoning jurisprudence – principally of the International Court of Justice in the *Nicaragua Case* (1986),[7] the *Case Concerning Oil Platforms* (2003)[8] and the *Case Concerning Armed Activities in the Territory of the Congo* (2005)[9] – but also to state and institutional practice and the insights of international law literature, our purpose will be to gain a greater sense of how international law views 'force' in its formidable totality. Our concern will be to understand how these topographies might begin to take shape, and, in the final analysis, to appreciate what measure of juxtaposition and coherence they bring in their wake.

II The Concept of War (or: War as a Legal Condition)

For all of the insights shed on 'force', 'armed attack', 'aggression' and 'intervention' in the jurisprudence of the International Court of Justice, the concept of 'war' carries something of a striking and, let it be said, persistent absence in the Court's conceptualizations, reasoning and conclusions. To be sure, there are occasional rhetorical invocations of the concept of war that we can observe in the Court's jurisprudence,[10] but the concept is nowhere awarded the same systematic or consequential treatment that we find reserved for 'force', 'aggression', 'armed attack' or 'intervention'.[11]

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7 *Military and Paramilitary Activities in and Against Nicaragua*: Nicaragua v. United States of America (1986) I.C.J. Rep. 14.

8 *Case Concerning Oil Platforms*: Islamic Republic of Iran v. United States of America (2003) I.C.J. Rep. 161.

9 *Case Concerning Armed Activities on the Territory of the Congo*: Democratic Republic of the Congo v. Uganda (Judgment of Dec. 19, 2005). Given the recent issue of this judgment, it has not as yet appeared in the I.C.J. Reports, so that all subsequent references are to the version contained on the website of the Court (www.icj-cij.org/icjwww/idocket/ico/icoframe.htm).

10 And, even then, it was often in the context of the citations of others, such as Father Miguel d'Escoto Brockmann, the Nicaraguan Foreign Minister in the *Nicaragua Case* (1986), *supra* note 7, at 73 (§133) ('materials of war') or the position of the Government of El Salvador at 77 (§138) ('waging war') and Daniel Ortega Saavedra, President of the Junta of Nicaragua at 79 (§144) ('divert enormous human and economic resources into war'). *See*, also, the *Case Concerning Armed Activities in the Territory of the Congo* (2005) (where 'civil war' had broken out in the DRC on Aug. 2, 1998), *supra* note 9, at 49 (§128) and at 69 (§212).

11 Though we are of course aware of the differing degrees of analytical commitment by the Court to these concepts – as discussed in Parts III and IV of this essay.

This approach of the Court stands to reason, for it follows the lead that states have themselves taken in their argumentation before the Court.[12] In pleadings before the Court, we find that the legal strategies adopted by states have tended to resemble one another in a sort of mirroring effect, where concentrations have turned away from the obsession of defining 'war' or placing it at the centerpiece of legal argumentation. This practice serves as an important contrast to the preoccupations of an earlier period in the history of international law.[13] By way of example, when Nicaragua instigated proceedings against the United States in April 1984 in the *Nicaragua Case* (1986), it did so without recourse to the concept of war in *either* its technical or its material sense.[14] Nicaragua instead called upon the Court to determine (*inter alia*) that the United States 'in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua' and that 'the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua'.[15] To similar effect, in its Application to the Court instituting proceedings against Uganda in June 1999, the Democratic Republic of Congo alleged that Uganda had committed 'acts of armed aggression',[16] and, in its memorial to the Court, argued that, amongst other infractions, Uganda had violated 'the principle of non-use of force in international relations, including the prohibition of aggression' and 'the principle of non-interference in matters within the domestic jurisdiction of States'.[17]

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12 Although in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (2002) I.C.J. Rep., the Court 'avoided any pronouncement on the law on the use of force, although it was called on by Cameroon to declare that Nigeria was responsible for violation of Article 2 (4) of the UN Charter and of the principle of non-intervention, and although Nigeria argued that it was acting in self-defense': *see* Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After* Nicaragua, 14 European J. Int'l Law 867, 882 (2003).

13 *See*, for example, A.D. McNair, *The Legal Meaning of War*, 11 Trans. G. Soc. 29 (1926) and J.L. Brierly, *International Law and Resort to Armed Force*, 4 Cambridge Law J. 308 (1932).

14 As formulated by Dinstein, *supra* note 1, at 9-10.

15 *Nicaragua Case* (1986), *supra* note 7, at 18-20 (§15). Nicaragua had also argued, *ibid.*, that 'the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua' and that – at the head of its itinerary of accusations against the United States – the United States 'has violated and is violating its express Charter and treaty obligations to Nicaragua', among which was mentioned Article 2 (4) of the Charter (or the prohibition of force).

16 *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, at 10 (§1).

17 *Ibid.*, at 16 (§24).

With this emphasis on 'force' and 'intervention', it is clear that we are witnessing the effective diminution of the legal significance of 'war' in the provenance and argumentation of the *jus ad bellum*[18] – a phenomenon that is not confined to the litigation strategies or jurisprudential structure of the cases mentioned.[19] Indeed, in the partial award made by the Eritrea–Ethiopia Claims Commission in December 2005, no legal premium was attached to the occurrence or existence of a 'war' in any legal sense, even though both of the contesting states 'utilized the terminology of *jus ad bellum* to describe the law governing the initial resort to force between them'.[20] Mention was made in the Commission's assessments of an 'alleged declaration of war' by the Ethiopian Council of Ministers and Parliament on May 13, 1998,[21] but this was only in the context of the 'defensive assertions' of

18 *See*, further, Christopher Greenwood, *The Concept of War in Modern International Law*, 36 Int'l & Comp. L.Q. 283, 301-303 (1987) (though noting, in qualification (at 302), that '[s]ince a declaration of war implies a threat of force, it will generally be a violation of the prohibition in Art. 2 (4) [of the Charter] even unaccompanied by any actual violence [and that] [t]he only possible exception would be if the declaration of war could be regarded as a legitimate measure of self-defense').

19 On this score, one should think especially of the *Legality of Use of Force Cases* (Serbia and Montenegro v. Belgium; Canada; France; Germany; Italy; the Netherlands; Portugal and the United Kingdom). While the Court concluded that it had no jurisdiction to entertain these cases – so that none of these proceedings progressed to adjudication upon their merits – it is equally instructive that the allegations leveled against these countries (and against Spain and the United States of America) by the Government of Serbia and Montenegro concerned (*inter alia*) the violation of the 'international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State [and] the obligation not to violate the sovereignty of another State'. Again, we see no prominence awarded to the concept of war in this argumentation, nor did it make a significant showing in the analyses of those who reflected at length on the lawfulness of Operation Allied Force: *see* Ian Brownlie and C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 Int'l & Comp. L.Q. 878 (2000) and *Kosovo Crisis Inquiry: Further Memordandum on the International Law Aspects*, 49 Int'l & Comp. L.Q. 905 (2000); Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law*, 49 Int'l & Comp. L.Q. 910 (2000); Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 Int'l & Comp. L.Q. 926 (2000) and Vaughan Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 Int'l & Comp. L.Q. 934 (2000). *See*, further, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 European J. Int'l Law 1 (1999).

20 As announced by the Commission itself at the outset of its award: *see* Eritrea–Ethiopia Claims Commission, Partial Award: *Jus Ad Bellum*, Ethiopia's Claims 1–8 between the Federal Republic of Ethiopia and the State of Eritrea (Dec. 19, 2005), 1 (§1) (www.pca-cpa.org/ENGLISH/RPC/EECC/FINAL%20ET20JAB.pdf) (or, as the Commission put it at *ibid.*, '[t]he Respondent [i.e. Eritrea] asserts that it fully complied with international law in its resort to military operations' (§2)).

21 *Ibid.*, at 6 (§17). Dinstein reports that before the 1907 Hague Convention (III) Relative to the Opening of Hostilities, 'most wars were precipitated without a pre-

Eritrea[22] and the Commission held that 'the essence of a declaration of war is an explicit affirmation of the existence of a state of war between belligerents'.[23] Its treatment of the issue, however, had no impact on the Commission's ultimate finding that Eritrea 'violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme … as well as other territory in [Ethiopia's] Tahtay Adiabo and Laelay Adiabo Weredas'.[24]

These marginalizations of the concept of war within the argumentative practices of the *jus ad bellum* become less problematic when we consider that the operation of the prohibition of force, as well as that of intervention, were never made contingent upon the existence of any legal state of war.[25] In fact, the discernable turn in state and institutional practice might be regarded as the necessary and inevitable acknowledgement of the conceptual shift which occurred in October 1945 with respect to the *jus ad bellum* and the entry into force of the United Nations Charter. As 'the seminal textual source of the postwar paradigm of international order',[26] the Charter's references to 'war' were kept limited and were made for stylistic – rather than substantive – purposes.[27] They defer, instead,

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lude in the form of a declaration of war' but that, following the conclusion of the Convention, '[t]he practice of States has not changed substantially': *see* Dinstein, *supra* note 1, at 32. Although the Commission found that the resolution of May 13, 1998, 'was not, as Eritrea has asserted, a declaration of war' (*ibid*., at 6 (§17)), declarations of war do occur in practice: *see* Panama's declaration of a state of war with the United States on Dec. 15, 1989 (Office of the Press Secretary of the White House, Statement by President George H.W. Bush (Dec. 20, 1989)) and Chad's declaration of a 'state of war' with the Sudan in December 2005 (Stephanie Hancock, *Chad in 'State of War' with Sudan*, BBC Online: Dec. 23, 2005 (www.news.bbc.co.uk/2/hi/africa/4556576.stm)). *See*, further, Conor Gearty, *How We Declare War*, 24 London Rev. Bks. 25 (2002).

22 *Ibid*., at 3 (§9).

23 *Ibid*., at 6 (§17).

24 *Ibid*., at 7.

25 *See*, further, the 1974 United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, which, in Art. 3, identifies a series of acts which shall 'qualify as an act of aggression' – 'regardless of a declaration of war': G.A. Resn. 3314, 29 U.N. G.A.O.R., Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

26 Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 Am. J. Int'l Law 503, 504 (1989).

27 The Charter's preamble famously announces the determination of the United Nations 'to save succeeding generations from the scourge of war' (an 'oratorical reference' according to the Report of the Committee on Study of Legal Problems of the United Nations, 46 Proceedings Am. Soc. Int'l Law 216, 217 (1952)) and Art. 107 provides that '[n]othing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the

to the concept of force.[28] Nevertheless, we find that in Yoram Dinstein's study of *War, Aggression and Self-Defence*, considerable attention has been paid to the concept of war in the intellectual design of the work because, Dinstein argues, 'a general reference to international armed conflicts ignores the important theoretical as well as practical distinctions existing between wars and other uses of inter-State force "short of war"'.[29] This reference to – and detailed regard for – 'international armed conflicts' in a work that is essentially dedicated to the predicates of the *jus ad bellum* might, however, strike the reader as curious, since the vocabulary of 'international armed conflict' has come to replace the vocabulary of 'war' not so much from the perspective of the *jus ad bellum* but from the perspective of the *jus in bello*.[30]

To be sure, the apparent concentrations of practice regarding the 'general reference to international armed conflicts'[31] do make sense at one level of analysis given that all four of the Geneva Conventions of August 1949 provide (in Common Article 2) that their provisions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. This formulation was a deliberate and explicit attempt to circumvent the 'handful of definitional problems'[32] that had accompanied the definition of war, and, with it, the activation mechanism that had traditionally existed for the 'laws of war'. The new framework of the Conventions was therefore designed to facilitate the application of the *jus in bello* by 'depriv[ing] belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations', as there would now be 'no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention'.[33] The Conventions posited a threshold that was altogether less reliant on technical rituals and more objective in terms of its operational premise since '[t]he occurrence of de facto hostilities is sufficient'.[34] This develop-

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Governments having responsibility for such action'. All remaining references are to the Second World War: Art. 53 (2), Art. 77 (1) (b) and Art. 107.

28 *See* Dino Kritsiotis, *When State Use Armed Force,* in The Politics of International Law 45, 52-61 (2004) (Chris Reus-Smit, ed.).

29 Introduction to the first edition of War, Aggression and Self-Defence. *See*, also, *supra* note 1, at xii.

30 And, as such, defines the terrain of Professor Dinstein's 'companion volume' of The Conduct of Hostilities under the Law of International Armed Conflict, *supra* note 2.

31 *Supra* note 29.

32 *See* Dinstein, *supra* note 1, at 15.

33 Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War 22 (1960) (Jean S. Pictet ed.).

34 *Ibid*., at 23 (which Dinstein attempts to achieve by his bifurcation between war in its 'technical' and 'material' senses: '[t]he *jus in bello* … is brought into operation as soon

ment suggests that it is not only incumbent upon us to differentiate (as Dinstein argues) between 'war' as 'a figure of speech' and as 'a legal term of art',[35] but also to understand the import of this term of art when compared with a chapter of the history of international law that is separate from our own (i.e. the period before the 1949 Geneva Conventions).

Even though it is 'conceded' that 'the relevant norms of the *jus in bello* must be implemented in the course of international armed conflicts of whatever type, and not only when a state of war is in effect',[36] it is telling that, in *War, Aggression and Self-Defence*, the prominent line that is taken for defending the 'legal meaning of war' occurs on the front of the constraints of warfare;[37] it is in the context of the *jus in bello* that the 'theoretical as well as practical distinctions' of this meaning are essentially foretold.[38] We find, for example, that considerable emphasis is awarded to the taxonomies of armed conflict[39] (whether in the form of Israel's War of Independence (1948)[40] or in relation to the disintegration of the Socialist Federal Republic of Yugoslavia[41] or Afghanistan after September 11, 2001),[42] but there are other representations of the *jus in bello* in this quintessential text on the *jus ad bellum*: mention is made of 'the internment of nationals of the enemy State and the sequestration of their property, irrespective of the total absence of hostili-

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as war in the material sense is embarked upon, despite the absence of a technical state of war'. *See* Dinstein, *supra* note 1, at 10). This is not to suggest that we are any the wiser regarding the degree of 'de facto hostilities' relevant for common Article 2. On this, see further *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, at 70-71 (§§218-219). *See,* also, Dinstein, *supra* note 1, at 11:

> In large measure, the classification of a military action as either war or a closed incident ('short of war') depends on the way in which the two antagonists appraise the situation. As long as both parties choose to consider what has transpired as a mere incident, and provided that the incident is rapidly closed, it is hard to gainsay that view. Once, however, one of the parties elects to engage in war, the other side is incapable of preventing that development. The country opting for war may simply issue a declaration of war, thereby initiating war in the technical sense. Additionally, the State desirous of war may escalate the use of force, so that war in the material sense will take shape.

35 *Ibid*., at 3.

36 *Ibid*., at 17. *See*, further, Dinstein, *supra* note 2, at 15 ('[law of international armed conflict] is brought to bear upon the conduct of hostilities between sovereign States, even if these hostilities fall short of war'). *See*, also, Greenwood, *supra* note 18, at 295.

37 *See* Dinstein, *supra* note 1, at 3.

38 *Supra* note 29.

39 *See* Dinstein, *supra* note 1, at 6-7 (where the disparities between international and non-international armed conflict are explored).

40 *Ibid*., at 7.

41 *Ibid*., at 7-8.

42 *Ibid*., at 7, 31 and 236-237.

ties',[43] the means of waging warfare,[44] the suspension of the application of the *jus in bello*[45] and the realization of neutral relations.[46]

That said, we should now give some consideration to the possibilities which the legal meaning of war might hold out for the *jus ad bellum* in *War, Aggression and Self-Defence*. What significances are professed for the legal meaning of war from the perspective of the *jus ad bellum*, notwithstanding the admission that '[t]he use of force in international relations, proscribed in [Article 2 (4) of the Charter], includes war, but also covers forcible measures "short of war"'?[47] Such as they are, these significances might be regarded as more subtle revelations from the text of *War, Aggression and Self-Defence*. They are not as obvious or as explicit as the 'theoretical as well as practical distinctions' urged for the waging of warfare in the opening chapters of that volume, but, rather, emerge as the work takes shape and as its overall argument progresses.[48] We shall identify and examine two here.

The first can be asserted in terms of a choice of law imperative, where the definitional berth awarded to 'war' in international law is sufficiently broad that it will occasionally eclipse the importance of the *jus ad bellum*. According to this perspective, we are invited to consider Israel's strike on the nuclear reactor in Iraq on June 7, 1981 as part of 'the war between Iraq and Israel which started in 1948',[49] or as an 'act' which 'represented another round of hostilities in an on-going con-

43 *Ibid*., at 9.

44 As in the 1993 United Nations Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, which 'cover[s] all armed conflicts of whatever scope (not even necessarily inter-State)': *See ibid*., at 17.

45 *Ibid*., at 18-19.

46 *Ibid*., at 24-29.

47 *Ibid*., at 85.

48 'The legal nature of war' would appear to be preparatory to the second part of the volume, on '[t]he illegality of war' – although the third part considers '[e]xceptions to the prohibition of the use of *inter-State force*' (emphasis supplied). *See ibid*., at v-ix.

49 *Ibid*., at 48. *See*, further, *ibid*. at 56: 'A number of rounds of hostilities between Israel and Egypt or Syria (most conspicuously, the so-called 'Yom Kippur War' of October 1973) are incorrectly adverted to as "wars". Far from qualifying as separate wars, these were merely non-consecutive time-frames of combat, punctuated by extended ceasefires, in the course of a single on-going war that had commenced in June 1967'. This raises the question of the extent to which a state of *armed conflict* – as opposed to a *war* – in the legal sense might be terminated, especially given the fact that its definition rests on the occurrence of '*de facto* hostilities': *supra* note 34. *See*, further, Dinstein, *supra* note 1, at 47 ('implied mutual consent') and 50-59 ('suspension of hostilities').

flict'.[50] If this perspective were adopted, the action would stand to be adjudicated according to the *jus in bello* and *not* the *jus ad bellum*:[51]

> Had Israel been at peace with Iraq [in June 1981], the bombing of the site [at Osiraq] would have been prohibited, since (when examined in itself and out of the context of an on-going war) it did not qualify as a legitimate act of self-defense consonant with Article 51 [of the Charter]. This is the position *de lege lata*, despite the understandable apprehension existing at the time that nuclear devices, if produced by Iraq, might ultimately be delivered against Israeli targets.[52]

The question of the choice of law has a fundamental bearing on how we view the lawfulness of Israel's action because, under the rules of the *jus in bello*, a contrary conclusion would have to be reached. That is because, under the relevant rules of targeting during a war or armed conflict, there would be no question concerning the permissibility of the action under international law. Article 52 (2) of the First Additional Protocol of 1977 limits attacks 'strictly to military objectives', which it defines as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture of neutralization, in the circumstances ruling at the time, offers a definite military advantage'. Against this standard, Israel's action of June 1981 would be a comfortable fit.[53]

This has not been, however, Israel's legal interpretation of events. As a matter of fact, Israel's legal assessment of the 'state of war' could be characterized as one of some equivocation,[54] since it first claimed that the war that had come

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50 *See* Dinstein, *supra* note 1, at 48.

51 Which, according to Dinstein, remains 'the only plausible justification for the bombing of the reactor': *ibid*. The difficulty with this justification rests more with the plausibility of its *premise* than its technical components or astuteness. As it happens, the view is shared by Prime Minister Ariel Sharon – though notably on the basis that he did 'not believe in peace agreements' and not on the basis that they existed with certain countries but not others: Ari Shavit, *The General*, New Yorker, Jan. 23 & 30, 2006, 52 at 55.

52 *See* Dinstein, *supra* note 1, at 186.

53 *See* Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 87-92 (2004) and, further, Stephen J. Solarz, *Israel Had No Other Way to End Nuclear Threat*, Wash. Star, June 11, 1981. Although neither Israel nor Iraq are parties to the Protocol, this formulation has been regarded as a reflection of custom: Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 64-65 (1989).

54 *See* Greenwood, *supra* note 18, at 292 ('the government of Israel appears to have modified its position').

into existence in 1948 had been terminated by armistice agreements in 1949,[55] and, then, it concluded peace treaties with Egypt (March 1979),[56] Lebanon (May 1983)[57] and Jordan (October 1994),[58] the contents of which would tend to suggest otherwise.[59] Nevertheless, as far as its relationship with Iraq was concerned and to the extent that one can make legal inferences from state actions as one does from the formulations of peace treaties, in June 1981 Israel proceeded from the assumption that a state of peace existed with Iraq and that it was from this state of peace that circumstances arose which necessitated recourse to its right of self-defense under international law. We know this because, before the Security Council, Israel argued that '[a] threat of nuclear obliteration was being developed against Israel by Iraq'[60] and that:

> [i]n destroying Osiraq, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right

55 With Egypt (42 U.N.T.S. 251); Jordan (42 U.N.T.S. 303); Lebanon (42 U.N.T.S.287) and Syria (42 U.N.T.S. 327). *See*, further, Israel's position with respect to Egypt in the Security Council in July 1951: S.C.O.R. 549th Mtg. (July 26, 1951).

56 Done at Washington D.C., March 26, 1979. Treaty of Peace between the Arab Republic of Egypt and the State of Israel: 18 I.L.M. 362 (1979) (Art. 1 (1): 'The state of war between the parties will be terminated and peace will be established between them upon the exchange of instruments of ratification of this treaty').

57 Done at Kiryat Shmona and Kaldeh, May 17, 1983. Agreement between the Government of the State of Israel and the Government of the Republic of Lebanon: 22 I.L.M. 708 (1983) (Art. 1 (2): 'The Parties confirm that the state of war between Israel and Lebanon has been terminated and no longer exists'). This treaty never entered into force because of Lebanon's decision not to ratify it.

58 Done at the Arava/Araba Crossing Point: Oct. 26, 1994. Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan: 34 I.L.M. 43 (1995) (Art. 1: 'Peace is hereby established between the State of Israel and the Hashemite Kingdom of Jordan … effective from the exchange of the instruments of ratification from this treaty'). However, the preamble of the treaty makes reference to the Washington Declaration of July 25, 1994, in which Israel and Jordan declared that '[t]he long conflict between the two states is now coming to an end. In this spirit, the state of belligerency between Israel and Jordan has been terminated'.

59 Although '[n]o mention is made of when or how this event [of the termination of a state of war] occurred' (*see* Greenwood, *supra* note 18, at 292), the formulation in the agreement between Israel and Lebanon is perhaps more consistent with Israel's earlier position – a fact not disturbed by the treaty's 'abortive' status: 'at Khaldeh and Qiryat Shemona, Lebanon and Israel did not terminate the war between them at the moment of signature (using the present tense) or undertook to end it upon ratification (in the future): they confirmed that the state of war had already ended at some indeterminate stage (in the past), and that it therefore no longer existed'. *See* Dinstein, *supra* note 1, at 37.

60 U.N. Doc. S/PV. 2280 (June 12, 1981), at 38. *See*, also, U.N. Doc. S/PV. 2288 (June 19, 1981), at 36 ('the concept [of self-defense] took on new and far wider application with the advent of the nuclear era').

> of self-defense as understood in general international law and as preserved in Article 51 of the [United Nations] Charter. A threat of nuclear obliteration was being developed against Israel by Iraq, one of Israel's most implacable enemies. Israel tried to have that threat halted by diplomatic means. Our efforts bore no fruits. Ultimately[,] we were left with no choice. We were obliged to remove that mortal danger. We did it cleanly and effectively.[61]

In other words, Israel invoked reasoning under the *jus ad bellum* as the basis for its official justification of the strike, which it would have had no legal need to do if it had considered itself to be at war – that is, a legal state of war – with Iraq. This fact is telling given that Israel stood to benefit from adopting the *jus in bello* as its choice of law or, as Dinstein has put it, as 'the relevant framework of hostilities'.[62] Importantly, Israel was not alone in this interpretation. In the ensuing Security Council deliberations, states took issue with Israel's position on account of its appreciation of the *scope* of the right of self-defense – and not on account of its failure to adopt the *jus in bello* as the applicable law.[63] Moreover, when Iraq fired off Scud missiles in the direction of Israeli cities in January 1991, the response of states was to criticize Iraq primarily for its violation of the prohibition of force under the *jus ad bellum* – a matter quite apart from the humanitarian dimension of these actions[64] – against which Israel had every right to exercise its inherent right of self-defense.[65] It was this understanding of the *jus ad bellum* as the 'relevant framework' which informed the 'widely shared perception' of the legal position – and 'not only in Israel'.[66]

A second point of significance for 'war' that is developed for the *jus ad bellum* in *War, Aggression and Self-Defence* stems from the 'cardinal division' that is made between self-defense 'measures "short of war"' and so-called 'wars of self-

61 *Ibid*., at 37 and U.N. Doc. S/14510 (June 8, 1981). *See*, further, Government of Israel, The Iraqi Nuclear Threat: Why Israel Had to Act (1981).

62 Dinstein, *supra* note 1, at 48.

63 *See* U.N. Doc. S/PV. 2280 (June 12, 1981); U.N. Doc. S/PV. 2281 (June 13, 1981); U.N. Doc. S/PV. 2282 (June 15, 1981); U.N. Doc. S/PV. 2283 (June 15, 1981); U.N. Doc. S/PV. 2284 (June 16, 1981); U.N. Doc. S/PV. 2285 (June 16, 1981); U.N. Doc. S/PV. 2286 (June 16, 1981); U.N. Doc. S/PV. 2287 (June 17, 1981) and U.N. Doc. S/PV. 2288 (June 19, 1981). Security Council Resolution 487 (1981) was adopted on June 19, 1981, and 'strongly condemn[ed] the military attack by Israel as a clear violation of the Charter of the United Nations and the norms of international conduct'.

64 On which, *see* Dinstein, *supra* note 2, at 118.

65 *See* Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 Mod. Law Rev. 153, 168 (1992) (claiming that 'Israel could … have invoked the right of self-defense in response to the Iraqi missile attacks upon it').

66 A technique which Dinstein himself adopts in his interpretation of the 'Six Days War' of June 1967, although the observation is actually qualified by the statement that it was 'based on sound judgement of events': *see* Dinstein, *supra* note 1, at 192.

defense'.[67] We might doubt the value of this dichotomy given Dinstein's later claim that the 'conditions' from the *Caroline* correspondence – that is those of necessity and proportionality[68] – 'are now regarded as pertinent to *all* categories of self-defense',[69] and that the 'language' of the correspondence has both come 'to be looked upon as transcending the specific legal contours of extra-territorial law enforcement, and has markedly influenced the *general* materia *of self-defense*'.[70] A cardinal division is, however, clearly intended,[71] since discrete modalities are developed for the right of self-defense depending on whether it is exercised against on-the-spot reactions, defensive armed reprisals and the protection of nationals[72] as opposed to 'war as an act of self-defense' (which, Dinstein reasons, 'denotes comprehensive use of counter-force in response to an armed attack').[73] According to this framework, then, '[w]hen a war of self-defense is triggered by an all-out invasion, the issue of necessity usually becomes moot'.[74] In more dramatic language, it is said of the principle of proportionality:

> The condition of proportionality has a special meaning in the context of a war of self-defense. When on-the-spot reaction or defensive armed reprisals are involved, proportionality points at a symmetry or an approximation in 'scale and effects' between the unlawful force and the lawful counter-force. … Proportionality in this sense, albeit appropriate for the purposes of on-the-spot reaction and defensive armed reprisals, is unsuited for an investigation of the legitimacy of a war of self-defense. There is no support in the practice of States for the notion that proportionality remains relevant – and has to be constantly assessed – throughout the hostilities in the course of war. Once war is raging, the exercise of self-defense may bring about 'the destruction of the enemy's

67 *Ibid.*, at 219.

68 29 B.F.S.P. 1129, 30 B.F.S.P. 195. Although Dinstein considers that 'immediacy' forms the final element of the 'three conditions' specified in the *Caroline* formula: *ibid.*, at 249 (and at 209: '[i]mmediacy signifies that there must not be an undue time-lag between the armed attack and the exercise of self-defense'). However, a close reading of the *Caroline* correspondence would suggest that an 'immediacy' requirement formed part of the understanding of the principle of necessity, and, in any event, was not devised in the context of any requirement of an 'armed attack'. *See*, further, R.Y. Jennings, *The* Caroline *and McLeod Cases*, 32 Am. J. Int'l Law 82 (1938).

69 *See* Dinstein, *supra* note 1, at 249 (emphasis supplied). Further, *ibid.*, at 249: 'It is sometimes put forward that the rule emerging from the *Caroline* incident is no longer valid under the UN Charter. But there is no corroboration of this view in the text of the Charter'.

70 *Ibid.*, at 249 (emphasis supplied).

71 *Ibid.*, at 210.

72 *Ibid.*, at 218-234.

73 *Ibid.*, at 235.

74 *Ibid.*, at 237.

> army', regardless of the condition of proportionality. … By its nature, war (as a comprehensive use of force) is virtually bound to be disproportionate to any measure 'short of war'.[75]

The effect of these positions would appear to empty the *Caroline* principles of any legal value in assessments of the 'merits' of a 'war of self-defense'.[76] They strongly suggest that the difference in the application of the principles to 'measures "short of war"' is actually one of kind rather than of degree – a perception that is easily reinforced by the structural significance which this distinction assumes in the composition of *War, Aggression and Self-Defence*.[77] Why else would the 'issue of necessity' be described as 'moot' for wars of self-defense? And 'usually' – or, presumably, systematically – so? And what other conclusion could possibly be drawn from the contention that 'wars of self-defense' may be undertaken *regardless of the condition of proportionality*, that '[o]nce a war of self-defense is justified by the merits of the case, only the Security Council can contain the hostilities'?[78] In view of these very postulations, what should then be made of the 'pertinent' nature of the *Caroline* principles which Dinstein had himself earlier posited in *War, Aggression and Self-Defence*?[79] We find it difficult to form any impression other than that, in this analysis, the principle of proportionality is effectively sidelined or displaced from any juridical reckoning of 'wars of self-defense', its controlling function subsumed within the powers and responsibilities of the Security Council.[80] These would appear to be the consequences – the legal consequences – when 'an armed attack brings about a war of self-defense', for there, Dinstein argues, 'the stakes are mortal'.[81]

Problematically, however, this effort to attribute legal significance (or significances) to 'war' is fraught with the 'risk' that 'we recognize the traditional institution [of war], unlimited as to aims (even if regulated as to means); whereas if what is recognized is the validity of war *in self-defense*, this immediately imparts

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75 *Ibid*., at 237-238. The quoted portion is footnoted as D. Alland, *International Responsibility and Sanctions: Self-Defense and Counter-measures in the I.L.C. Codification of Rules Governing International Responsibility*, in United Nations Codification of State Responsibility 143, 183 (1987) (M. Spinedi and B. Simma eds.).

76 *See* Dinstein, *supra* note 1, at 240.

77 *Ibid*., at viii. *See*, also, *ibid*. at 219-243.

78 *Ibid*., at 240.

79 *Supra* note 69.

80 Presumably acting pursuant to the 'until clause' in Article 51 of the Charter, the clause that provides for Security Council intervention in the event of the exercise of the right of self-defense: *see*, further, D.W. Grieg, *Self-Defense and the Security Council: What Does Article 51 Require?*, 40 Int'l & Comp. L.Q. 366 (1991).

81 *See* Dinstein, *supra* note 1, at 241 and *supra* note 73.

restrictions on the aims that are legitimate'.[82] The sense of those 'restrictions' should be apparent from any reading of Article 51 of the Charter, which nowhere cultivates such precious dichotomies for the right of self-defense. Instead, Article 51 treats the 'inherent' right of self-defense in generic (even if not in complete)[83] terms and, crucially, in the *Nicaragua Case*, the Court specifically held to the relevance of the principle of proportionality in the event of an armed attack[84] – which it understood to include 'action by regular armed forces across an international border'[85] (or, we could say *pace* Dinstein's synopsis, 'an all-out invasion').[86] The Court made no distinction between armed attacks which yield to self-defense 'measures "short of war"' and those that would precipitate a so-called 'war of self-defense'.[87] The same thinking prevailed in the *Case Concerning Oil Platforms*.[88]

Furthermore, when the Court issued its opinion in the *Legality of the Threat or Use of Nuclear Weapons* in July 1996, it did not circumscribe or remove the principle of proportionality from its considerations of the right of self-defense,

82 D.W. Bowett, in his review of the first edition of War, Aggression and Self-Defence in 58 British Yrbk. Int'l Law. 263, 264 (1988). It is instructive to note that it is only in the second part of his volume on disputes, war and neutrality that Oppenheim provides his definition of 'war' – immediately after his consideration of the 'renunciation of war' under the *jus ad bellum*: *see* L. Oppenheim, International Law: A Treatise (Vol. II: Disputes, War and Neutrality) (7th ed., 1952), 202 (§54) (and *ibid*., at 187-188 (§52g), 'elementary principles of interpretation preclude a construction which gives to a State resorting to an alleged war in self-defense the right to ultimate determination, with a legally conclusive effect, of the legality of such action').

83 As the Court said in the *Nicaragua Case*: 'the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'. *See Nicaragua Case* (1986), *supra* note 7, at 94 (§176). To this, one could add the issue of the right of anticipatory self-defense: *see* Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich. Law Rev. 1620, 1634 (1984).

84 As it did for the principle of necessity: *see Nicaragua Case* (1986), *supra* note 7, at 122-123 (§237).

85 *Ibid*., at 103 (§195).

86 The trigger for a 'war of self-defense': *supra* note 74.

87 Given Dinstein's understanding of this concept (*supra* note 81), perhaps more poignantly demonstrated in the 'war' between the Democratic Republic of Congo and Uganda, where no such bifurcation was made in the argumentation of either Party to the case (nor, for that matter, was it urged by the Court): *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, at 20 (§23) ('in a situation of self-defense' (for the Democratic Republic of the Congo)) and at 29 (§39) ('the lawful exercise of its sovereign right of self-defense' (for Uganda)). *See*, also, the 'war' between Ethiopia and Eritrea where, again, no legal store was put on any 'war of self-defense': *supra* nn. 20-24.

88 *See Case Concerning Oil Platforms* (2003), *supra* note 8, at 196-197 (§§73-74).

its deliberations set within the particular context of 'the fundamental right of every State to survival' or, as the Court additionally intimated, the right of every State 'to resort to self-defense, *in accordance with Article 51 of the Charter*, when its survival is at stake'.[89] While the stakes may well be 'mortal' for states on certain occasions,[90] the Court therefore appears to have been saying that that fact should not be used to deny the application – or the importance – of the principle of proportionality for the *jus ad bellum*.[91] For, alongside the principle of necessity, it will instruct the Court's assessment of the lawfulness of any and every self-defense action that is brought before it: '[t]his dual condition [of necessity and proportionality] applies equally to Article 51 of the Charter', said the Court, '*whatever the means of force employed*'.[92]

Finally, it should be said that the distinction between measures taken in self-defense that amount to 'war' and those falling 'short of war' attributes a much greater degree of sophistication to the right of self-defense than we are able to discern in practice. With the launch of Operation Enduring Freedom in October 2001, the United States claimed that it had 'initiated actions' against Afghanistan 'in the exercise of its inherent right of individual and collective self-defense'.[93] The same position was taken by the United Kingdom,[94] with no particular play made for any 'war of self-defense' against the target State,[95] even though these actions occurred in circumstances that would have easily qualified as an archetypal 'war of self-defense' from *War, Aggression and Self-Defence*[96] (and which would have stood to benefit, we can presume,[97] from this assignation as proposed by Dinstein). If anything, the communication dispatched by the United States to the Security Council in October 2001 struck a chord of moderation as much as it

89 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) I.C.J. Rep. 226, 266 (§96) (emphasis supplied).

90 *Supra* note 81.

91 According to the Court on a previous occasion – the *Nicaragua Case* – 'Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defense, and it is hard to see how this can be other than of a customary nature': *see Nicaragua Case* (1986), *supra* note 7, at 94 (§176).

92 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), *supra* note 89, at 245 (§41) (emphasis supplied) (though also concluding (*ibid.* (§42)) that '[t]he proportionality principle may … not in itself exclude the use of nuclear weapons in self-defense').

93 U.N. Doc. S/2001/946 (Oct. 7, 2001).

94 U.N. Doc. S/2001/947 (Oct. 7, 2001).

95 Although the United States did inform the Security Council that '[w]e may find that our self-defense requires further actions with respect to other organizations and other States': *supra* note 93.

96 *See* Dinstein, *supra* note 1, at 236.

97 *Supra* nn. 74 and 75.

did conviction,[98] suggesting that factors *other than the intervention of the Security Council* would be at work for the entirety of that operation. We could identify one of these factors as the principle of proportionality. Thus identified, we could say that the principle does not in and of itself exclude 'the unconditional surrender of the enemy';[99] rather, the burden of argument and evidence remains with the defending state to rationalize its actions as the exigencies of circumstance require, since the self-defender 'cannot necessarily seek the annihilation or complete submission of the aggressor simply because it is the victim State'.[100] Lest we forget, Operation Enduring Freedom actually ended with the ouster of the Taliban regime from power,[101] but with little (if indeed any) sympathies shed for its eventual demise. Taken together, then, the principles of necessity and proportionality serve as 'requirement[s]' for the right of self-defense,[102] and we find that it is to that end that states have committed themselves in their respective practices.[103]

III The Concept of Force and the *Jus ad Bellum*

As we observed in the introduction, at one period of time, both of the corpuses of the *jus ad bellum* and the *jus in bello* took as their essential frame of reference the existence of 'war' as a condition recognized and defined by international law. We are able to appreciate this position more fully from a casual perusal of some

98 According to the United States, '[i]n carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property': *supra* note 93.

99 *See* Dinstein, *supra* note 1, at 241.

100 Dapo Akande, *Nuclear Weapons, Unclear Law? Deciphering the* Nuclear Weapons *Advisory Opinion of the International Court*, 68 British Yrbk. Int'l Law 165, 191 (1998).

101 Cf. the Vietnamese intervention of 'self-defense' against Kampuchea in December 1978: Gary Klintworth, Vietnam's Intervention in Cambodia in International Law 25 (1989).

102 As per the Dissenting Opinion of Judge Higgins in the *Nuclear Weapons* Advisory Opinion (*supra* note 89, at 583 (§4)) – as does Dinstein himself: *see* Dinstein, *supra* note 1, at 210. Furthermore, as Bowett argues: 'one effect of construing the British military operations as self-defense [in the Falklands conflict] was to limit those operations to what was strictly necessary to self-defense and thus avoid extending the conflict to the Argentinean mainland'. *See* Bowett, *supra* note 82, at 264. Greenwood mentions that 'Portugal did not react to India's seizure of Goa in 1961 by seizing Indian shipping in European waters where Portugal enjoyed naval superiority': *see* Christopher Greenwood, *Self-Defense and the Conduct of International Armed Conflict*, in International Law At A Time of Perplexity: Essays in Honor of Shabtai Rosenne 273, 277 (1989) (Yoram Dinstein and Mala Tabory eds.).

103 *See* Christine Gray, International Law and the Use of Force 124-126 (2nd ed., 2004) and Judith Gardam, Necessity, Proportionality and the Use of Force by States 158-159 (2004).

of the defining texts of both the *jus ad bellum* and the *jus in bello.* For the *jus ad bellum*, High Contracting Parties of the 1928 Kellogg-Briand Pact (or the Pact of Paris) undertook to 'condemn recourse to war for the solution of international controversies, and to renounce it as an instrument of national policy in their relations with one another',[104] and, as far as the *jus in bello* was concerned, the 'laws of war' became applicable 'in time of war': consider, for example, the specifications of the 1856 Paris Declaration Respecting Maritime Law,[105] the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight[106] and the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[107]

The ubiquitous presence of 'war' in both of these specializations was not, however, sufficient to guarantee or furnish the concept with an acceptable degree of determinacy[108] and it did not prove possible to harness a single definition of 'war' that was 'serviceable for all purposes'.[109] It was therefore a matter of time before a systematic dismantling began of the concept of war – and, thus, of the significance of war as a legal condition – for *both* the *jus ad bellum* and the *jus in bello*. For the *jus ad bellum*, the new organizing principle was set out in the form of the prohibition contained in Article 2 (4) of the 1945 United Nations Charter, which forbids all member states of the United Nations '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'.[110] With the proscription of the *threat* as well as the *use* of *force*,[111] it was the legal condition of 'force' as opposed to 'war' that therefore became the defining criterion of the *jus ad bellum* (or, as some have suggested, the *jus contra bellum*).[112] This contrasted with the inauguration in August 1949 of the concept of 'armed conflict' for the *jus in bello*, which was framed in overarching terms so that it became the organ-

104 94 L.N.T.S. 57 (1928).

105 115 C.T.S. 1 (1856).

106 138 C.T.S. 297 (1868-1869).

107 *Reproduced in* The Laws of Armed Conflicts 301 (1988) (Dietrich Schindler and Jiri Toman eds.)

108 In the sense used by Thomas M. Franck, Fairness in International Law and Institutions 30 (1995).

109 *See* Dinstein, *supra* note 1, at 15.

110 59 Stat. 1031.

111 Which constituted 'an important innovation in the law': *see Nicaragua Case*, *supra* note 7, at 530 (per Judge Sir Robert Jennings (citing Sir Humphrey Waldock, 106 Hague Recueil 231 (1962-II): 'The illegality of recourse to armed reprisals or other forms of armed intervention not amounting to war was not established beyond all doubt by the law of the League, or by the Nuremberg and Tokyo Trials. That was brought about by the law of the Charter').

112 As enunciated by Dinstein, *supra* note 1, at 83.

izing principle of that subject, one that encompassed but also extended beyond the legal condition of war.[113]

With this marked diminution of the concept of war in formal terms, it became less possible to make direct disciplinary equations between the *jus ad bellum* and *jus in bello*. We could, of course, still refer to the separate functions, methodologies and responsibilities of each of these specializations with international law,[114] but it could no longer be said (as had for some time been the case) that these specializations shared the same normative bond or base (i.e. that of 'war'). 'Force' and 'armed conflict' created their own legal meanings, and, as part of that process, came to redefine the spheres of substantive operation of (respectively) the *jus ad bellum* and *jus in bello*. They did so *not by specific relation or appeal to one another* but, rather, by paying particular heed to their respective experiences with the concept of 'war' and, importantly, to their particular tasks and disciplinary objectives.[115] It could not therefore be assumed that any application of 'force' entailed a legal condition of armed conflict,[116] for we notice how tentatively the International Court of Justice has positioned itself on this very question. While the Court has not been supplied with a concrete opportunity to define the *scope* of an (international) armed conflict in international law, it would appear to have stopped short of drawing an exact coincidence between the concepts of 'force' and (international) 'armed conflict'. In the *Nicaragua Case*, it concluded that the 'use of force may *in some circumstances* raise questions of [international humanitarian] law [or the law applicable in the event of an international armed conflict]',[117] and

113 Dietrich Schindler, *State of War, Belligerency, Armed Conflict*, in The New Humanitarian Law of Armed Conflict 3 (1979) (Antonio Cassese ed.). *See*, further, *infra* note 118.

114 *See* Myres S. McDougal and Florentino P. Feliciano, The International Law of War: Transnational Coercion and World Public Order 531 & ff. (1994) and Christopher Greenwood, *The Relationship Between* ius ad bellum *and* ius in bello, 9 Rev. Int'l Studies 221 (1983).

115 Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 34-41 (3rd ed., 2000). So that it has been argued that the scope of prohibition of force in Article 2 (4) is considerable in its reach: 'most uses of force, no matter how brief, limited, or transitory, do violate a state's territorial integrity. A simple aerial intervention will do so'. *See* Rosalyn Higgins, Problems and Process: International Law and How We Use It 240 (1994).

116 *See* Howard S. Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by A Neutral in the Persian Gulf Area*, 82 Proceedings Am. Soc. Int'l Law 594, 597-599 (1988). Cf. Dinstein, *supra* note 2, at 16 (armed conflict to include 'a mere incident').

117 *Nicaragua Case*, *supra* note 7, at 112 (§216) (emphasis supplied). Although we should of course speculate as to why the Court said what it said here: was it because the *jus ad bellum* ('force') and the *jus in bello* ('armed conflict') engage different fields of coverage or because the Court was of the view that *questions* of the law applicable in the event of an international armed conflict do not necessarily arise with each and every instance of 'force'?

we are able to discern certain discrepancies in the way states have treated this matter in their own, individual practices.[118]

The Court's position on the concept of force is more developed in view of the fact that, on more than one occasion, it has been called upon to examine the scope and meaning of the prohibition of force. In the *Corfu Channel Case* between Albania and the United Kingdom, the Court heard argumentation to the effect that Operation Retail, the mine-sweeping intervention of the United Kingdom in Albanian territorial waters, 'threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence'.[119] While the argument 'was not specifically considered in the judgment, the Court's condemnation of Operation Retail [was] not in sympathy with it'.[120] Then, in the *Nicaragua Case*, the Court concluded that the prohibition of force 'may thus be regarded as a principle of customary international law, not as such conditioned by the provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter'.[121] The Court found confirmation for this position in regular citations of the prohibition of force 'as being not only a principle of cus-

118 *See*, principally, Levie, *supra* note 116. Note, also, the apparent interchangeability between 'force' and 'armed conflict' (or, here, 'war') in the following formulation:

> What degree of intervention brings about a state of war in a material sense? It appears that the mere supply of arms to the rebels (epitomized by American support of Moslem insurgents against the Soviet-backed Government in Afghanistan in the 1980s) does not qualify as an actual use of armed force. … But there comes a point – for instance, when the weapons are accompanied by instructors training the rebels – at which the foreign country is deemed to be waging warfare.

See Dinstein, *supra* note 1, at 10. Note, also, the position of the ICRC Commentary on the meaning of armed conflict in common Article 2 of the 1949 Conventions: 'Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial': *see* Commentary, *supra* note 33, at 23.

119 Statement by Sir Eric Beckett (United Kingdom), Oral Proceedings of the *Corfu Channel Case* (First Part) International Court of Justice, Nov. 12, 1948: I.C.J. Pleadings, Vol. III, 295-296.

120 D.J. Harris, Cases and Materials on International Law 892 (6th ed., 2004).

121 *See Nicaragua Case*, *supra* note 7, at 100 (§188). The Court continued: 'It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, *especially those of an institutional kind*, to which it is subject on the treaty-law plane of the Charter' (emphasis supplied). For the Court, at *ibid*., 'the principles as to the

tomary international law but also a fundamental or cardinal principle of such law',[122] that is to say a peremptory norm of international law – or *jus cogens*.[123]

With this principle in hand, the Court proceeded in the *Nicaragua Case* to dissect instances of the 'use of force' into what it called the 'most grave forms of the use of force' and those which it described as 'other less grave forms' of force.[124] It gave an immediate indication of what it meant by each of these categories. The Court considered that the 'most grave forms of the use of force' were 'those

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use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.'

122 *Ibid*.

123 *See*, further, Dinstein, *supra* note 1, at 99-104. Although, in the discussion of '[t]he prohibition of the use of inter-State force as *jus cogens*', reference is made (*ibid*., at 100) to the position of the International Law Commission in the context of its work on state responsibility, where it concluded that 'it is generally agreed that the prohibition of aggression is to be regarded as peremptory'. *See* Report of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts 43, 283 (2001). We should, however, question whether the prohibition of force and aggression are interchangeable. If it is true that '[t]he special standing of *jus cogens* is manifested less in enjoining States from contrary behavior (violations), and more in aborting attempted derogations from general norms' (*ibid*., at 100), then it is surely curious why 'exceptions' pertain to the 'prohibition of the use of inter-State force' (*ibid*., at vii), when no such thing can be said for the prohibition of aggression (described *ibid*., at 325, as 'the paradigmatic illustration of a peremptory norm').

124 *Nicaragua Case*, *supra* note 7, at 101 (§191). I have emphasized 'uses' because the Court sits silent on the question of the 'threat' of force in this part of the analysis, even though Article 2 (4) (and, presumably, customary international law) prohibits the threat as well as the use of force. In its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that '[t]he notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal': *supra* note 97, at 246 (§47). The outstanding question, however, is where one places the threshold for a 'threat' of force, as revealed in the *Nicaragua Case*, *supra* note 7, at 118 (§227):

> The Court has also found … the existence of military manoeuvres held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a 'threat of force', which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.

The military maneuvers were undertaken 'jointly with Honduras on Honduras territory near the Honduras/Nicaragua frontier' and were carried out in the autumn of 1982, February and August 1983, November 1984, and in February, March and June of 1985: *supra* note 7, at 53 (§92). *See*, Romana Sadurska, *Threats of Force*, 82 Am. J. Int'l Law 239 (1988) and, further, N.D. White and Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?*, 29 Calif. W. Int'l Law J. 243 (1999).

constituting an armed attack'.[125] As far as 'other less grave forms' of the use of force were concerned, the Court relied on General Assembly Resolution 2625 (XXV), the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations of October 1970,[126] for explication. According to the Court, 'other less grave forms' of the use of force included the threat or use of force for:

- the violation of existing international boundaries for the resolution of international disputes;
- 'acts of reprisal';
- the deprivation of the right of peoples to self-determination;
- the 'organizing or encouraging the organization of irregular forces of armed bands, including mercenaries, for incursion into the territory of another state', and
- the organization, instigation, assistance or participation 'in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commissions of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.[127]

It is to this dichotomy that the Court returned – and which it reaffirmed – in November 2003, on the occasion of its judgment in the *Case Concerning Oil Platforms* between Iran and the United States.[128]

What was the Court's purpose in making this distinction? Plainly, the Court was not seeking to suggest that there would be a difference in the substantive outcome in relation to the prohibition of force between 'most grave forms of the use of force' and 'other less grave forms' – for, *par definitionem*, both of these forms of force would constitute 'force' within the meaning of that term under international law and would thus fall foul of the prohibition in question. Rather, at issue here was an attempt by the Court to fashion a greater coherence or understanding between the conceptual pieces that comprise the Charter puzzle – force, armed attack, collective self-defense, aggression – as they play out within customary international law, in a way that is not altogether evident from the Charter itself and in a manner that would not compromise the intended meanings or respective autonomies of these terms. We are able to more fully appreciate this mission of the Court when we reflect upon the considerable reach of the Charter's pro-

125 *Ibid*. And, presumably, the 'most grave forms of the use of force' were *only* those constituting an armed attack since the Court did not make allowance for 'most grave forms of the use of force' other than 'those constituting an armed attack'.

126 25 U.N. G.A.O.R., Supp. (No. 28), U.N. Dec. A/5217 (1970), at 121. *See*, further, Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 Am. J. Int'l Law 713 (1971).

127 *See Nicaragua Case*, *supra* note 7, at 101 (§191).

128 *See Case Concerning Oil Platforms*, *supra* note 8, at 186–187 (§51).

hibition of force,[129] so that the Court's purpose was to make greater sense of how this broad proposition related to or coincided with other Charter propositions as conceived and understood in customary international law.[130]

If this rationalization of the Court's approach, evident in the *Nicaragua Case* and then in the *Case Concerning Oil Platforms*, provides the first point of significance of the distinction between forms of force, then it provides the stepping stone to the second point of significance of the Court's distinction, namely, the attempt to chart the lawful consequences that would – or, to be sure, *could* – result for the state that is on the receiving end of such contraventions of the prohibition of force. We can appreciate this factor most from the gravitational importance which the Court awarded to the 'most grave forms of the use of force' – or, to use the Court's rephrasing of that term, to an 'armed attack'[131] – in its construction of the right of self-defense.[132] It is also reflected by the speculative manner in which the Court addressed forms of force falling short of an armed attack. The Court was keen to establish that even when force used against a state does *not* amount to an armed attack,[133] then it is still open for that state to take action against a 'less grave' form of force (or what the Court called 'intervention').[134] According to the Court, international law would not leave that state empty-handed or helpless against the intervention, even though the Court could not prescribe, with exact or penetrating precision, what options were lawfully available to that state:

> While an armed attack would give rise to an entitlement to collective self-defense, a use of force of a lesser degree of gravity cannot … produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[135]

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129 *Supra* note 115.

130 *See* Gray, *supra* note 103, at 66.

131 *Supra* note 125.

132 *See Nicaragua Case*, *supra* note 7, at 103-105 (§§195-199) and at 122 (§237).

133 As in 'assistance to rebels in the form of the provision of weapons or logistical or other support', which, the Court said, 'may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States': *see Nicaragua Case* (1986), *supra* note 7, at 103 (§195).

134 Hence the focus of Part IV of this essay.

135 *See Nicaragua Case*, *supra* note 7, at 127 (§249); denoted by Judge Simma as one of 'the less fortunate statements in the Court's *Nicaragua* Judgment of 1986' in his Dissenting Opinion in the *Case Concerning Oil Platforms*, *supra* note 8, at 331-332 (§12) ('by such proportionate counter-measures the Court cannot have understood

From the Court's schemata, then, it should be apparent that not all uses of force amount to an armed attack in international law. Concomitantly, not all uses of force will give rise to the right of self-defense since that right depends on the occurrence of an armed attack as the 'condition *sine qua non*' for its activation.[136] Those uses of force which do not qualify as an armed attack may constitute an 'intervention' for the purposes of international law and might, in turn, entitle the victim – but not a third – State to take 'proportionate counter-measures'.[137] The distinct sense imparted by these aspects of the Court's reasoning is that, even though the prohibition of intervention commands an older normative pedigree,[138] the rules regulating force and the right of self-defense somehow come to overtake those of intervention in terms of legal importance as and when an 'armed attack' occurs. We would be able to tabulate the Court's thinking thus (*figure* 1):

	FORCE	
INTERVENTION	less grave forms of the use of force (*Nicaragua Case* (1986), §191)	most grave forms of the use of force (*Nicaragua Case* (1986), §191)
	↓ ↓ ↓ INTERVENTION (*Nicaragua Case* (1986), §191) ↓ proportionate counter-measures (*Nicaragua Case* (1986), §249)	↓ ↓ ↓ ARMED ATTACK (*Nicaragua Case* (1986), §195) ↓ right of individual/collective self-defense

(figure 1)

However, even if one is amenable to this commitment of the Court – of constructing a template of seamless conceptual juxtapositions, of imposing discipline and coherence where none had previously been found to exist – it is not at

mere pacific reprisals … the Court can only have meant … defensive military action "short of" full-scale self-defense': *ibid.*).

136 *Supra* note 132 – although the Court actually withheld its position on 'the lawfulness of a response to the imminent threat of armed attack': *ibid.*, at 103 (§194)). This finding is without prejudice to the application of the principles of necessity and proportionality: *supra* nn. 68-70.

137 *See supra* note 135 and, further, *infra* nn. 242-243.

138 Compare the entry for intervention to that of the prohibition of force in Lassa Oppenheim, International Law: A Treatise 181-191 (Vol. I: Peace) (1905). Note that, in the *Nicaragua Case*, Sir Robert Jennings remarked that the principle of non-intervention 'is very much older than any of the multilateral treaty regimes in question' – i.e. the Charter regime on force: *Nicaragua Case*, *supra* note 7, at 534-535.

all transparent how or why some of the General Assembly's itemizations from Resolution 2625 (XXV) have been used as illustrations for the Court's conception of 'less grave forms of the use of force'. We say this because different inspirations were at work behind each assignment: in October 1970, the General Assembly was committed in the main to marking out the *scope* of the Charter's *prohibition of force,*[139] whereas, in June 1986, the Court was attempting to configure the *scope* of the *right of self-defense* by examining the relationship between the concepts of 'force' and 'armed attack'.[140] With its inventory of actions in Resolution 2625 (XXV), the General Assembly was therefore concerned with actions which – though at one time might have been considered permissible under international law – now, by virtue of the prohibition of force, would be considered unlawful *per se*.[141] The General Assembly was clearly not dedicating itself to the unenviable enterprise of defining an armed attack when it adopted Resolution 2625 (XXV) in October 1970.[142]

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139 So that the Committee responsible for drafting the Resolution 'regarded the concluding phrase of Art.2, paragraph 4, as a limitation on state action and not an escape clause': *see* Rosenstock, *supra* note 126, at 719. The inclusion of the eighth and ninth paragraphs on the prohibition of force – that '[e]very state has the duty to refrain from organizing and encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another state' and that '[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force' – was designed 'to respond to the view sometimes asserted that anything that violates Art. 2, paragraph 4 [of the Charter], gives rise to rights under Art. 51'. *See* Rosenstock, *supra* note 126, at 720. However, this aspect of the Resolution has been challenged on the following ground:

> Whether the addition adds anything but a degree of circularity to the text and what the function of the word 'threat' was in the minds of the proponents of the addition are perhaps open to question. Indeed, once the notion of 'threat' is included, it is difficult to perceive any limitations on what was previously set forth. Even 'encouraging' is a threat.

See Rosenstock, *supra* note 126, at 720 (and at 724).

140 Within (of course) the realm of custom, although it should of course be observed that the Declaration was in large measure inspired by the ambition of 'codification': *see ibid*., at 716 (and, at 717: 'the rules of the Charter can now be said to be binding on all states, which are by definition subjects of international law and derive their sovereign existence from that body of rules'). The Declaration addresses the prohibition of force to 'every State' rather than, as in Art. 2 (4) of the Charter, to all member states of the United Nations.

141 Or, as Rosenstock wrote at the time: 'the individual paragraphs, while incapable of providing a complete system, provide vital guidelines in a number of key situations'. *See ibid*., at 724.

142 As we discern from the 'principles' adumbrated therein: *supra* note 126. *See*, further, *supra* note 139. We may make the same point in connection with Resolution 3314

In consequence, we are none the wiser as to why the 'threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States' constitutes an example of 'less grave forms of the use of force'.[143] We are none the wiser because, at base, this proposition is *not* concerned with the *scale* of force but, rather, with the formal justification advanced for it. This we can discern from *other* instances of 'less grave forms of the use of force' proffered by the Court courtesy of General Assembly Resolution 2625 (XXV): 'acts of reprisal involving the use of force' and 'any forcible action which deprives people referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence'.[144] Since none of these manifestations of force speak to the scale of force – the Court's apparent concern in the *Nicaragua Case* – it is hard to rationalize why, of necessity, they feature under the Court's rubric of 'less grave forms of the use of force' rather than 'the most grave forms of the use of force' (or 'armed attack'). Indeed, Argentina's invasion of the Falklands in April 1982 and Iraq's invasion of Kuwait in August 1990 both involved the 'use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States',[145] and, yet, we would be hard-pushed to regard either of these actions as 'less grave forms of the use of force' under international law.

Neither of these actions would be regarded in these terms because *both* of these actions involved 'action by regular armed forces across an international border' – terminology which the Court actually used a short while later in its jurisprudence for depicting 'the *most grave forms* of the use of force', or, as it uttered in the same breath, an 'armed attack'.[146] What would have mattered more to the Court in analyzing either the 1982 or the 1990 invasion would have been

(XXIX) (*infra* note 170): *see* Albrecht Randelzhofer, *Article 51*, in The Charter of the United Nations: A Commentary 788, 796 (Vol. I) (2nd ed., 2002) (Bruno Simma et al. eds.).

143 *Nicaragua Case*, *supra* note 7, at 101 (§191).

144 *Nicaragua Case*, *supra* note 7, at 101 (§191). Indeed, the defining feature of 'acts of reprisal involving the use of force' has never been the scale of force but, rather, their purpose – which 'is always punitive rather than defensive': *see* Dinstein, *supra* note 1, at 226. *See*, further, D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l Law 1 (1972).

145 For their respective claims, see Alfred P. Rubin, *Historical and Legal Background of the Falklands/Malvinas Dispute*, in The Falklands War: Lessons for Strategy, Diplomacy and International Law 10 (1985) (A. Coll and A. Arendt eds.) (Argentina) and Richard Schofield, Kuwait and Iraq: Historical Claims and Territorial Disputes (1991) (Iraq).

146 *Nicaragua Case*, *supra* note 7, at 103 (§195) (emphasis supplied). We should note that this aspect of Resolution 2625 (XXV) concerns 'territorial disputes' in addition to 'problems concerning frontiers of States': *see supra* note 126 and *infra* note 149.

the scale of force involved – although, to be sure, at first blush of the Court's analysis in the *Nicaragua Case*, it would appear that the consideration of the scale of force was reserved for irregular force, or 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State'. For it is in this context that the Court mentions the issue of 'gravity',[147] and of the 'scale and effects' of an operation.[148] It is only as a result of reading the *Nicaragua Case* further – or, better, deeper – that we can appreciate that the Court actually applied its notion of the scale and effects of force to the actions of regular force as well, since it draws (and maintains) a distinction between an 'armed attack' and 'a mere frontier incident'.[149]

For the Court, then, not every action of regular (or State) armed forces automatically qualifies as an armed attack. The question to be asked is the degree of force applied in a given situation – whether that force occurs at the hands of regular *or* irregular forces. As we read further into the jurisprudence of the *Nicaragua Case*, we learn that it is also a matter of 'the circumstances of [transborder] incursions [and] their possible motivations', since these considerations will have some bearing on the decision of whether actions of this sort 'may be treated for legal purposes as amounting, singly or collectively, to an "armed attack"'.[150] The Court's position in this respect seems counter-intuitive, however, because it allows little,

147 As in 'of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces': *Nicaragua Case*, *supra* note 7, at 103 (§195). The Court is here drawing on the formulations of the 1974 General Assembly Definition of Aggression for its inspiration: *see supra* note 25.

148 *Nicaragua Case*, *supra* note 7, at 103 (§195).

149 For that is how the Court represents itself in the *Nicaragua Case*: 'The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack *rather than as a mere frontier incident had it been carried out by regular armed forces*'. *See Nicaragua Case*, *supra* note 7, at 103 (§195) (emphasis supplied).

150 Discussed in the context of 'certain transborder incursions' into the territory of Honduras and Costa Rica which 'were imputable to the Government of Nicaragua': *Nicaragua Case*, *supra* note 7, at 119-120 (§231). The Court appeared to have developed this notion further in the *Case Concerning Oil Platforms*, where it said:

> There is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid *with the specific intention of harming that ship*, or other United States vessels.

See Case Concerning Oil Platforms (2003), *supra* note 8, at 191-192 (§64) and William H. Taft, IV, *Self Defense and the* Oil Platforms *Decision*, 29 Yale J. Int'l Law 295, 302-303 (2004). Though, *see* Norman Menachem Feder, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. Int'l L. & Pol. 395, 412 (1986-1987) ('Unlike most domestic criminal laws, there is no *mens rea* component to an armed attack').

if any, scope for the proportionate exercise of the right of self-defense in situations of this order,[151] for states confronted with such a challenge to have early and effective recourse to counter-force in self-defense in order to obviate the need for an even greater quotient of force later. Taking account of the fact that the Court was reflecting on these matters from the comfort and convenience of its own hindsight, it may not be fully apparent to the target State that – at a given point in real or actual time – a particular action is really no more than 'a mere frontier incident' as opposed to the initial manifestations of an armed attack,[152] and, to this extent, the Court's position has attracted the critique of being 'operationally unworkable':

> When a state has to decide whether it can repel incessant low-level irregular military activity, does it really have to decide whether that activity is the equivalent of an armed attack by a foreign army – and, anyway, is it not *any* use of force by a foreign army entitled to be met by sufficient force to require it to withdraw? Or is that now in doubt also? Is the question of *level* of violence by regular armed forces not really an issue of *proportionality*, rather than a question of determining what is 'an armed attack'?[153]

Nevertheless, as things stand, it is clear that the Court invoked some threshold for force across the board, so that it applies equally to State actions as it does 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State'.[154] On this point, the Court took its lead from the 1974 General Assembly Definition of

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151 *See* Gray, *supra* note 103, at 145-151.

152 It has been said that the Court was 'rather non-committal' on the question of whether Nicaragua had committed an armed attack against Honduras and Costa Rica (*see* Gray, *ibid*., at 145) – because, as it said, it 'had very little information as to the circumstances or possible motivations of the incursions and this rendered it difficult to decide whether they could be treated for legal purposes as amounting either singly or collectively to an armed attack by Nicaragua on either or both of these states'. *See Nicaragua Case*, *supra* note 7, at 119-120 (§231). However, one wonders whether, given an identical paucity of information, the target State could afford to be – or, indeed, be expected to be – similarly non-committal.

153 *See* Higgins, *supra* note 115, at 250-251.

154 *Nicaragua Case*, *supra* note 7, at 103 (§195). Although there are signs that the General Assembly invoked the notion of 'gravity' in the context of irregular force and confined it to that context: Art. 3 (*a*) of the Definition of Aggression mentions '[t]he invasion or attack by the armed forces of a State of the territory of another State, *or any military occupation, however temporary*, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof' and Art. 3 (*b*): '[b]ombardment by the armed forces of a State against the territory of another State *or the use of any weapons by a State against the territory of another State*': *supra* note 25 (emphases supplied).

Aggression,[155] although, as we have already mentioned,[156] it had previously designated the 'organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State' [from General Assembly Resolution 2625 (XXV)] as an instance of 'less grave forms of force',[157] and not, as it was now doing, as one of 'the most grave forms of force'.[158] While the Court was therefore crisscrossing from its initial designation of irregular force as a 'less grave' form of force (paragraph 191 of its *Nicaragua* judgment) to a 'most grave form' of force (paragraph 195 of the same judgment),[159] the mutation can be explained on the basis of the 'gravity' or 'scale and effects' of such an operation[160] – as derived from the General Assembly's definition of *aggression* from December 1974.[161]

The Court thus reached for the definition of aggression to anchor its definition of an armed attack. This much is clear from the *Nicaragua Case*, but, true to the earlier reasoning of the Court and given its conceptual discretions in that jurisprudence, we should be clear in questioning the extent to which correlations of this sort are advisable and, indeed, empirically sustainable. We are agreed on

155 *Supra* nn. 25 and 147. *See*, further, Julius Stone, Aggression and World Order (1958), A.J. Thomas & A.V.W. Thomas, The Concept of Aggression in International Law (1972) and Benjamin J. Ferencz, Defining International Aggression (1975). *See*, further, Bert Broms, *The Definition of Aggression*, 154 Hague Recueil 299 (1977) and Jack I. Garvey, *The U.N. Definition of 'Aggression': Law and Illusion in the Context of Collective Security*, 17 Va. J. Int'l Law 177 (1977). *See*, also, Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 Am. J. Int'l Law 224 (1977) and Vernon Cassin, Whitney Debevoise, Howard Kailes and Terence W. Thompson, *The Definition of Aggression*, 16 Harvard Int'l Law J. 589 (1975).

156 *Supra* note 127.

157 *Nicaragua Case*, *supra* note 7, at 101 (§191).

158 *Ibid*., at 103 (§195).

159 Whereas Dinstein appears to regard this formulation in General Assembly Resolutions 3314 (XXIX) and 2625 (XXV) as part of the same stream of argument: *see* Dinstein, *supra* note 1, at 201–202.

160 Hence the Court's statement that it 'sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another state, *if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces*': *Nicaragua Case*, *supra* note 7, at 103 (§195) (emphasis supplied).

161 Art. 3 (*g*). *See*, also, Art. 2 of the Definition: 'The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, *including the fact that the acts concerned or their consequences are not of sufficient gravity*' (emphasis supplied). Further, in the preambular paragraphs to the Definition, the General Assembly noted that 'aggression is the most serious and dangerous form of the illegal use of force': *supra* note 25.

the Court's mission of coherence, and on the fact that, even though the Charter uses various terminologies to inaugurate its system of collective security, there are doubtless prospects for coincidence of the *phenomena* covered by these terms. Yet, it is the nature and extent of this overlap that is the source of some difficulty, because we are not only constructing topographies of force from the perspective of the Charter and international law more broadly, we are at the same time addressing questions of competence – that is to say that we are deciding which state and institutional actors may or must do what and when and for how long and with whom.[162]

That perhaps explains why the Court was so particular with its definition of an 'armed attack' in the *Nicaragua Case*, but this may have come at the cost of suggesting that an 'armed attack' and an 'aggression' are one and the same thing.[163] We realize this from an early part of the Court's analysis because, in sifting through the 1970 Declaration on Friendly Relations for examples of 'less grave forms of the use of force',[164] the Court mentioned that, in addition to this calendar of scenarios, the Resolution contains 'certain descriptions which may refer to aggression'.[165] The inference is that these outstanding descriptions await consideration as part of the Court's category of 'the most grave forms of the use of force',[166] or, as the Court immediately then put it, 'those constituting armed attack'.[167] The sense of an exact conceptual match between armed attack and aggression could therefore be regarded as strong from these formulations, and might be depicted in the following terms:

162 It is indeed humbling to reread that section of Oppenheim's text which provides that 'it is of the essence of the conception of self-defense that recourse to it must, in the first instance, be left to the unfettered judg[e]ment of the party which deems itself to be in danger': *see* Oppenheim, *supra* note 82, at 187 (§52g).

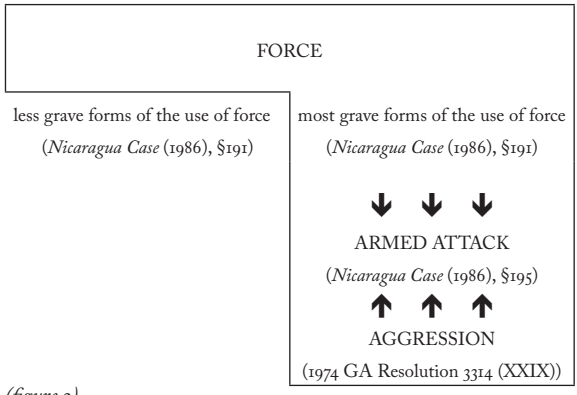
163 As would appear to have happened with the Democratic Republic of Congo in its case against Uganda – where an 'armed aggression' was alleged and the right of self-defense proclaimed: *see Case Concerning Armed Activities in the Territory of the Congo*, *supra* note 9, at 20 (§24). It is possible, of course, that the Court considered the relationship as one of partial (rather than complete) synonymy, but, if this is so, it is not necessarily betrayed by the Court's overall representations (see especially *infra* nn. 165-167 (and accompanying text)). Gray considers that the Court had 'limited reliance' on the Definition of Aggression, 'stopping short of a complete identification of the two concepts [of armed attack and aggression]': *see* Gray, *supra* note 103, at 109.

164 *Supra* note 127.

165 *Nicaragua Case*, *supra* note 7, at 101 (§191).

166 *Ibid*.

167 *Ibid*.



(figure 2)

To be sure, there would be some merit to the Court taking this position – if it is indeed taking this position[168] – because, in the French text of the Charter, Article 51 provides for the right of individual and collective self-defense where a state is the object of 'une agression armée' – or, literally, *an armed aggression*.[169] However, if we take the Definition of Aggression for what it is, we realize that the incidences of aggression outlined in Article 3 are intended to be just that – illustrative of what constitutes *aggression* in international law. By all accounts, the General Assembly was not intending to flesh out the meaning of an armed attack when it set out to adopt Resolution 3314 (XXIX) in December 1974.[170]

We also find that each of these illustrations appears under the general rubric of the concept of aggression, defined by the General Assembly in Resolution 3314 (XXIX) as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.[171] On account of this formulation, it might be thought that the closer parallel for the Court to have made in June 1986 would have been between *the use of armed force* and an *armed attack*,[172] but the Court contented itself in sequestering one of these *manifestations* of aggression – '"the sending by or on behalf of a State of armed bands,

168 *See* Gray, *supra* note 103, at 109.

169 Though these are not themselves necessarily identical: *see* Randelzhofer, *supra* note 142, at 794.

170 Thomas Bruha, Die Definition der Aggression 110-111 (1980) (by way of illustrations that were not intended to be exhaustive: Art. 4 of the Definition stipulates that '[t]he acts enumerated [in Art. 3] are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter').

171 *Supra* note 25.

172 *See*, further, Higgins, *supra* note 153. Although this would have put the Court on collision course with its treatment of Resolution 2625 (XXV) given *that* resolution's

groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein"' – and declaring, without more, that this activity 'may be taken to reflect customary international law'.[173] Its conclusion has left us with food for thought – namely, whether this aspect of the Definition of Aggression is unique in its contribution to the customary definition of an armed attack under international law or whether the same conclusions can be held out for the other 'descriptions' of aggression contained in Article 3 of Resolution 3314 (XXIX).[174]

Caution has also been advised in the reception of the Definition on account of the fact that it is 'not a treaty text',[175] nor a resolution of the General Assembly which 'purports to declare principles of customary international law not regulated by the United Nations Charter'.[176] To these considerations, it would repay us to recall that the Charter addresses 'armed attack' and 'aggression' differently – the former as an aspect of the right of self-defense, the latter appears alongside 'threats to the peace'[177] and 'breaches of the peace'[178] as part of the plenitude of

understanding of the relationship between the concepts of 'force' and 'armed attack': *see* Rosenstock, *supra* note 139.

173 *Nicaragua Case*, *supra* note 7, at 103 (§195) (a finding which, according to Gray, 'seems justified in the light of state practice': *see* Gray, *supra* note 103, at 109). By this statement, however, the Court does not appear to have conveyed what it apparently wanted to convey. What is actually meant by saying that the activity in question 'may be taken to reflect customary international law'? Given the context in which this statement appears, it perhaps would have been better for the Court to have said that the activity in question – 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity' – may be taken to reflect an armed attack as defined in customary international law. *See infra* note 174 (and accompanying text).

174 In which case, it would be difficult to square the Court's later jurisprudence – of the *Case Concerning Oil Platforms* – with its *Nicaragua* position, since, there, the Court reflected that it did 'not exclude the possibility that the mining of *a single military vessel* might be sufficient to bring into play the "inherent right of self-defense"'. *See Case Concerning Oil Platforms*, *supra* note 8, at 195-196 (§72) (emphasis supplied). This should be set against Art. 3 (*d*) of the Definition of Aggression, *supra* note 25, which incorporates in its examples of aggression '[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air *fleets* of another State' (emphasis supplied).

175 Not least of all by one of the Court's own members: see the Dissenting Opinion of Judge Schwebel, *supra* note 7, at 345 (§168).

176 *Ibid*. (in the manner of General Assembly Resolution 2625 (XXV)).

177 Note that the 'threat of force' is excluded from the Definition of Aggression: *see* Dinstein, *supra* note 1, at 127.

178 *See* Higgins, *supra* note 3, at 274. Amongst other factors, this breadth of executive powers might go some way in explaining why the Security Council has not found a legal need to make determinations of aggression in its practices: *see infra* nn. 185 and 186 (and accompanying text).

vires bestowed upon the Security Council.[179] Moreover, the concept of aggression enjoins a protracted history which precedes that of armed attack,[180] whose *function* has changed with the course of time. The original 'legal problem' was to 'specify and render illegal aggressive acts which precipitated wars', whereas, with the advent of the United Nations, the concept of aggression became aligned with the concern to afford the Council 'maximum flexibility' in terms of its executive powers under the Charter.[181] It is for this reason that Article 39 is recited in the preambular paragraphs to the Resolution 3314 (XXIX),[182] as well as the notation of the General Assembly that 'nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter *with respect to the functions and powers of the organs of the United Nations*'.[183]

179 See D.W. Bowett, Self-Defense in International Law 262 (1958) and Garvey, *supra* note 155, at 181 and 196-197.

180 *See* Higgins, *supra* note 3, at 271-272 and Schwebel, *infra* note 192, at 419 (noting that '[t]he problem of the definition of aggression goes back at least to 1923'). The history continues: *see* Art. 5 (1) (d) of the 1998 Rome Statute of the International Criminal Court and the deferral of the decision on definition: Art. 5 (2). *See*, further, Phani Dascalopoulou-Livada, *The Crime of Aggression: Making Operative the Jurisdiction of the ICC: Tendencies in the PrepCom*, 96 Proceedings Am. Soc. Int'l Law 185 (2002).

181 *See* Cassin, Debevoise, Kailes and Thompson, *supra* note 155, at 590. *See*, further, 6 U.N.C.I.O. Docs. 342 (1945). It is Garvey's contention that 'the specification of both a core concept of "aggression" and a list of acts that may qualify as "aggression" is intended to frame and guide State behavior and the deliberations of the Security Council': *supra* note 155, at 180. Indeed, the failure to define the term in the Charter is explained on the basis that 'a definition would interfere with Security Council pacification efforts' (*ibid*., at 183).

182 Which recalls 'that the Security Council, in accordance with Art. 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Arts. 41 and 42, to maintain or restore international peace and security': *supra* note 25.

183 *Supra* note 25 (emphasis supplied). *See*, further, *supra* note 170. Indeed, upon the adoption of the Resolution on Dec. 14, 1974, the General Assembly '[c]alled the attention of the Security Council to the Definition of Aggression … and recommend[ed] that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression'. *See supra* note 25. Garvey's position is that '[t]he term "aggression" is a prime example of language uniquely characterized by the institutional context of collective security'. *See supra* note 155, at 178, and (at 180): 'The [Security] Council renders judgment about "aggression" in order to set the stage for action under Chapter VII of the Charter'. This, of course, is not to deny, however, other purposes of the Definition, as outlined by the Netherlands:

> The Assembly's object had been, first, to contribute to the maintenance of international peace and security by formulating a definition for the guidance of the competent organs of the United Nations … and secondly, to promote the development of international law by providing directions for the judges

Notwithstanding the significance given to the Security Council in relation to determinations of 'aggression' in Resolution 3314 (XXIX),[184] we should nevertheless be aware of the glaring paucity of practice where the Council has made such determinations. One can think of Resolution 598 (1987) (where the Council determined that 'there exists a breach of the peace as regards the conflict between Iran and Iraq') and Resolution 660 (1990) (which labeled the Iraqi invasion of Kuwait in August 1990 as 'a breach of international peace and security'). These were instances where an act of aggression was demonstrably clear-cut,[185] or so one would have thought. Yet, the Council responded in a manner – and with a certain consistency of action, it has to be said – that suggests the possible onset of an institutional allergy toward making any determination of aggression.[186] The same cannot be said for state practice on armed attack,[187] however, where we find a veritable embarrassment of empirical riches, that are often, it is true, accompanied with accusations and assertions of aggression.[188] This contrast does provide us with an appropriate and necessary platform to ask what or how the concept of aggression adds to our understanding of the concept of force and – specifically – whether the purpose and consequences of these designations in *state* practice are of a political or legal orientation.[189] Do they articulate in any way a legal *function*

called upon to try persons guilty of international crimes. Quite clearly, a guide intended for politicians differed fundamentally from one intended for jurists.

7 U.N. G.A.O.R. C.6 (334th Mtg.), 172, U.N. Doc. A/C.6/SR.334 (1952).

184 *See*, in particular, Art. 2 and Art. 4: *supra* note 25.

185 According to the terms of the General Assembly's own Definition of Aggression: *supra* note 25.

186 In this, the Council would not appear to be alone: in the *Case Concerning Armed Activities in the Territory of the Congo*, Judge Bruno Simma (in his separate opinion) chided the Court for 'the way in which [it] has avoided dealing with the explicit request of the [Democratic Republic of Congo] to find that Uganda, by its massive use of force against the [Democratic Republic of Congo] has committed an act of aggression': *supra* note 9, at 1 (§2). Judge Simma noted that the situation in the Great Lakes region 'must appear as a textbook example of the first one of the definitions of "this most serious and dangerous form of the illegal use of force" laid down in General Assembly Resolution 3314 (XXIX)' and that '[t]he Council will have its own – political – reasons for refraining from such a determination [of aggression]': *ibid.*, at 1 (§3).

187 *See* Gray, *supra* note 103, at 108-120.

188 Visible *par excellence* in the official responses to Israel's action against Iraq on June 7, 1981. *supra* nn. 60, 61 and 63.

189 Cf. *ibid.* and the *Case Concerning Armed Activities in the Territory of the Congo*, where Judge Simma was of the view (*see*, further, *supra* note 186) that the Court should have engaged the question of aggression on the grounds that this had been 'the explicit request of the DRC' (*supra* note 9, at 1 (§3)) – and not necessarily because it would have any substantive implications for the Court's reasoning or analysis. The Democratic Republic of Congo had asked the Court to adjudge and declare that Uganda was guilty *inter alia* 'of an act of aggression within the meaning of

or *significance* for the concept of aggression that is separate to that which exists for it in the enforcement powers of the Council or in the substantive firmament we now know as international criminal law?[190]

IV Force and Intervention

Although 'intervention' forms no part of Dinstein's overarching triptych of 'war', 'aggression' and 'self-defense',[191] its relationship with the legal framework for force is an important one and should neither go unmentioned nor unexamined.[192] We make this observation regarding the interface between force and intervention in view of their related *materia* and given the relationship that has developed between 'force' and 'intervention' in the jurisprudence of the International Court of Justice. We have already adverted to this question in respect of our discussion of 'force' falling short of an armed attack,[193] but we are also mindful of the Court's announcement – also drawn from the *Nicaragua Case* – that acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of the non-use of force in international relations'.[194] From the structure of the Court's ruling in the *Case*

Article 1 of Resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter': *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, at 15 (§23) (and, at 16 (§24), that the Republic of Uganda 'has violated … the principle of non-use of force in international relations, including the prohibition of aggression'). *See*, also, *ibid*., at 22 (§24) and at 26 (§28).

190 Cf. *supra* note 183. Possibly as a means of legally quantifying those 'uses' of force – or, we could also say, those interventions – that are not able to avail themselves of any of the admitted *exceptions* to these prohibitions under international law? *Quaere*, though, whether this approach would cohere with the Court's distinction between 'most grave forms of the use of force' and 'other less grave forms' (*supra* note 124) and the relationship between 'most grave forms of the use of force' and aggression (*supra* nn. 125 and 165-167).

191 Though not entirely absent from the substance of his work even if not represented in terms of 'intervention': 'consent by States to the use force' is a 'new supplementary section' in War, Aggression and Self-Defence, *supra* note 1, at xi and 112-116; *see*, also, *infra* nn. 248-250 (and accompanying text).

192 In contrast, consider the structural approaches of Gray, *supra* note 103, at 59-94 and Stephen M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 Hague Recueil 411 (1972). *See*, further, J.E.S. Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 Hague Recueil 342 (1961).

193 *See supra* nn. 133-135 (and accompanying text). *See*, also, figure 1 (*supra*).

194 *Nicaragua Case*, *supra* note 7, at 109-110 (§209).

Concerning Armed Activities in the Territory of the Congo almost two decades later, it is clear that the Court has not demurred from this position.[195]

According to the Court, 'forms of action' stand to be assessed 'in the light of both the principle of non-use of force, and that of non-intervention',[196] so that these principles (or prohibitions) of international law are responsible for creating their own spheres for analysis which, in turn, instruct our legal *understanding* of a single complement of facts or set of realities. To designate these 'spheres' thus, however, might suggest that these principles exist as rival frameworks. It would be closer to the mark to say that states – and the Court – have regarded them as complementary to one another, each with their own histories, content and function.[197] We learn this from the *Nicaragua Case* when the Court, after giving detailed treatment to the framework concerning force (which includes the right of self-defense) in its examination of the behavior of the United States,[198] turned to the framework concerning intervention to 'enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities [of the United States]'.[199]

The Court made this conceptual stride from 'force' to 'intervention' on the basis of a certain imperative – namely that such was the structure of claims made by Nicaragua against the United States before the Court and that 'regard' had to be paid to 'the non-participation of the United States in the merits phase' of the case.[200] This imperative required the Court to 'enquire whether there [was] any

195 *Case Concerning Armed Activities in the Territory of the Congo*, *supra* note 9, at 56 (§164). The Court was of the view that '[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter' (*ibid.*, at 57 (§165)).

196 *Nicaragua Case*, *supra* note 7, at 107-108 (§205).

197 *Supra* note 138. Cf. Higgins, *supra* note 115 (prohibition of force) and Lowe, *infra* note 211 (prohibition of intervention).

198 *Nicaragua Case*, *supra* note 7, at 103-115 (§§194-200).

199 *Ibid.*, at 106 (§201). This representation by the Court would tend to lend credence to the theory, posited earlier, of the prioritization of the framework of force over that of intervention where and when an 'armed attack' occurs: *see supra* note 138 (and accompanying text).

200 *Ibid.* Further to the allegation in its Application to the Court of April 1984, '[t]hat the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua', Nicaragua had also contended that the United States 'in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua': *ibid.*, at 18-19 (§15) and at 22 (§23).

> As a matter of law, Nicaragua claims, inter alia, that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules

justification for the activities in question, to be found not in the right of collective self-defense against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack'.[201]

In respect of the actual relationship between 'force' and 'intervention', it became apparent to the Court in the *Nicaragua Case* that some sense would first need to be given as to the meaning of each of these prohibitions in international law. Having defined the prohibition of force in Charter and in custom,[202] the Court proceeded to examine the nature of the prohibition of intervention. For reasons identical to those relating to the law on 'force' in the United Nations Charter,[203] the Court could not access the provisions of the Charter in order to frame its understanding of the prohibition of intervention. However, in total contrast to the prohibition of force, it must be said that even if it had been possible for the Court to have recourse to the Charter in the *Nicaragua Case*, it would

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> of customary international law forbidding intervention; and that the United States has acted in violation of the sovereignty of Nicaragua, and in violation of a number of other obligations established in general customary international law and in the inter-American system. The actions of the United States are also claimed by Nicaragua to be such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

In the *Case Concerning Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo framed its allegations against Uganda in similar terms: *supra* note 9, at 16 (§24).

201 *Nicaragua Case*, *supra* note 7, at 106 (§201). Compare this position with the Court's later pronouncement that it does not have the 'authority' to 'ascribe to States legal views which they do not themselves advance'. *See ibid.*, at 108-109 (§207). *See*, further, Dino Kritsiotis, *Arguments of Mass Confusion*, 15 European J. Int'l Law 233, 238-241 (2004). To be sure, though, the significance of the prohibition of intervention in the case does not derive from the Court's own volition (*ibid.*) and the Court justified its handling of the matter by the 'non-participation' of the United States: *supra* note 200. *See*, also:

> the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law; it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

Nicaragua Case, *supra* note 7, at 134 (§266).

202 *Supra* nn. 119-127 (and accompanying text).

203 According to the Vandenberg Reservation, all disputes involving multilateral treaties concluded by the United States would be exempted from the compulsory jurisdiction of the Court 'unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction'. For a reproduction of this text, *see Nicaragua Case*, *supra* note 7, at 31 (§42).

not have found any expression of the prohibition of intervention that forms a direct equivalent to the Charter's prohibition of force – for, whereas Article 2 (4) of the Charter addresses its prohibition to the member states, the intended audience of Article 2 (7) is the United Nations itself. Specifically, the latter provision provides that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.[204] The Court fully (and rightfully) acknowledged this position:

> statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, *since this principle is not, as such, spelt out in the Charter*. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force.[205]

For its construction of the principle of non-intervention, the Court therefore had to turn its attentions elsewhere; it had to cast its gaze away from the Charter's text. The Court relied on what it called 'generally accepted formulations' of the principle,[206] as had appeared in General Assembly Resolutions,[207] regional treaties and in institutional practice.[208] As it did so, the Court remained conscious of the occasions when states had committed themselves to the principle 'only [as] a statement of political intention and not a formulation of law'.[209] It nevertheless felt sufficient confidence in discerning a certain determinacy for the prohibition of intervention in international law – a conclusion it reached even though (as

204 Compare Albrecht Randelzhofer, *Article 2(4)*, in The Charter of the United Nations: A Commentary 112, at 121 (Vol. I) (2nd ed., 2002) (Bruno Simma et al. eds.) with Georg Nolte, *Article 2 (7)*, in Simma (ed.), *ibid*., 148, at 151-152.

205 *See Nicaragua Case*, *supra* note 7, at 106-107 (§202) (emphasis supplied).

206 *Ibid*., at 107-108 (§205).

207 *Ibid*., at 106-107 (§§202-203).

208 Such as the 1933 Montevideo Convention on Rights and Duties of States and the 1936 Additional Protocol Relative to Non-Intervention and AG/RES. 78 and AG/RES. 128 of the General Assembly of the Organization of American States: *ibid*., at 107 (§204). The Court also referred to the declaration appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975) which 'included an elaborate statement of the principle of non-intervention': *ibid*.

209 As had happened with the United States in respect of General Assembly Resolution 2131 (XX): Official Records of the General Assembly, Twentieth Session, First Committee, A/C.I/SR.1423, p. 436: cited by the Court in *ibid*., at 107 (§203). Though note the Court's position in respect of the Helsinki Final Act: *ibid*.

the Court observed) 'examples of trespass against this principle are not infrequent'.[210]

For the Court, the principle 'forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States', where '[t]he element of coercion' is what 'defines, and indeed forms the very essence of, prohibited intervention'.[211] The Court found that 'intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State',[212] a statement which testifies as much to the independent existences of the prohibitions of force and intervention as it does to the broader sweep of the prohibition of intervention when compared with that of force. According to the Court, then, as a matter of law, intervention should be understood to include 'uses' of force – intervention is 'particularly obvious' in such cases, the Court says – allowing us to infer that not all interventions involve or contain 'uses' of force as defined by international law.

In defining the scope of the prohibition of intervention, the Court paid important homage to General Assembly Resolution 2625 (XXV) for its specification of 'basic principles' of international law and, significantly, 'on the adoption of which no analogous statement was made by the United States representative', as had happened for General Assembly Resolution 2131 (XX).[213] This imbued Resolution 2625 (XXV) with the relevant normative credentials that allowed the Court to interpret '[t]he effect of consent' in relation to Resolution 2625 (XXV) as 'an acceptance of the validity of the rule or set of rules declared by the resolution [itself]'.[214] It is from this conception of intervention – a conception that incorporates 'armed interventions' as well as 'all other forms of interference', and which provides that '[n]o State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'[215] – that the Court obviously took its cue.

General Assembly Resolution 2625 (XXV) demonstrates the conscious effort of the General Assembly in October 1970 to frame an understanding of the prohibition of intervention that was more expansive in nature than the prohi-

210 *Ibid.*, at 106-107 (§202).

211 *Ibid.*, at 107-108 (§205). *See*, also, Vaughan Lowe, *The Principle of Non-intervention: Use of Force*, in The United Nations and Principles of International Law: Essays in Honor of Michael Akehurst 66, 67 (1994) (Colin Warbrick and Vaughan Lowe eds.) ('[i]t is the intention, rather than the means adopted, which may qualify a State's action as unlawful intervention').

212 *Ibid.*, at 107-108 (§205).

213 *Ibid.*, at 107 (§203). *See*, further, *supra* note 207.

214 *Ibid.*, at 99-100 (§188).

215 *See* General Assembly Resolution 2625 (XXV), *supra* note 126 (§2).

bition of force which, as we have already learnt, was itself the subject of elaboration in the same resolution.[216] This interpretation is not only obtainable from the General Assembly's explicit invocation of terms such as 'armed intervention' and 'use of force' for *part* of its definition of intervention, but in the restrictive treatment it afforded to the concept of force in the very same resolution. Ever since the inception of the Charter's prohibition of force, it has been argued that the prohibition applies to *forms* of force *other* than to armed force.[217] Support for this interpretation is typically drawn from the fact that Article 2 (4) of the Charter does not contain the adjectival qualification of *armed* force, when that formulation appears elsewhere in the Charter.[218] However, the references made by the General Assembly in the context of the prohibition of force in Resolution 2625 (XXV) – 'wars of aggression'; the 'violation' of 'existing international boundaries' and 'international lines of demarcation'; 'acts of reprisal involving the use of force'; 'forcible action'; the 'organizing or encouraging of irregular forces or armed bands'; and 'military occupation'[219] – suggest that the General Assembly was not prepared to share this understanding. Rather, the overall inflections of the General Assembly in Resolution 2625 (XXV) sided against a prohibition of force that encompasses '[p]sychological or economic pressure'.[220]

The difficulty in the Court's reliance on the General Assembly's construction of the prohibition of intervention lies not so much in 'the exact content of the principle so accepted',[221] although, truth be told, '[t]aken literally', as has been argued in an identical context, 'this language would outlaw diplo-

216 *Supra* note 126.

217 J. Zourek, L'Interdiction de l'emploi de la force en droit international 73-78 (1974) and Higgins, *supra* note 3, at 276-277.

218 Namely, in the Preamble and in Arts. 41 and 46: *see* Dinstein, *supra* note 1, at 86. Furthermore, 'Art. 44 [of the Charter] supports the view that the Charter uses the term "force" when it clearly means "armed force"'. *See* Randelzhofer, *supra* note 204, at 118.

219 *See* General Assembly Resolution 2625 (XXV), *supra* note 126, and, further, *supra* note 127.

220 *See* Dinstein, *supra* note 1, at 86. Though, in this section of the Resolution, the General Assembly does stipulate that 'States have the duty to refrain from *propaganda for wars of aggression*' (*supra* note 126 (emphasis supplied)) – but this statement is made in the context of 'the purposes and principles of the United Nations'. Note, though, General Assembly Resolution 42/22: A/RES/42/22, 73rd Plenary Mtg. (Nov. 18, 1987), which, as part of its Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, provides: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of this kind' (§8).

221 *See Nicaragua Case*, *supra* note 7, at 107-108 (§205).

macy'.[222] The problem arises more from the categorical stance with which the General Assembly endorsed the prohibition. Its representation of the prohibition was cast in terms as absolute as they were broad, for the Resolution provided that '[n]o State or group of States has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law'.[223]

It is here that the Court parted company with the General Assembly.[224] This is because, in the *Nicaragua Case*, the Court's commitment was not to grandstanding or to sermonizing in the abstract, but to testing these hypotheses of the General Assembly on intervention (or, less controversially, these 'generally accepted formulations')[225] against the vicissitudes of state practice. It asked at one point whether 'the practice [is] sufficiently in conformity with [the exact content of the principle so accepted] for this to be a rule of customary international law'.[226] The Court was also of the view that '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law',[227] as if the Court was setting out to provide some methodological constitution for meaning of the prohibition of intervention in international law (note the reference to an 'exception to [this] principle'). We are therefore put on alert for a method that was by turns more nuanced and negotiable than that of the General Assembly – at least as far as the Court's initial approach toward the prohibition of intervention was concerned.

To this end, and after it had made some definitional headway on the prohibition of intervention, the Court enquired whether 'there might be indications of a practice illustrative of belief in a kind of general right for States to inter-

222 *See* Farer, *supra* note 26, at 507. The context was Art. 18 of the Charter of the Organization of American States: 'No State … has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements'. *See* 119 U.N.T.S. 3, 58.

223 *See*, General Assembly Resolution 2625 (XXV), *supra* note 126 (emphasis supplied).

224 On which, *see* Lowe, *supra* note 211, and Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Michigan J. Int'l Law 1005, 1110-1113 (1998).

225 *See Nicaragua Case*, *supra* note 7, at 107-108 (§205).

226 *Ibid.*, at 107-108 (§205). Or, as the Court put it in paragraph 206: 'before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it'.

227 *Ibid.*, at 108-109 (§207) (though it is not altogether clear how the Court would have set about this task given its statement that it 'has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute' (§207)).

vene, directly or indirectly, with or without armed force, in support of an internal opposition in another State whose cause appeared particularly worthy by reason of the political and moral values with which it was identified'.[228] The Court is therefore applying its framework to a specific context or question here – whether, as a matter of law, states possess a right to intervene or to threaten or to use force in order to change the political or ideological persuasion of the government of a country (by removing, if necessary, an incumbent government from power).[229] For convenience, we shall frame this proposition as a right of 'political' or 'ideological' intervention. The Court concluded that any finding in favor of 'such a general right' would involve 'a fundamental modification of the customary law principle of non-intervention'.[230]

What is of interest to us here is not that, for better or for worse, the Court effectively reached the same substantive conclusion on the unlawfulness of a right of political or ideological intervention as the General Assembly had done in October 1970, but the *manner* in which it did so. In fealty to its own terms of reference, the Statute of the International Court of Justice, the Court found that no such modification of a right of political or ideological intervention was 'evidenced by a general practice accepted as law'.[231] It did so as part and parcel of a process that admitted the possibility – at least in principle – of *exceptions* to the prohibition of intervention: the Court found 'that States have not justified their conduct by reference to a new right of intervention or a new exception to

228 *Ibid*., at 108 (§206).

229 Note, however, the Court's observation, *ibid*. at 124 (§241): 'It appears to the Court to be clearly established first, that the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely …; and secondly that the intention of the contras themselves was to overthrow the present Government of Nicaragua'. For the historical dimension of this debate, see W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 Yale J. Int'l Law 171 (1988) and, further, Robert F. Turner, International Law and the Brezhnev Doctrine (1987) and Jeanne J. Kirkpatrick and Michael Gerson, *The Reagan Doctrine, Human Rights and International Law*, in Right v. Might: International Law and the Use of Force (2nd ed., 1991) (Louis Henkin *et. al.* eds.). More contemporary reflections are offered by Professor Reisman on this topic in his 2004 Manley O. Hudson Lecture, *Why Regime Change is (Almost Always) a Bad Idea*, 98 Am. J. Int'l Law 516 (2004).

230 *See Nicaragua Case*, *supra* note 7, at 108 (§206) (as opposed to its later specification (*supra* note 227) of an 'unprecedented exception').

231 The preferred understanding of custom to Art. 38 (1) (b) of the Statute of the Court: *see* Higgins, *supra* note 115, at 18-19. Note, though, that the Court also said that it 'cannot contemplate the creation of a rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system'. *See Nicaragua Case*, *supra* note 7, at 133 (§263).

the principle of its prohibition'[232] and that, in consequence, 'acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations'.[233] This formulation raises the question of the potential application of this set of exceptions to the prohibition of intervention to that of force,[234] which, today, is invariably conceived in the terms of the United Nations Charter – and *only* the United Nations Charter.[235] Importantly, the Court's method also highlights the time-sensitive nature of its substantive pronouncements, coming as they do with the implicit proviso that the state practice which formed the basis of the Court's conclusions in June 1986 might not still obtain in our time.[236]

The Court's schemata for intervention did not end with its examination of an alleged right of political or ideological intervention: it proceeded to discuss the possibility of *other* exceptions to the prohibition of intervention with varying degrees of subtlety and detail.[237] The Court made passing reference to what it called 'the process of decolonization'[238] and, then, to the intervention of so-called third States. It addressed this matter in the language of counter-measures:

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232 *See Nicaragua Case*, *supra* note 7, at 108-109 (§207). According to the Court, *opinio juris sive necessitatis* could be manifested by '[e]ither the states taking such action [i.e. intervention] or other States in a position react to it', or, we can presume, both.

233 *Ibid.*, at 109-110 (§209).

234 We presume that 'an intervention which uses force' (*supra* note 212) but which is accommodated by an exception to the prohibition of intervention will not qualify as a violation of the prohibition of force – as per the very formulation of the Court: *ibid.*

235 We refer back to the Court's helpful prognosis at *supra* note 205.

236 While it may have been the situation in the *Nicaragua Case* that 'the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances' (*ibid.*, at 109 (§208)), this situation is of course subject to change as a matter of fact (and, therefore, possibly, law). The Court indeed said as much in its position on 'a right of "collective" armed response to acts which do not constitute an "armed attack"': 'In the view of the Court, *under international law in force today* – whether customary international law or that of the United Nations system – States do not have a right of "collective" armed response to acts which do not constitute an "armed attack"' (*ibid.*, at 110-111 (§211) (emphasis supplied)).

237 In the spirit of its self-professed enterprise: *see supra* nn. 199-201 (and accompanying text).

238 Which, the Court noted, 'is not in issue in the present case': *Nicaragua Case*, *supra* note 7, at 108 (§206). *See*, also, Dinstein, *supra* note 1, 68-70 and, further, R.E. Gorlick, *Wars of National Liberation*: Jus ad bellum, 11 Case W. Res. J. Int'l Law 71 (1979). See General Assembly Resolution 2625 (XXV) (*supra* note 126) and Art. 7 of Resolution 3314 (XXIX) (*supra* note 25).

> if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defense in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defense, one which might be resorted to in a case of intervention short of armed attack.[239]

We notice that this paragraph actually approaches the question of third State intervention (or 'the exercise of some right analogous to the right of collective self-defense, one which might be resorted to in a case of intervention short of armed attack'),[240] but that, in so doing, the Court also flagged the possibility of intervention *by the victim State* (note the reference within this passage to 'any particular counter-measure'), 'possibly involving the use of force'.[241] While the Court ultimately concluded *against* the lawfulness of the former proposition,[242] it did so in a manner that seemed to leave the door open to the permissibility of the latter proposition in the excerpted passage above – a position that somehow seemed to have matured as the Court's judgment unfolded:

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239 *See Nicaragua Case*, *supra* note 7, at 110 (§210) (though Dinstein is of the view that '[i]f forcible counter-measures are taken in response to an ordinary breach of international law, not constituting an armed attack, they are unlawful': Dinstein, *supra* note 1, at 226).

240 *Ibid*. (and, also, *supra* note 201).

241 *Ibid*.

242 *See Nicaragua Case*, *supra* note 7, at 110-111 (§211) ('the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack') and, *further*, *infra* note 243.

> While an armed attack would give rise to an entitlement to collective self-defense, a use of force of a lesser degree of gravity cannot, as the Court has already observed …, produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[243]

The Court's deliberations on intervention in the *Nicaragua Case* therefore opened up a fairly sophisticated set of ideas and structures of thinking – and, perhaps most importantly of all, of *possibilities* for permissible intervention under international law, possibilities that stand an appreciable distance from the categorical articulations of the General Assembly of October 1970. We have engaged part of this discourse, but we should note that it is a discourse which extended much further into the Court's jurisprudence in the *Nicaragua Case*, touching upon interventions pursuant to 'a mere request for assistance made by an opposition group in another state',[244] to interventions which occur 'at the request of the govern-

243 *See Nicaragua Case*, *supra* note 7, at 127 (§249). Notwithstanding the temporal qualification issued by the Court (*supra* note 236), its conclusion attracted the criticism of Judge Stephen M. Schwebel in his Dissenting Opinion: *See ibid.* at 349 (§175). Though the Court's conclusion on this issue was *obiter dictum*, Judge Schwebel argued that 'it is no more correct because it is unnecessary', and considered that 'its errors are conspicuous':

> The Court appears to reason in this way. Efforts by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, if they are not to amount to an armed attack upon State B, give rise to no right of self-defense by State B, and hence, to no right of State C to join State B in measures of collective self-defense. State B, the victim state, is entitled to take counter-measures against State A, of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.

Judge Schwebel found the reasoning of the Court – and the effects of its conclusion – 'worrisome': 'the Court appears to offer – quite gratuitously – a prescription for overthrow of weaker governments by predatory governments while denying potential victims what is some cases may be their only hope of survival'. *See ibid.*, at 350 (§177). *See*, further, John A. Perkins, *The Right of Counter-intervention*, 17 Ga. J. Int'l & Comp. Law 171 (1987).

244 *See Nicaragua Case*, *supra* note 7, at 126 (§246) (where the Court concluded that 'it is difficult to see what would remain of the principle of non-intervention in international law if intervention … were … to be allowable at the request of the opposition').

ment of a State',[245] as well as those undertaken 'to monitor or ensure … respect' for human rights.[246]

Of those possibilities mentioned by the Court in June 1986, officially solicited interventions (or those pursuant to 'the request of the government of a State')[247] emerged with the blessing of the Court, for (in the Court's own words) these are 'already allowable'.[248] The Court seemed to adopt this position within its analytical framework of '*prima facie* acts of intervention' that 'may nevertheless be justified on some legal ground',[249] though others (such as Dinstein) have maintained that '[m]iltary assistance from the outside against non-State actors, being "consensual" rather than "coercive" is not forbidden by Article 2 (4) of the Charter of the United Nations'.[250]

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245 *Ibid*., at 126 (§246).

246 Although, so broadly was this 'right' construed or conceptualized, that it should not be mistaken for a 'right' of humanitarian intervention, which claims a much more exceptional provenance. *See Nicaragua Case*, *ibid*., at 134-135 (§268):

> while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defense.

See, further, Kritsiotis, *supra* note 224, at 1018. Cf. Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 Int'l & Comp. L.Q. 321 (1989).

247 *See Nicaragua Case*, *supra* note 7, at 126 (§246).

248 *Ibid*. Consider also the Court's stance on 'proportionate counter-measures on the part of the State which [is] the victim of … acts [of a lesser degree of gravity than an armed attack]': cf. *supra* nn. 239 and 243). *See*, further, the Court's conclusion that '[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law': *ibid*., at 124-125 (§242).

249 *Ibid*. (where the Court draws an explicit parallel between intervention 'at the request of the government of a State' and that 'at the request of the opposition'). *See*, also, *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, at 54 (§149), where the Court reached its conclusions *within* the framework of Article 2 (4) of the Charter – that 'Uganda engaged in the use of force for purposes and in locations in which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defense'.

250 *See* Dinstein, *supra* note 1, at 112 (footnote omitted) and Fawcett, *supra* note 192, at 356 (though, presumably, we would include within this reasoning the prohibition of intervention) – although one of the citations used in corroboration of this position is

As we attempt to digest the Court's thinking on intervention, we might remark upon the importance of any *premise* which underpinned the Court's observations – were the various postulations of the Court intended for *all* seasons? do they presume the existence of a state of peace or a state of civil war?[251] what, if any, change would the latter condition yield upon the former from the specific standpoint of international law rules on intervention?[252] Be these questions as they may, since the Court has developed a clear sense of the prohibitions of force and intervention,[253] it may be helpful, in the concluding part of this section, to provide a kaleidoscopic reflection of the limitations – or of the *potential* limitations – which

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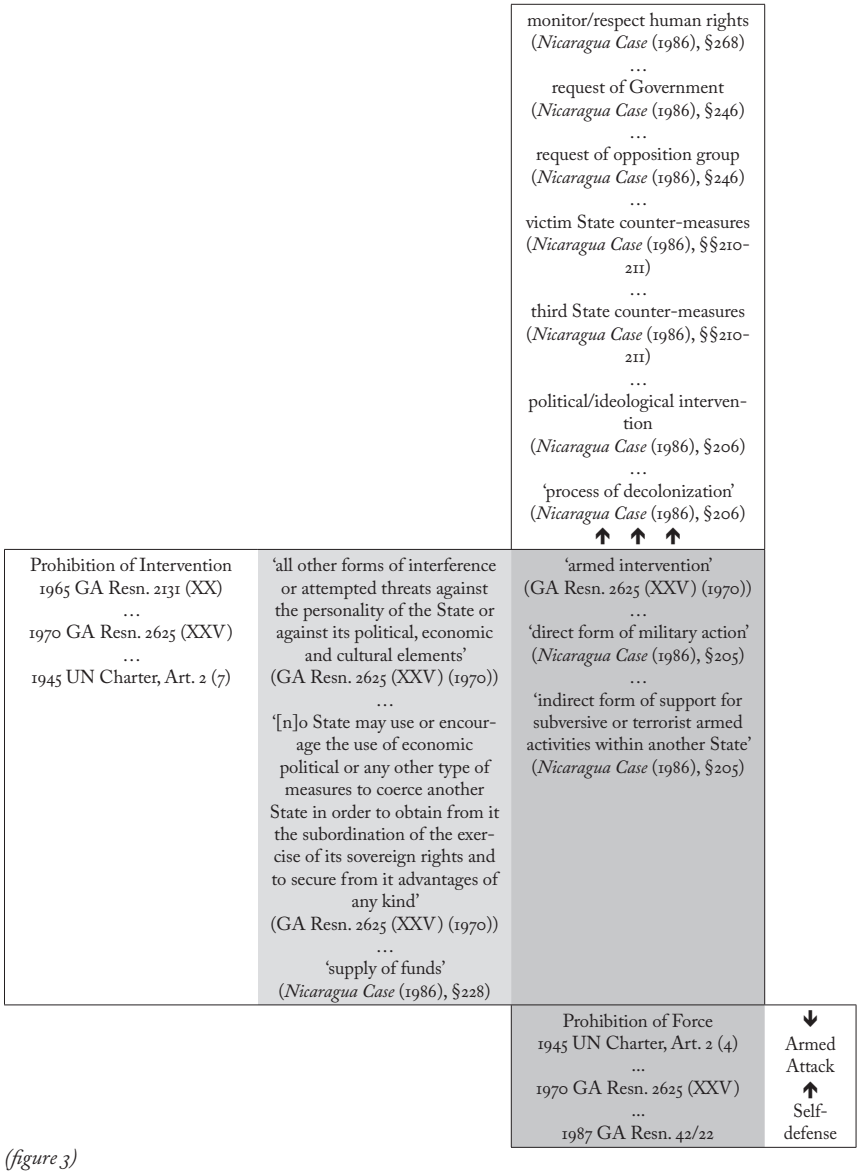
Article 20 of the International Law Commission's Articles on State Responsibility, which regards '[v]alid consent by a State to the commission of a given act by another State' as an act which '*precludes the wrongfulness of that act in relation to the former State* to the extent that the act remains within the limits of that consent' (emphasis supplied). *Quaere*, though, whether there would be any legal need to preclude the wrongfulness of consensual uses of force/interventions if these are not, in fact, 'forbidden by Article 2 (4) of the Charter' (*ibid*.), or, indeed, by the prohibition of intervention. Note in this respect the manner in which the Court has understood the matter (in the *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 9, the Court considered consent 'as validating that presence [of Uganda's forces] in law' (at 44 (§105)). *See*, also, the position taken by Rosalyn Higgins regarding the International Law Commission's treatment of the right of self-defense in its Articles: *see* Higgins, *supra* note 115, at 161 ('a lawful measure of self-defense will not be a wrongful act'). The answer to this enigma undoubtedly lies in how we construct the prohibitions of force and intervention: note that though the Court relied on the 'element of coercion' in its exposition of the prohibition of intervention in the *Nicaragua Case* (*supra* note 211), it is in respect of 'economic, political or any other type of measures' that the General Assembly invokes the notion of 'coercion' (i.e. coercion 'of another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'): General Assembly Resolution 2625 (XXV), *supra* note 126. 'Armed intervention and all other forms of interference or attempted threats' are constructed 'against the personality of the State or against its political, economic and cultural elements': *ibid*. Oppenheim famously defined intervention as 'the dictatorial interference of a third State in a difference between two States, for the purpose of settling the difference in the way demanded by the intervening State': *see* Oppenheim, *supra* note 82, at 150 (§50) – itself a valuable comparator for making assessments of the construction of the prohibition of force in international law.

251 Note principally the August 1975 Resolution of the Institut de Droit International on 'The Principle of Non-Intervention in Civil Wars'. See, further, Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 Harvard Law Rev. 511 (1969).

252 Note, for instance, Rosalyn Higgins, *Internal War and International Law*, in The Future of the International Legal Order (Vol. 3) 118 (1971) (C. Black and Richard Falk eds.) ('What is less clear – and it has become still more doubtful in recent years – is the legal authority of the government to ask for military assistance during civil hostilities – either of arms or active participation').

253 *See Nicaragua Case*, *supra* note 7, at 118-119 (§228) ('the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua … does not in itself amount to a use of force').

the Court has envisaged for the prohibition of intervention (and, by possible implication, for the prohibition of force).[254] These have been developed below (*figure* 3):



(figure 3)

254 *Supra* nn. 233-235.

V Conclusion

In the course of this essay, our endeavor has been to depict what we have called the *topographies of force*, essentially the broader lay of the land with respect to 'force' in international law, by referencing its various conceptual guises or aliases. We have attempted to make a provisional advance on this topic, although, it is clear that, in our efforts, we have sought to be neither exhaustive nor comprehensive.[255] Our main motivation has been to make a start at etching the broader contours of these topographies so that, as is so often the case with legal discourse, some insights might be shed on the minutiae of the law on force, or some cause given to reflect on the history or function of a particular rule as it relates to the legal detail of force. The outline of these topographies has come to pass as we have examined the relationships of 'force' with, first, 'war' and, then, 'armed conflict', followed by 'armed attack' and 'aggression' and, finally, 'intervention'. The idea has been to emphasize the broader context in which the laws on force live and operate, rather than to run our horizons along the sanguine perimeters of the United Nations Charter. It is an exercise undertaken very much in the general spirit of the jurisprudence of the International Court of Justice and, in the process, it is hoped that a better understanding has been forged of the concept of force itself, together with its importance for international law and for the (apparently) settled law of the United Nations Charter.[256]

255 We have not for example given full exposition to the doctrine of state responsibility or the impact of bilateral arrangements on force (which consumed a good share of the Court's energy in the *Case Concerning Oil Platforms*, *supra* note 8).

256 *Supra* note 205.

Chapter 4

Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order

W. Michael Reisman and Andrea Armstrong

The United States' claim to a right of what has come to be known as "pre-emptive self-defense" has provoked deep anxiety and soul-searching among the members of the college of international lawyers. Some have feared that the claim was signaling a demand to legitimize "Pearl Harbor" types of actions, i.e., sudden massive and destructive military actions by one state against another in the absence of a state of war, "out of the blue" as it were, all undertaken to neutralize militarily, or even eliminate, a latent or potential adversary. Since voices of some public intellectuals within the American political system had, in the midst of the Cold War, recommended such a strategy with respect to the People's Republic of China,[1] the anxiety could not be dismissed as entirely unfounded or even hysterical. Nor could it be dismissed as some sort of American aberration. From the earliest unilateral claims to a continental shelf, a copycat or mimetic dynamic in modern international law has been evident whenever an enhancement of state power is available, so the possibility of many other states making a similar claim to an expanded notion of pre-emptive self-defense could not be excluded.

The United Nations Charter's prescription with respect to the use of force is essentially binary: a use of military force is either in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful. As for the right to resort to military measures in self-defense, it materializes only upon the state invoking it, having suffered an "armed attack," a stricture that does not even extend to the *Caroline* doctrine.[2]

1 William Buckley, *A Noted Liberal Agrees: Let's Destroy Peking's A-Threat Now*, L.A. Times, Dec 16, 1964, at A6 *available at* ProQuest Historical Newspapers.

2 See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82 (1938). See also Reisman, *International Legal Responses to Terrorism*, 22:1 Houston Journal of International Law 3 (1999).

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During the Cold War, the Charter regime had come under stress from the practice of low-level protracted conflicts and it was obliged to ignore the overt and explicit nuclear threats which had come to constitute the system of strategic deterrence. But despite these problems, the International Court[3] and most international lawyers have steadfastly insisted on a strict retention of the Charter regime, most recently in the *Congo v. Uganda* decision, which is discussed below. Whether customary international law is in the process of accommodating the United States' claim to a right of pre-emptive action and thus breaching the doctrine's defensive perimeter is one of the issues we address.

I

The claim to pre-emptive self-defense is a claim to use unilaterally, and without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational and is not yet directly threatening, but that, if permitted to mature, could then, in the view of the potential pre-emptor, be neutralized only at a higher and possibly unacceptable cost to the party contemplating the pre-emptive action.[4] Pre-emptive self-defense differs from anticipatory self-defense in that the latter can point to a palpable and imminent threat. Thus, anticipatory self-defense (which was, in our view, not in the contemplation of the drafters of the Charter, though claimed by many to have been grafted thereon by subsequent practice) is at least akin to the armed attack requirement of Charter Article 51, in that there is palpable evidence of an imminent attack. A claim for pre-emptive self-defense can point only to a possibility among a range of other possibilities, a contingency. As one moves from an actual armed attack as the requisite threshold of reactive self-defense, to the palpable and imminent threat of attack, which is the threshold of preventive self-defense, and from there to the conjectural and contingent threat of only the possibility of an attack at some point in the future, which is the threshold of pre-emptive self-defense, the self-assigned interpretive latitude of the unilateralist becomes wider yet the nature and quantum of evidence that can satisfy the burden of proof on the unilateralist becomes less and less defined and is often, by the very nature of the exercise, extrapolative and speculative. In an international system marked by radically different cultures, values and, as a consequence, factual perceptions and their

3 *See e.g., Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (Jurisdiction of the Court and Admissibility of the Application); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14. (June 27) (Merits); *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12) (Preliminary Objections Decision); *Oil Platforms* (Iran v. U.S), 2003 I.C.J. 161 (Nov. 6) (Merit).

4 The discourse has used different terms to describe this claim throughout the debate on the legality of the use of force. For an interesting discussion, see Yoram Dinstein, War, Aggression and Self-Defence (4th ed. 2005).

assessments, an act of pre-emptive self-defense, based upon the actor's self-perceived good faith conviction, will often look like a serious or hysterical misjudgment to some actors and like either cynical or self-deluded naked aggression to others.

When a major international actor claims a right of pre-emptive self-defense, the implications for changing customary international law are great, for, at every level of social organization, law-making, much more than law-applying, is largely political; doctrines of sovereign equality notwithstanding, the actions of a great power may be more law-generative than those of smaller states. The question that is posed in this essay, which is dedicated to Yoram Dinstein, an admired and esteemed friend for more than 40 years, is whether, in the period since 2002 when the United States began elaborating its claim, the U.S. has remained committed to its broadest possible conception and whether the international legal system has begun to incorporate it, in whole or in part. If it has, a pertinent question for the jurist is whether the change has enhanced or reduced world public order.

II

Claims to pre-emptive uses of military force have been associated preeminently with the Administration of George W. Bush but they were, in fact, pressed by previous administrations as well as by a number of other states. In the United States, one can trace a series of indicators of a shift in official thinking toward pre-emptive military strategies well prior to 9-11. In 1984, President Reagan issued a classified National Security Decision Directive outlining his Administration's response to terrorism. An unclassified extract explains:

> State-sponsored terrorist activity or directed threats of such action are considered to be hostile acts and the U.S. will hold sponsors accountable. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measure (sic) to protect our citizens, property, and interests.[5]

Two years later, against the continuing backdrop of suspected Libyan government support for terrorist attacks, a classified directive raised the prospect of unilateral attacks to prevent terrorist attacks. National Security Decision Directive 207 explained:

> The U.S. Government considers the practice of terrorism by any person or group a potential threat to our national security and will resist the use of terror-

5 *Extract of National Security Decision Directive 138*, April 1984, at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd138.pdf (the full directive is still classified).

> ism by all legal means available. The United States is opposed to domestic and international terrorism and is prepared to act in concert with other nations or unilaterally when necessary to prevent or respond to terrorist acts.
>
> States that practice terrorism or actively support it, will not be allowed to do so without consequence. Whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measures to protect our citizens, property, and interests.[6]

Although initially confined to classified documents, the new policy was explicitly discussed in newspaper articles and in speeches by high administration officials[7], a widely used and internationally legally noted method for establishing national positions.[8] In what later became known as the "Shultz Doctrine," Secretary of State George Schulz argued for the right to take limited military action to address terrorist threats while they are still "manageable."

> In the wake of the recent attacks at the Rome and Vienna airports, we have heard it asserted that military action to retaliate or pre-empt terrorism is contrary to international law. Some have suggested that even to contemplate using force against terrorism is to lower ourselves to the barbaric level of the terrorists. I want to take this issue head on.
>
> Unlike terrorists and communist guerrillas, we do not believe the end justifies the means. We believe in the rule of law. This nation has long been a champion of international law, the peaceful settlement of disputes, and the UN Charter as a code of conduct for the world community.
>
> But the Charter's restrictions on the use or threat of force in international relations include a specific exception for the right of self-defense. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists, or to rescue its citizens when no other means is available. The law requires that such actions be necessary and

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6 National Security Decision Directive 207, *The National Program for Combating Terrorism*, January 20, 1986 (Top Secret), at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/nsdd207.pdf.

7 *See e.g.* Robert C. Toth, *Pre-emptive Anti-Terrorist Raids Allowed*, Wash. Post., Apr. 16, 1984, at A19.

8 *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253, 267-268 (Dec. 20).

> proportionate. But this nation has consistently affirmed the right of states to use force in exercise of their right of individual or collective self-defense.[9]

And strongly foreshadowing the position espoused by the Bush Administration in 2002, Shultz argued:

> Such discreet uses of power for limited purposes will always involve risks. But the risks of inaction will, in many circumstances, be greater. Our political analysis must be clear sighted. Allies and friends may object to our action--or say they object. But this cannot be decisive. Striking against terrorism in the Middle East, for example, is bound to be controversial. But the worst thing we could do to our moderate friends in the region is to demonstrate that extremist policies succeed and that the United States is impotent to deal with such challenges.

Several months later, Secretary of State Schulz expanded on these comments arguing for developing a domestic consensus on the right to use force pre-emptively in terrorist "gray areas" of fact and law.

> The heart of the challenge lies in those cases where international rules and traditional practices do not apply. Terrorists will strike from areas where no governmental authority exists, or they will base themselves behind what they expect will be the sanctuary of an international border. And they will design their attacks to take place in precisely those "gray areas" where the full facts cannot be known, where the challenge will not bring with it an obvious or clear-cut choice of response.
>
> In such cases we must use our intelligence resources carefully and completely. We will have to examine the full range of measures available to us to take. The outcome may be that we will face a choice between doing nothing or employing military force. We now recognize that terrorism is being used by our adversaries as a modern tool of warfare. It is no aberration. We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force.[10]

These claims of a right to unilateral pre-emption were more muted in the Administration of George Bush, Sr. from 1988-1992. Indeed, directly after Shultz's

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9 George Shultz, Secretary of State, Low-Intensity Warfare: The Challenge of Ambiguity (Presentation at National Defense University) (January 15, 1986), in 25 I.L.M. 173, 205-06 (1986).

10 George Shultz, Secretary of State, Terrorism and the Modern World, (Presentation at Park Avenue Synagogue) (October 25, 1984), in Bureau of Public Affairs, U.S. Department of State: Current Policy No. 629.

speech in October 1984, then Vice-President Bush (perhaps not coincidentally one of the few leaders in the Administration to have had battle experience) publicly disagreed with the policy. Vice-President Bush argued, "I think you've got to pinpoint [the response to terrorism] and we're not going to go out and bomb innocent civilians or something of that nature."[11]

The claim to a right of pre-emptive self-defense was not limited to Republican administrations. In the "National Security Strategy for a New Century," published by the Clinton Administration in October, 1998, the possibility of a claim for a right of pre-emption was indicated, but more by implication.

> Adversaries will be tempted to disrupt our critical infrastructures, impede continuity of government operations, use weapons of mass destruction against civilians in our cities, attack us when we gather at special events and prey on our citizens overseas. The United States must act to deter or prevent such attacks and, if attacks occurs [sic] despite those efforts, must be prepared to limit the damage they cause and respond decisively against the perpetrators.[12]

But in 2000, the Clinton Administration issued a new security document, "A National Security Strategy for a Global Age," in which more explicit attention was given to terrorism. With respect to possible nuclear attacks from a symmetrical adversary, the policy continued to be reactive.

> Our military planning for the possible employment of U.S. strategic nuclear weapons is focused on deterring a nuclear war and it emphasizes the survivability of our nuclear systems, infrastructure, and command, control, and communication systems necessary to endure a pre-emptive attack yet still deliver an overwhelming response.[13]

A strategic posture of *reaction* rather than *pro-action* would be consistent with Article 51. But in the same document, pre-emptive action is raised as a means of combating asymmetrical foes using the techniques of terrorism.

> The United States has mounted an aggressive response to terrorism. Our strategy pressures terrorists, deters attacks, and responds forcefully to terrorist acts. It combines enhanced law enforcement and intelligence efforts; vigorous diplomacy and economic sanctions; and, when necessary, military force.

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11 Don Obedorfer and Juan Williams, *Officials Split on Shultz's Anti-Terrorism Speech*, Wash. Post, Oct. 27, 1984, at ProQuest Historical Database.

12 A National Security Strategy for a New Century at 7, (October 1998), at: http://www.fas.org/man/docs/nssr-98.pdf.

13 A National Security Strategy for a Global Age at 17, (December 2000) at: http://www.globalsecurity.org/military/library/policy/national/nss-0012.pdf.

> Domestically, we seek to stop terrorists before they act, and eliminate their support networks and financing. Overseas, we seek to eliminate terrorist sanctuaries; counter state and non-governmental support for terrorism; help other governments improve their physical and political counterterrorism, antiterrorism, and consequence management efforts; tighten embassy and military facility security; and protect U.S. citizens living and traveling abroad. Whether at home or abroad, we will respond to terrorism through defensive readiness of our facilities and personnel, and the ability of our terrorism consequence management efforts to mitigate injury and damage.
>
> Our strategy requires us to both prevent and, if necessary, respond to terrorism.[14]

The Security Strategy proceeded to an even more explicit formulation:

> Whenever possible, we use law enforcement, diplomatic, and economic tools to wage the fight against terrorism. But there have been, and will be, times when those tools are not enough. As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist, or actively support them, as we have done over the years in different countries.[15]

Thus, the attack on September 11, 2001, rather than occasioning a radical change in strategy, only reinforced incipient trends. On June 1, 2002, President Bush stated: "We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[16] On September 17, 2002, he made explicit and expanded a claim to pre-emptive action:

> We will disrupt and destroy terrorist organizations by:
> – direct and continuous action using all the elements of national and international power. Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors;
> – defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate

14 *Id.* at 23.

15 *Id.* at 24.

16 George W. Bush, Pres. of the United States, Commencement Address at the United States Military Academy in West Point (June 1, 2002), 38 Weekly Comp. Pres. Doc. 944, 946 (June 10, 2002).

> to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country; and
> – denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.[17]

Even more explicitly, the President's *National Strategy to Combat Weapons of Mass Destruction*, issued in December 2002, stated: "Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through pre-emptive measures."[18] This is a claim of pre-emption in the broadest sense.

The Bush Administration is currently debating the military content of these pre-emptive measures. A Pentagon draft of the "Doctrine for Joint Nuclear Operations" suggested that the U.S. could deploy nuclear weapons in self-defense to pre-empt a WMD attack.[19] Congressional leaders and arms control experts quickly criticized the draft document, however, and an Administration official emphasized that the doctrine had not yet been finalized.[20]

Since the release of the 2002 strategy, members of the Bush administration have indicated that the "Bush doctrine" of preemption may indeed be more limited. One limiting factor appears to be the rationality of the state regime supporting terrorism. In distinguishing the claim by the U.S. to potential claims for pre-emption within the contexts of the simmering China/Taiwan or India/Pakistan conflicts, a White House official argued,

> Well, I think what's different is the unique history of Iraq and the irrationality of Iraq. Different policies work in different regions of the world, and different doctrines work at different times and in different regions because of the local circumstances. Policies of containment work more with a rational figure than with an irrational one. That's why the policy of containment worked vis a vis the Soviet Union.

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17 National Security Strategy of the United States at 6 (Sept. 2002), at: http://www.whitehouse.gov/response/index.html.

18 National Strategy to Combat Weapons of Mass Destruction at 3, (Dec. 2002), at: http://www.whitehouse.gov/response/index.html.

19 Dept of Defense, Doctrine for Joint Nuclear Operations, Final Coordination (2), March 15, 2005 at I-6. (JP 3-12), at: http://www.globalsecurity.org/wmd/library/policy/dod/jp3_12fc2.pdf.

20 Walter Pincus, *Pentagon May Have Doubts on Pre-emptive Nuclear Moves*, Wash. Post, Sept. 19, 2005 at A5 (Lexis). Pincus also notes that the unclassified draft document was removed from the Defense Department website after details were published in newspapers.

> …
> [speaking about Iraq] Given the fact that an irrational leader who has a history of military force and military use and military aggression and domination may acquire a nuclear weapon, the question is, should it be the policy of the United States to do nothing, and allow such a leader to acquire a weapon that he could then use to blackmail the world and blackmail the region, and even use it to harm us.[21]

Then-National Security Advisor, Dr. Condoleezza Rice, similarly limited the policy, noting,

> The number of cases in which it might be justified will always be small. It does not give a green light – to the United States or any other nation – to act first without exhausting other means, including diplomacy. Pre-emptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.[22]

Indeed, the Bush Administration appears to have moderated its initial expansive claims in the newly released 2006 National Security Strategy, while nevertheless retaining its claim of a right to use force preemptively. Although the new strategy proclaims that "[t]he place of preemption in our national security strategy remains the same,"[23] the 2006 strategy also places much more emphasis on alternatives to military pre-emption and reliance on multilateral solutions. The Bush Administration argues, "[t]aking action [to prevent proliferation of weapons of mass destruction] need not involve military force. Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners."[24] Preemptive military action also appears to be limited to a "hard core of terrorists," who cannot be deterred and therefore must be "tracked down, killed, or captured."[25] The underlying networks supporting these terrorists, however, would be deterred "using a broad range of tools."[26]

The 2006 strategy provides further support to experts, who, in the aftermath of the war in Iraq, speculated that the Bush Administration had already softened

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21 Ari Fleisher, White House Spokesperson, Press Briefing, Oct. 15, 2002, http://www.whitehouse.gov/news/releases/2002/10/20021015-5.html.

22 Condoleezza Rice, Sec. of State, Wriston Lecture at the Waldorf Astoria Hotel, (Oct. 1, 2002), http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html.

23 National Security Strategy of the United States at 23 (March 2006), at: http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

24 *Id.*

25 *Id.* at 12.

26 *Id.*

its claim to a right of pre-emption in practice if not in policy – particularly with respect to Iran and North Korea.[27] Large scale attacks on states appear to be less favored than strategic pre-emptive strikes against weapons of mass destruction or terrorist training camps. This may be more of a tactical rather than an international legal correction.

III

In the period under review, the United Nations High-level Panel on Threats, Challenges and Change, appointed by the Secretary General, appears to have sided with those favoring a certain loosening of the strict requirement of an "armed attack" for self-defense by resort to unilateral military action. The High-level Panel stated:

> 188. The language of this article is restrictive: "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 to maintain international peace and security". However, a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.[28]

The Red Queen may assign whatever meaning she wishes to words but it is plain to us that the language of Article 51, whether wise or not, was not designed to accommodate the *Caroline* principle. The Panel's interpretation appears to be an attempt at adjustment of the Charter to meet part of the United States' claim.[29] But only part of it! The High–level Panel proceeded to make clear that if imminent armed attack were now brought within the meaning of armed attack and unilateral military action to head it off could now be potentially lawful, pre-emptive self-defense could not. The Panel rejected, in explicit terms, the possibility that acting "preventively (against a non-imminent or non-proximate one

27 See, e.g., Francis Fukuyama, *After Neoconservatism*, N.Y. Times, Feb.19, 2006; James Sterngold, *Bush Tempers Argument for Pre-emptive strikes*, San Francisco Chronicle, Oct.2, 2004 at A10 (Lexis).

28 Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our Shared Responsibility*, 54, U.N. Doc. A/59/565 (Dec. 2, 2004), at: http://www.un.org/secureworld/report.pdf.

29 Reisman, *Expanding the UN Security Council: Much Ado*, JURIST, Aug. 7, 2005, at: http://jurist.law.pitt.edu/forumy/2005/08/expanding-un-security-council-much-ado.php.

[threat])" could fall within the confines of lawful self-defense. The High-level Panel explained:

> 191. For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[30]

Curiously, this part of the High Level Panel Report, with its putative emendation of the Charter, has excited relatively little comment despite its radical character, for it would significantly change the purport of Article 51 by moving it towards the U.S. position. Unless, of course, the change had already been accomplished by practices long since incorporated into customary international law.

IV

In a series of judgments and advisory opinions, the International Court of Justice has hewed to a rather strict reading of Article 51 of the United Nations Charter. Assessing the legal content of the right to self defense in 1986, the Court surveyed treaty law and customary international law and concluded:

> 195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein." . . . It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.[31]

30 *Id.* at 55.

31 *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 103-04. (June 27) (Merits).

Seventeen years later, the International Court of Justice applied its interpretation of Article 51 from *Nicaragua* to U.S. claims of self-defense in attacking Iranian oil installations. The Court further explained that the U.S. must prove not only that it suffered from an "armed attack," but also that it must establish Iranian responsibility for that attack – a requirement the U.S. was ultimately unable to satisfy.[32]

> Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua,* it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" (*I.C.J. Reports 1986,* p. 101, para. 191), since "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack" (*ibid.,* p. 103, para. 195). The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.[33]

The Court similarly employed a strict reading of Article 51 in the *Wall* opinion, finding that Israel's claim of self-defense in constructing a wall in the Occupied Palestinian Territories was not relevant to the case.

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

32 *Oil Platforms* (Iran v. U.S), 2003 I.C.J. 161, para. 57, 61, 64, 71-72 (Nov. 6) (Merit).

33 *Id*. at para. 51

> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[34]

Its most recent holding in the *Case Concerning Armed Activities on the Territory of the Congo*, which the Democratic Republic of the Congo brought against Uganda, the Court was required to address, under its contentious jurisdiction, the issue of pre-emptive self-defense.

On September 11, 1998, the Ugandan High Command issued a document known as "Safe Haven." The document stated

> WHEREAS for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda;
> AND
>
> WHEREAS the successive governments of the DRC have not been in effective control of all the territory of the Congo;
> AND
>
> WHEREAS in May 1997, on the basis of a mutual understanding the Government of Uganda deployed UPDF to jointly operate with the Congolese Army against Uganda enemy forces in the DRC;
> AND
>
> WHEREAS when an anti-Kabila rebellion erupted in the DRC the forces of the UPDF were still operating along side the Congolese Army in the DRC, against Uganda enemy forces who had fled back to the DRC;
>
> NOW THEREFORE the High Command sitting in Kampala this 11th day of September, 1998, resolves to maintain forces of the UPDF in order to secure Uganda's legitimate security interests which are the following:
>
> 1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
> 2. To enable UPDF to neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
> 3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.

34 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, para. 139.

4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces.[35]

None of the "legitimate security interests" in the five points in Safe Haven involves response to an armed attack. Each is either an action in anticipatory self-defense, in the sense of the *Caroline* doctrine, or, insofar as the event for which military action is proposed is not imminent, it is an action purportedly in pre-emptive self-defense, in the sense in which the United States' Administration has used the term. Only Item 2, insofar as the facts supported it, could be characterized as anticipatory self-defense in the *Caroline* sense.

The Court remarked that "the objectives of operation 'Safe Haven', as stated in the Ugandan High Command document [] were not consonant with the concept of self-defence as understood in international law."[36] After reciting Article 51 of the Charter, the Court continued:

> The Court recalls that Uganda has insisted in this case that operation "Safe Haven" was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, "reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised" (*I.C.J. Reports 1986*, p. 103, para. 194). The Court there found that "[a]ccordingly [it] expresses no view on that issue." So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary "to secure Uganda's legitimate security interests." The specified security needs are essentially preventative to ensure that the political vacuum does not adversely affect Uganda, to prevent attacks from 'genocidal elements,' to be in a position to safeguard Uganda from irresponsible threats of invasion, to "deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda." Only one of the five listed objectives refers to a response to acts that had already

35 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, 19 December 2005, at paragraph 109.

36 *Id*. at para. 119.

> taken place the – neutralization of "Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan."[37]

The Court also observed that Uganda had not reported the events purporting to justify self-defense to the Security Council. Reverting to the strict contingency of Article 51, the Court said "while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to armed attack by the armed forces of the DRC."[38]

As to whether a state is entitled to take actions in self-defense when it has suffered an armed attack from a military force not affiliated with a state, the Court observed as a factual matter that "on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC."[39] As for self-defense against such irregular forces, the Court stated:

> the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.[40]

The question of self-defense with respect to armed bands not affiliated with a state is, of course, at the very center of the expanded claim to pre-emptive self-defense. As we have seen, the International Court had rejected a right of self-defense to such armed attacks in *Nicaragua* and the *Wall* opinion; *Congo v. Uganda* might have been, as Judge Kooijmans in a separate opinion observed, an opportunity for the Court to revisit the issue. Judge Kooijmans suggested an analytical distinction with regard to the question of whether or not a state from which irregular forces sally forth is responsible and the question of whether such actions entitle the target state to undertake actions in self-defense.

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37 *Id*. at para. 143.
38 *Id*. at para. 146.
39 *Id.* at para. 146.
40 *Id.* at para. 147.

> The Court only deals with the question whether Uganda was entitled to act in self-defence *against the DRC* and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, "because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 103, para. 195) but no involvement of the "host government" can be proved.[41]

In the *Wall* Opinion, Judge Kooijmans had said in this regard that Article 51 "conditions the exercise of the inherent right of self-defense on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years."[42] In *Congo/Uganda*, he observed that the Court's interpretation is no longer shared by the Security Council.[43] Indeed, after agreeing with Judge Kooijmans that the Court should have addressed the right to self-defense with respect to non-state groups, Judge Bruno Simma elaborated in his separate opinion,

> Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the "Bush doctrine" justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51.[44]

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41 *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19 December 2005, (Separate Opinion of Judge Kooijmans at para. 26).

42 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004 at para. 35.

43 *Id.* at para. 28.

44 *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19 December 2005, (Separate opinion of Judge Bruno Simma at para. 11) (footnotes omitted).

V

The Security Council has been skeptical of explicit unilateral claims of pre-emptive self defense. In 1981, the Security Council condemned Israel's pre-emptive strike against Iraq,[45] noting

> *Deeply concerned* about the danger to international peace and security created by the premeditated Israeli air attack on Iraqi nuclear installations on 7 June 1981, which could at any time explode the situation in the area, with grave consequences for the vital interests of all States,
>
> *Considering* that, under the terms of Article 2, paragraph 4, of the Charter of the United Nations: "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",
>
> 1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct;
> 2. *Calls upon* Israel to refrain in the future from any such acts or threats thereof;[46]

In terms of explicit collective claims to pre-emptive self-defense, the Security Council has remained relatively silent. The Security Council has expressed neither support for nor disapproval of U.S. pre-emptive strikes in Iraq, a posture attributable to the fact that, as a permanent member, the U.S. could veto any such resolution, rather than to a view shared by the other members of the Council on this question of international law[47] As is well known, the Bush Administration tried, but failed, to win Security Council authorization for the U.S. March 2003 invasion.[48]

But the Security Council has not accepted the interpretation of the International Court of Justice of Article 51 which requires *state* responsibility for the attack provoking a claim of a right to self-defense. Following the September 11, 2001 terrorist attacks in the U.S., the Security Council was plainly operating

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45 *See infra* Section VI.B.

46 S.C. Res. 487 (June 19, 1981).

47 The Security Council did however approve a resolution implicitly endorsing U.S. occupation by authorizing a "multinational force under unified command" to provide security in Iraq. See United Nations Security Council, Resolution 1511, U.N. Doc. No: S/2003/1511 (Oct. 16, 2003).

48 *See e.g.*, Elizabeth Neuffer, *After Discord, UN's Effectiveness Called into Question*, Boston Globe, Mar. 18, 2003 (Westlaw).

on the understanding that both non-state actors and the states that aid, support, or harbor them would be held accountable.

> *Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter,
>
> . . .
>
> 3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;[49]

VI

In the period since the United States lodged its broader claim, a number of governments have openly debated the question of a possible right of pre-emptive self-defense. Classified memoranda and contingency plans may be based on other legal theories, but it is significant that public documents are almost always expressed as proposing actions that are internationally lawful. The following discussion examines two groups of states: those participating in the U.S. coalition effort in Iraq, part of whose rationale was preemptive self-defense, and those states which have refused to take part and have been critical of United States' action there. While any grouping is somewhat arbitrary, an initial examination reveals rather surprisingly that a state's position on the lawfulness of the military strikes in Iraq is not necessarily determinative of its adoption of a policy of preemption.

A U.S. partners in Iraq

United Kingdom

The United Kingdom has not explicitly adopted the pre-emptive self-defense doctrine described in the United States' National Security Strategy 2002. But various remarks by the Prime Minister, Foreign Minister, Defense Minister and Minister of Veteran Affairs come close to it. In March 2004, Prime Minister Blair stated:

> Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment.

49 S.C. Res. 1368, U.N. Doc. No: S/2001/1368 (Sept. 12, 2001).

> Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising.[50]

In reaction, a Select Committee of the House of Commons concluded, "The Prime Minister's words appear to support the doctrine of anticipatory self-defense."[51] This buttressed an earlier House of Commons finding in 2002, where

> The Foreign Secretary appears to accept the principle of pre-emption, as set out in the National Security Strategy of the United States. He told us on 25 September that "If any nation feels that it is threatened in a direct way then under Article 51 it has an inherent right to take action pre-emptively." The Prime Minister has also asserted that "The one thing we have learned post-11 September is that to take action in respect of a threat that is coming may be more sensible than to wait for the threat to materialise and then to take action."[52]

The primary impetus for the U.K.'s implicit though inconsistent support for the U.S. pre-emption strategy is the need for an effective and timely response to the new type of threats posed by terrorism. After the attacks on September 11, 2001, the British government commissioned a new chapter to its Strategic Defense Review, which had been compiled in 1998.

> Experience shows that it is better where possible, to engage an enemy at longer range, before they [sic] get the opportunity to mount an assault on the UK. Not only is this more effective than waiting to be attacked at a point and timing of an enemy's choosing, but it can have a deterrent effect. We must therefore continue to be ready and willing to deploy significant forces overseas and, when legally justified, to act against terrorists and those who harbour them.[53]

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50 Prime Minister Tony Blair, "Prime Minister warns of continuing global terror threat" (Sedgefield Constituency Speech) March 5, 2004, at: http://www.pm.gov.uk/output/Page5461.asp.

51 House of Commons, Select Committee on Foreign Affairs Seventh Report, "International Law and the War Against Terrorism" (para 420) July 21, 2004, at: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/44120.htm.

52 House of Commons, Select Committee on Foreign Affairs Second Report, "Disarming Iraq" (para 159) December 17, 2002, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/19609.htm#n210 (internal footnotes omitted).

53 Ministry of Defence, "The Strategic Defense Review: A New Chapter" (para 9), July 2002, at: http://www.mod.uk/issues/sdr/newchapter.htm A progress report on the New Chapter stated:

> all our analysis shows that tackling the problem at distance – whether through prevention or, where justified, pre-emption, or through use of other effects in

> And, in any case, all our analysis shows that tackling the problem where possible at a distance is preferable to waiting for problems to come to us: in that sense operations overseas are often the best form of home defence.[54]

At the same time, the United Kingdom has approached the U.S. position with caution. The Defense Ministry has noted the importance of a case-by-case approach for pre-emptive action.[55] In addition, the United Kingdom does not appear necessarily to support *unilateral* pre-emptive action.[56] The Defense Military Academy, which publishes papers produced by the Conflict Research and Security Centre,

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> the framework we have developed – is much preferable to waiting for problems to come to us.

Ministry of Defense, Speech to City Forum Roundtable, A Progress Report on the New Chapter to the Strategic Defense Review, May 23, 2002, at http://news.mod.uk/news/press/news_press_notice.asp?newsItem_id=1727.

54 *Id*. at para 77. A strategy of attacking problems abroad before they manifest themselves on British soil is also a prominent theme in discussions on restructuring the military. In April 2002, the Veterans Minister stated:

> The Ministry of Defence is therefore currently conducting work to re-examine our own defence posture to ensure that we have the right defence concepts, forces and capabilities to defeat the threat from international terrorism. . . . But the initial findings are that we need to put more emphasis on taking the initiative and, where possible and justifiable, to pre-empt problems rather than simply wait for problems to come to us.

Opening Address by Dr Lewis Moonie MP, Minister for Veterans Affairs to Veteran Plenary Forum, April 17, 2002, at: http://www.veteransagency.mod.uk/veterans_initiative/veterans_intiative_openadd.htm.

55 In a Letter to the House of Commons, the Defense Ministry summarized key discussion points of a 2002 seminar, stating,

> Pre-emptive action – and particularly a series of pre-emptive actions – is likely to create serious difficulties for coalition cohesion. We cannot be dogmatic in pursuing pre-emptive action: a case by case analysis will be required before any action is undertaken.

House of Commons, Select Committee on Defence, Appendices to the Minutes of Evidence Appendix 10, "Letter from Ministry of Defence to Committee Specialist summarising key points of Birmingham Seminar 28 February 2002," (seminar discussed drafts of New Chapter) May 7, 2003, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap11.htm.

56 Select Committee on Defence Appendices to the Minutes of Evidence, Appendix 1, "Letter to the Committee Specialist from the Ministry of Defence (17 May 2002), at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap02.htm.

> *[House of Commons] The New Chapter consultation paper uses terms such as prevent, deter, coerce, disrupt and destroy – does this mean that a pre-emptive role for the UK forces is at the heart of the New Chapter in the war on terrorism? Can the UK actually do any of these things alone and if not how far is our understanding of this problem shared by likely allies or collaborators?*

takes a similarly skeptical view of pre-emptive strikes, although for practical, not legal, reasons.[57]

> [Administration Response] Our initial thinking on these issues was set out in the discussion paper published in February. We will set out more developed thinking when we publish some conclusions. But the UN, NATO, the EU and other organisations have all played key roles in recent months, and we see them all playing key roles in future. We continue to regard it as vital for the US and its European Allies to be able to operate together (as many Allies are doing now in Afghanistan), and for the Europeans to make improvements in their capabilities to facilitate that. We fully recognise that, in the future as in the past, effective coalition operations will normally be the key to success, and that we therefore needed a shared approach, shared doctrine and interoperable capabilities. We have been continuing to work to those ends.
>
> We have already indicated that we need to put more emphasis on being proactive and, where possible and justifiable, pre-empting problems, rather than simply waiting for problems to come to us. In that, we should use the whole range of responses that the Government has at its disposal – not just military means.

See also House of Commons, Select Committee on Foreign Affairs Seventh Report, "International Law and the War Against Terrorism" (para. 404) July 21, 2004, at: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/44120.htm.

The House of Commons also concluded that:

> The Foreign Secretary underlined the Government's advocacy of reform of the system of international law when he gave the Committee evidence on 30 March 2004. We presented a theoretical situation to the Minister, asking how the Government might respond to evidence of an imminent threat by terrorists with access to WMD, but when there was little certainty as to the target. The Minister said:
>
> … If it was that imminent and country X perceived that the threat could apply to them, then I think that they would be justified in acting in self-defence and there is nothing in Article 51 which could prevent that. If it was a wider, more general threat, then although there might not be the time nor might it be desirable to have a public debate, there would almost certainly be time secretly to consult P5 partners who are crucial to any decision and if they were on board, in practice the Security Council would be.

57 C.J. Dick, Conflict Studies Research Centre, Defence Academy, "The Future of Conflict – Looking Out to 2020" (# MJ30) April 2003 p. 23 and 37, at: http://www.da.mod.uk/CSRC/documents/Special/M30-CJD.pdf/file_view. Their report notes,

> Deterring intra-state conflict, including by pre-emptive deployments, is theoretically attractive and may become fashionable but will be fraught with problems .... Despite the lessons of the wars of Yugoslav succession and, arguably, the long-term threat posed by Saddam's missiles and WMD, it will be very difficult to convince many electorates that such action will be cheaper in the long run. Pre-emptive actions may also be morally and legally dubious and therefore politically divisive, both domestically and internationally (including between allies). President Bush's strident demands for war to disarm Iraq and more controversially, to effect regime change is a case in point. (p. 23)

The New Chapter specifically notes that pre-emption is allowed only when "legally" justified. The New Chapter specifically states:

> We have made clear that our responses will be proportionate and in accordance with our international legal obligations. But we will not let the less scrupulous think we do not mean business, or simplify an aggressor's calculations by announcing how we would respond in particular circumstances. The only certainty we should offer is that we shall respond appropriately if we need to, using any of the wide range of options open to us. It should be clear that legally the right to self defence includes the possibility of action in the face of an imminent attack. [58]

But that, of course, assumes that pre-emptive military action may sometimes be lawful. Note also that the term "imminent" appears to have acquired a certain longitudinal extension. Indeed, the U.K. government does not appear to believe that international law imposes severe limits. One exchange in the House of Commons suggests that the U.K. military takes a rather broad view of international law in this regard.[59] In contrast to the public documents indicating some degree of support for an implicit acceptance of the U.S. strategy, Attorney-General Goldsmith, in a newly leaked document, explicitly stated in 2003:

> [I]n my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to

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> One way or another, the USA will leave itself open to charges of hypocrisy, selectivity and bully-boy behaviour, not to mention the deliberate flouting of international law through mounting dubious pre-emptive attacks. (p. 37).

58 Ministry of Defence, The Strategic Defense Review: A New Chapter (para. 22), July 2002, at: http://www.mod.uk/issues/sdr/newchapter.htm.

59 691. [House of Commons] Are you saying then that if there were a second Resolution of the United Nations which was not carried, but in fact was defeated and the outcome was that it was not right for a war to be engaged in at this time against Iraq, would you then say that if the United Kingdom and the United States were to act unilaterally and go ahead and engage in a war with Iraq, basically they would be working within the realms of the law?

(*Mr Hoon*) I indicated earlier that there are different sources of international law. There is the common law of international nations which provides basic principles like self-defence, for example. There is also the law made by the Security Council of the United Nations and indeed by the General Assembly, so there is a range of ways in which action would be justified, but I assure you that whatever decision is taken by the British Government would be in conformity with international law.

House of Commons, Select Committee on Defence, Minutes of Evidence, Examination of Witnesses, March 5, 2003, at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/3030505.htm.

> use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.[60]

Australia

The Australian government defends its adoption of a pre-emptive strike policy against terrorists as a liberal interpretation of Article 51. Defense Minister Robert Hill has argued,

> It is clear that, when an armed attack against a State is imminent, that State is not compelled to wait until the first blow has been struck. But what action can a State legitimately take when that attack is to be launched by a non-State actor, in a non-conventional manner, operating from a variety of bases in disparate parts of the world? There are no tell-tale warning indicators such as the mobilisation and pre-deployment of conventional forces.
>
> Whilst the Charter of the U.N adopted not dissimilar language (Article 51 permits the use of self-defence "if criminal attack occurs"), it has not settled the debate between those who adopt a literal interpretation and those who argue that contemporary reality demands a more liberal interpretation.
>
> Again the jurisprudence of the International Court of Justice does not include a definitive statement on the scope of the law of anticipatory self-defence under the Charter. States act according to their interpretation, no doubt informed by the interpretations of others.[61]

This policy is also embodied in Australian military policy documents. The "National Security: A Defence Update 2003" states,

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60 Attorney General Goldsmith, Secret Memo to the UK Prime Minister on Iraq Resolution 1441, 7 March 2003, at: http://www.number-10.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf (leaked April 2005). This section was not included in the first publicly released version of the opinion in March 2003. See Attorney General Goldsmith, Public Memo to the UK Prime Minister on Iraq Resolution 1441, 17 March 2003, at: http://www.guardian.co.uk/Iraq/Story/0,2763,1471659,00.html (summary presented to Parliament). Indeed, in initial discussions about the legality of military action, the British government refused to base its actions on the U.S. pre-emptive doctrine. Instead, in accordance with Attorney-General Goldsmith's opinion, the purported basis was the breach of Security Council resolutions.

61 Defence Minister Robert Hill, John Bray Memorial Oration, at the University of Adelaide (Nov. 28, 2002), at: http://www.minister.defence.gov.au/HillSpeechtpl.cfm?CurrentId=2121.

> But diplomacy and international cooperation will not always succeed: the Australian Government may need to consider future requests to support coalition military operations to prevent the proliferation of WMD, including to rogue states or terrorists, where peaceful efforts have failed.[62]

Similarly, a report by the Australian Air Force notes,

> Strike may also take the form of a pre-emptive strike, aimed at deterring an aggressor before major conflict erupts. While there would always be significant political and diplomatic consideration of any pre-emptive strike, confronted by irrefutable intelligence of impending hostilities, the Government may exercise a pre-emptive strike option to remove the immediate threat and demonstrate national resolve.[63]

Australia was an early supporter of the U.S. pre-emption claim. In June 2002, following a press conference on the ratification of the International Criminal Court statute, Prime Minister Howard stated,

> Well the principle that a country which believes it is likely to be attacked is entitled to take pre-emptive action is a self-evidently defensible and valid principle and I don't think you need a government decision to say you agree with that. I mean let me make it very clear if I were presented with evidence that Australia was about to be attacked and I was told by our military people that by launching a pre-emptive hit we could prevent that attack occurring I would authorise that pre-emptive hit and expect the Opposition to support me in the process.[64]

This comment, well before the October 2002 Bali terrorist attacks, received little public attention. In December 2002, Prime Minister Howard repeated his claim of pre-emptive self-defense but within a different context. In response to a question on whether Australia would act pre-emptively based on knowledge of terrorists *in a neighboring country* planning an attack, Howard stated,

> Oh yes, I think any Australian Prime Minister would. I mean, it stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a

62 Australian Ministry of Defence, "Australia's National Security: A Defence Update" (2003), at: http://www.defence.gov.au/ans2003/Report.pdf.

63 Australian Air Force, "Air Force During Military Operations: Strike", at: http://www.defence.gov.au/raaf/organisation/info_on/operations/strike.htm.

64 John Howard, Prime Minister, Australia, Press Conference, Parliament House, (June 20, 2002), at: http://www.pm.gov.au/News/interviews/2002/interview1709.htm.

> capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it.[65]

Less than a week after those comments, Mr. Howard met with high-level diplomats from ten South-east Asian nations in response to a widespread regional outcry.[66] More recently, Prime Minister Howard has cast pre-emptive action as a theoretical, not concrete, possibility.

> Well, I certainly wouldn't envisage that that would occur in relation to Indonesia. I was not really stating that in relation to any country and I have the very strong view that countries like Indonesia, with whom we have very close relationships, if action were needed to be taken against groups that might threaten Australia then that action would be taken by the Indonesian forces. I was simply stating a principle, that principle merely was that if you ever had, how remote the likelihood of the situation in the future where a country were unable or unwilling and the only way to protect Australia was to take action, that that action would be taken. But I imagine that's a view that many countries hold. I don't think Australia would be alone in holding that view but I certainly don't regard that as a statement of a last resort principle as something that should be seen as being in any way antagonistic to any of our friends in the region and, most particularly, Indonesia.[67]

Japan

The Japanese government, while not engaged in war-fighting in Iraq, has supplied elements of its Self-Defense Forces to Iraq since December 2003 to assist in humanitarian and reconstruction efforts.[68]

Article 9 of the Japanese Constitution "forever renounce(s) war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." There is some movement within Japan to amend the Constitution to make explicit the right to self-defense under Article 9.[69] Despite these potential constitutional difficulties, the Japanese parliament recently passed the "Law Concerning Measures to Ensure National Independence and Security in a Situation of Armed Attack." The law addresses "[s]ituation(s) of Armed

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65 John Howard, Prime Minister, Interview with Laurie Oaks, (Dec. 1, 2002) (Lexis).

66 AAP Newsfeed, *Philippine VP defends outcry over Australia,* Dec. 5, 2002 (Lexis).

67 Prime Minster John Howard, Interview with Metro TV (Indonesia), (Oct. 19, 2004), at: http://www.pm.gov.au/news/interviews/Interview1130.html.

68 Japanese Defense Agency, *Overview of Japan's Defense Policy* (May 2005), at: http://www.jda.go.jp/e/publications/overview/english.pdf.

69 Tetsushi Kajimoto, *Constitution faces long road to amendment*, Japan Times, May 3, 2005 (LexisAcademic).

Attack [which are] a situation where an Armed Attack against Japan from the outside (including a case where an Armed Attack is imminent) has occurred and a situation where an Armed Attack is anticipated as tensions arise."[70] The 2003 law contemplates two potential situations: one in which there are actual military attacks and the other when attacks are expected.[71] Unlike positions advanced by other coalition partners, the law requires "imminent and illegal invasion of Japanese territory" to trigger the right to self-defense.[72] Both China and North Korea have criticized the new laws as destabilizing to the region.[73]

B Non-U.S. coalition partners

Israel

The Israeli raid on the Osirak reactor in Iraq in 1981 remains the clearest example of a pre-emptive use of force in the period following World War II.[74] Israel has also practiced targeted assassinations which might be characterized as a form of pre-emptive self-defense.[75] In the period covered in this essay, Israel has made an explicit claim of a right to pre-emptive self-defense in the context of the withdrawal from Gaza in 2005. In the "Amended Disengagement Plan of 2004," Israel stated

> The State of Israel reserves the fundamental right to self-defense, including the taking of preventive measures, and responsive acts using force against threats emanating from the Gaza Strip.[76]

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70 Japanese Defense Agency, Defense of Japan White Paper (summary), 2002, Section 4, at: http://www.jda.go.jp/e/pab/wp2002/0304.htm.

71 British Broadcasting Corporation, *Japan's Upper House Begins Debating Military Contingency Bills*, May 19, 2003 (LexisAcademic).

72 *Govt outlines new view on self-defense* The Daily Yomiuri, (Tokyo) January 26, 2004 (Lexis).

73 *See e.g.*, China Daily, *Japan's Security Bills Dangerous for Region*, June 9, 2003. British Broadcasting Corporation International News Service, *North Korea Denounces Japan's Moves for "Overseas Expansion,"* June 5, 2003. (LexisAcademic).

74 Reisman, *Assessing Claims to Revise the Laws of War*, 97 Am. J. Int'l L. 82 (2003).

75 *See generally*, Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 Cornell Int'l L.J. 233 (2003).

76 Amended Disengagement Plan, Annex A, section 3.A.3, May 28, 2004, at: http://www.pmo.gov.il/PMO/Communication/hitntkut/mesht280504.htm.

Russia

Following the seizure of a school in Beslan by Chechen militants, the Russian government indicated its willingness to strike at terrorists pre-emptively. President Putin declared on September 17, 2004 that "today in Russia, we are seriously preparing to act preventively against terrorists. . . . This will be in strict respect with the law and constitution and on the basis of international law."[77] The Defense Minister has explicitly announced the right of pre-emptive strikes against terrorists anywhere in the world.[78] At the same time, Russian officials have noted that their pre-emptive strikes will not include the use of nuclear weapons.[79]

This policy stands in marked contrast to numerous public statements prior to the U.S.-led attacks in Iraq, which the Russian government loudly denounced.[80] President Putin even lamented the "replacement of the international law with the law of the jungle."[81] One former high-level Russian official believes the recent statements endorsing pre-emptive strikes are more likely a diplomatic overture to the U.S. and NATO, rather than a concrete statement on military policy.[82] In any event, both the U.S. and the U.K. have publicly supported the change in Russian policy.[83]

India

Federal Finance Minister Jaswant Singh has said every country has a right to pre-emptive strikes as an inherent part of its right to self-defence and it was not the prerogative of any one nation. "Pre-emption or prevention is inherent in deterrence. Where there is deterrence there is pre-emption. The same thing is there in Article 51 of the UN Charter which calls it 'the right of self-defence.'"[84]

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77 *Putin says Russia 'seriously' preparing preventive strikes, rejects talks*, Agence France Presse English Wire, Sept. 17, 2004 (Westlaw).

78 *Ivanov: Military Force Remains a Political and Anti-Terrorist Instrument*, News From Russia (compiled by Russian Foreign Ministry), Dec. 17, 2004, at: http://www.india.mid.ru/nfr2004/nf51.html.

79 British Broadcasting Corporation Worldwide Monitoring, *Russia's "preventive strike" rhetoric seen as olive branch to NATO and USA,* Sept. 12, 2004 (Lexis).

80 *See e.g.*, Christian Caryl, *Balancing Act*, Newsweek, March 20, 2005 (Lexis).

81 Veronika Voskoboinikova, *Putin-Iraq Statement*, ITAR-TASS, March 20, 2003 (Lexis).

82 British Broadcasting Corporation Worldwide Monitoring, *Russia's "preventive strike" rhetoric seen as olive branch to NATO and USA,* Sept. 12, 2004 (Lexis).

83 *See e.g.*, Nicholas Kralev, *Russia vows pre-emptive terror hits,* Wash. Times, Sept. 9, 2004 (Lexis), Cam Simpson, *U.S. voices support, caution on Russia's terrorism war,* Chi. Trib., Sept. 10, 2004 (Lexis).

84 *Every country has right to pre-emption: Jaswant,* The Press Trust of India, Sept.30, 2002 (Lexis).

Iran

Iran has adopted a dual strategy in light of U.S. claims of a right to pre-emptive self defense. First, it has explicitly raised the costs of a potential preemptive attack by declaring that an attack on its nuclear facilities would be an attack on the entire country. Moreover, the Iranian government noted that it would not distinguish between the U.S. and Israel, in the event of an attack by Israeli forces.[85] Defense Minister Ali Shamkhani, in an interview with Al Jazeera network, argued,

> As far as the destruction of our nuclear program, I'll tell you it's impossible given the basic fact that the program is supported by experts among our people who can't be destroyed militarily. So any attack against our nuclear facilities will be seen as an attack against the whole country. We'll respond with every means in our power.
>
> As far as Israel is concerned, we have no doubts it's an evil entity. It can't take any military action without a US green light. So we can't distinguish the two.

Second, Defense Minister Shamkhani has signaled that the Iranian government may also invoke a right to pre-emptive self-defense either on U.S. soil or U.S. forces in the Middle East.

> ALI SHAMKHANI: The presence of the US military doesn't empower the US at our expense. The opposite is true. We can hold their troops hostage.
>
> ANCHOR: You say that Iran has a presence in the Gulf, in Iraq, and in Afghanistan, which means that if the US attacks you, you can respond. Is that a correct interpretation?
>
> ALI SHAMKHANI: We won't stay silent and wait for others to act against us. Some among Iran's military leadership are confident that the preventive operations being discussed by the Americans aren't limited to them.[86]

North Korea

In February 2003, in the context of continuing discussions on North Korea's alleged nuclear program, the North Korean Foreign Ministry declared that North Korea was entitled to launch a pre-emptive strike against US forces rather than wait until the American military was finished with Iraq. The deputy director

85 Federal News Service, Interview with Iranian Defense Minister Ali Shamkhani, Al-Jazeera, August 18, 2004 (LexisAcademic).

86 *Id.*

stated, "The United States says that after Iraq, we are next, but we have our own counter-measures. Pre-emptive attacks are not the exclusive right of the US."[87] Similarly, in September 2004, Yang Hyong-sop, vice-president of the Presidium of the Supreme People's Assembly, stated that "[a] pre-emptive attack is not a monopoly of the US."[88]

France

Despite France's vocal opposition to the war in Iraq, it too has announced a defense policy that would allow for pre-emptive action. In a statement of defense policy for 2003-2008, the French government noted:

> Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible pre-emptive action is not out of the question, where an explicit and confirmed threat has been recognized. This determination and the improvement of long range strike capabilities should constitute a deterrent threat for our potential aggressors, especially as transnational terrorist networks develop and organize outside our territory, in areas not governed by states, and even at times with the help of enemy states.... Prevention is the first step in the implementation of our defense strategy, for which the options are grounded in the appearance of the asymmetric threat phenomenon.[89]

Here, as in many of the other examples, the focus is on the asymmetrical threat presented by terrorists. As an additional deterrent to terrorist attack, President Chirac recently stated that retaliations for large state-backed terrorist attacks against France could involve the use of nuclear weapons. In a speech delivered at a military base, President Chirac argued that,

> [N]uclear deterrence is not intended to deter fanatical terrorists. Yet, the leaders of States who would use terrorist means against us, as well as those who would consider using, in one way or another, weapons of mass destruction, must understand that they would lay themselves open to a firm and adapted

87 *Australia, N. Korea join 'pre-emptive' bandwagon,* News Straits Times, Oct. 26, 2003.

88 Global NewsWire, *North Korean Official Says Pre-emptive Attack Not a Monopoly of the U.S.*, Sept. 10, 2004 (LexisAcademic).

89 Government of France, Ministry of Defense, "2003-2008 Military Program," at: http://www.ambafrance-us.org/atoz/mindefa.pdf.

> response on our part. And this response could be a conventional one. It could also be of a different kind.[90]

China

The Chinese government has criticized the U.S. pre-emptive policy because it "mainly relies on subjective judgments, and is very easily abused and used as a pretext for war. So, the US' 'pre-emptive' strategy is in fact a logic of the powerful."[91] Notwithstanding this criticism, such action appears to be possible in the limited context of China's claims to Taiwan, with respect to which the Chinese government appears to support a limited version of a right to pre-emptive action. In March 2005, the People's Congress of China adopted an anti-secession law that authorizes "non-peaceful means" in the event of overt Taiwanese secessionist actions or even once "possibilities of peaceful reunification" are exhausted.[92]

Taiwan

Well before the passage of the Chinese Anti-Secession Law, Taiwan had invoked the right to pre-emptive action against China. In 2003, the Defense Minister of Taiwan refused to rule out "pre-emptive attacks" against military targets in China in situations where there is clear Chinese intent and military mobilization.[93]

VII

The initial assertions of a right of pre-emptive self-defense made by the Bush Administration in 2002 were cast more broadly than those of his predecessors. Even though the broader claim was provoked and was conditioned by the attack of September 11, 2001, its open-textured formulation could be interpreted to include surprise attacks on other states. This is, as we have seen, how some members of the British government, which was hardly unfriendly to the U.S. and its military program, read it. The British reading may not have been off the mark. Significant statements of national military doctrine are not made hastily. It is

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90 President Jacques Chirac, Speech during visit to Strategic Air and Maritime Forces at Landivisau, January 29, 2006, at: http://www.elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2006/speech_by_jacques_chirac_president_of_the_french_republic_during_his_visit_to_the_stategic_forces.38447.html.

91 British Broadcasting Corporation International Reports, *Quotes from China, Taiwan Press*, Feb. 8, 2006, (citing *China Defense Daily*) (Lexis Academic).

92 People's Republic of China, Order of the President No.34, Mar. 14, 2005 (promulgating the law), at: http://taiwansecurity.org/News/2005/CD-140305.htm (English translation).

93 British Broadcasting Corporation, *Taiwan cannot rule out pre-emptive attacks on mainland,* Oct. 6, 2003 (LexisAcademic).

possible that the National Security Strategy of 2002 was already in the works and was designed to prepare the world for direct action against Iraq, one of whose justifications was a pre-emptive self-defense.

Significantly, not all states' claims of rights of pre-emptive self-defense which we have been able to find appear to contemplate a right to attack another state pre-emptively. Rather, the more common formulation appears to be a right to use force in a pre-emptive fashion against non-state entities employing what have come to be called "terrorist" methods. One variation on this leitmotif in statements by the U.S., France, and Australia, appears to be the right to strike pre-emptively against states only when there is a risk of terrorists acquiring weapons of mass destruction from a 'rogue state.' (That conclusion is perforce speculative, for we do not have access to secret "contingency plans" which may be based on much broader conceptions of pre-emptive self-defense.) Hence, the policy of pre-emptive strikes of many of the states reviewed here appears more narrowly confined to cases of 1) non-state entities, such as terrorists who may or may not possess weapons of mass destruction; and 2) states where there is a risk of terrorists acquiring weapons of mass destruction.

It is also noteworthy that many governments have explicitly refused to recognize the U.S. claim as indicative of or consistent with international law. Then-Chancellor Gerhard Schröder explicitly stated his disagreement with the U.S. claims to the right to pre-emption.[94] The Spanish Prime Minister, citing Iraq as an example of failure, stated, "pre-emptive wars, never again; violations of international law, never again."[95] The Islamic Conference of Foreign Ministers has similarly condemned "the principle of preemptive military strikes against any country under any pretext whatsoever."[96]

Thus, insofar as the college of jurists may have considered the claim to use military force pre-emptively as a serious erosion of international restraints on the use of force and, in the worst sense, simply as a euphemism for aggression, the examination of statements of political leaders made in the last five years in the contexts of national political debates may provide a modest degree, if not of comfort then at least the relief of concluding that it could have been worse. Very few of the more recent statements seem to contemplate or claim a right to direct preemptive attacks against other states. Only Iran and North Korea appear to sanction such action. Almost all of the remaining states seem to be focused on actions against non-state entities and, in virtually all the statements, the assumed

94 Interview with Bundeskanzler Gerhard Schröder in the ARD television show "Tagesthemen" (Jan. 29, 2003), at: http://www.bundesregierung.de/dokumente/-,413.465140/Interview/dokument.htm.

95 *Iraq proves pre-emptive wars fail*, Associated Press, May 3, 2004 (Lexis).

96 Final Communique of the Thirty-First Session of the Islamic Conference of Foreign Ministers, Istanbul, Republic of Turkey, para. 41 (June 16, 2004), reprinted in General Assembly, U.N. Doc. No. A/58/856 (July 21, 2004).

context appears to be serial conflicts, *i.e.*, continuing conflicts marked by intermittent explosions of violence, followed by relatively long periods of quiescence without, however, formal conclusion of the conflict, succeeded by renewed explosions of violence. In this respect, one wonders if the claimed right of pre-emptive self-defense may be subsiding into a right to initiate the use of force in ongoing overt conflicts, without awaiting a particular provocation. But even under these more limited circumstances, claims of pre-emptive self-defense would involve uses of force in an ever widening arena and any possible gain in the restoration of minimum order will have been secured at the cost of a geographical extension of the conflict. A pre-emptive attack on Iranian nuclear installations would, of course, depart from the trend we have described and signal a major change in the *jus ad bellum*.

Even if claims to pre-emptive self-defense are henceforth limited to military actions in protracted low-level conflicts rather than "Pearl Harbor" type initiations of inter-state war, it is clear that all of the claims are incompatible with conceptions of the lawful use of force in self-defense as understood by the International Court of Justice in its recent decisions. A discrepancy between practice and formal law – between myth system and operational code[97] – is hardly unique to the international legal system. But the uncertainty of precisely what the law prohibits is always an invitation to adventurism; adventurism with highly destructive and non-discriminating weapons is a particularly frightful prospect. In any event, if one were to hazard a prediction in this very fluid situation, it would be that a conception of lawful self-defense incorporating only the *Caroline* doctrine will continue for most matters, having been relaxed only for the so-called war against terrorism.

But just as this broad, but necessarily incomplete, survey may have provided some comfort, increasing legal mimetic effects may accelerate the drift away from the binary formulation of Article 51 towards a more vague, and possibly less stable, definition on the right to use force. Imitation is said to be the highest compliment. And in this instance, the United States has developed some unlikely – and from its perspective, undesired – admirers. Two of the three remaining "axis of evil" members, North Korea and Iran, quickly adopted the U.S. claim in potential defense of their own fragile international positions.[98] Russia specifically noted that it was not the first government to announce a policy of pre-emptive self-defense. According to Defense Minister Ivanov, "[w]hether we like it or not, the pre-emptive use of force in the modern world is a reality. While

97 W.M. Reisman, Folded Lies (1979).

98 President George Bush, "State of the Union Address," January 29, 2002 (noting Iraq, North Korea and Iran constituted an axis of evil), at: http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

this principle exists, we are not going to relinquish it voluntarily."[99] The House of Commons noted this very danger in requesting the Blair government to assist in developing a clear international consensus on the right to use force in self-defense. Otherwise, "there is a serious risk that this will be taken as legitimising the aggressive use of force by other, less law-abiding states."[100] Prime Minister Howard has rejected these claims, arguing that there has been "too great a tendency to impute a generalised intention on the part of the Untied States to adopt what you call a pre-emptive strike policy."[101]

But in the grip of such mimetic effects, the actual policy of the United States becomes less important than its imputed policy. In its examinations of evolving custom, international law will take account of the policies and practices of all nations. Although U.S. policy may now be more limited than initially claimed, other states may not have received that message and may reactively adopt exaggerated pre-emption policies with respect to their own latent adversaries, thus skewing assessments of international consensus and practice back toward a position which may ironically no longer be claimed by major powers. Hence, what appears to be a growing adoption of claims to pre-emptive self defense in limited circumstances may mistake political posturing for international consensus with grave consequences for both the expectation and eventuation of violence.

There are other covert costs to broad claims of preemptive self-defense. Although the U.S. doctrine not unreasonably aims to enhance its own security, wider adoption of a legal policy of preemptive self-defense may actually undermine it. States may, rightly or wrongly, appropriate the language of pre-emption to fit their individual security concerns – essentially "free riders" in the international legal system. For example, North Korea has justified its further development of nuclear weapons as essential to North Korean self-defense against U.S. claims of a right to pre-emptive self-defense.[102] Such invocations of U.S. policies to justify domestic measures is apparent in other areas impacted by the "war on terror." The UN Special Rapporteur on Independence of the Judiciary notes the downward spiral as states refashion U.S. policy for their particular local circumstances.

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99 British Broadcasting Corporation International Monitoring, *Russia Not Planning to Give Up Right to Pre-emptive Strikes*, Oct. 20, 2003 (Lexis).

100 House of Commons, Select Committee on Foreign Affairs Second Report, "Conclusions and Recommendations" December 17, 2002, para 154(r), at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/19603.htm.

101 John Howard, Prime Minister, Australia, Interview with Leon Delaney, Radio 2SM (Oct. 10, 2003) *See also*, *Where's the Red Line?*, Newsweek, February 17, 2003 (Lexis).

102 Foreign Ministry of North Korea, "Memorandum of DPRK Foreign Ministry," March 3, 2005 (accessed via LexisAcadmic)(stating "Therefore, it is quite natural that the DPRK has manufactured nukes for self-defence and continues to do so to cope with the policy of the Bush administration aimed at mounting a pre-emptive nuclear attack on it.").

> Based on the doctrine of counter-terrorism and sometimes even taking inspiration from the status of "enemy combatant," the governments of many States have adopted or strengthened legal instruments giving them powers of detention beyond all judicial control which, depending on the context, they use to detain terrorist suspects, political opponents, refugees or asylum seekers.[103]

These mimetic and free riding effects remained somewhat muted during the initial iteration of claims to a right of pre-emptive self-defense under the Reagan Administration. Perhaps this was due to the controls which two superpowers in a bipolar system exercised over the various states within their zones of influence. The point is not to be nostalgic about the Cold War but simply to note that because the controls exercised by the formal institutions of international law are not yet comparably effective, these implications should be borne in mind when contemplating the expansion of lawful unilateral military action.

The dangers of legal mimesis and free-riding are further amplified given the difficulty of the international community in formulating a consensus on defining "terrorism." Definitions establish a focus. Definitions of terrorism are particularly outcome sensitive precisely because they tend to delimit the range of lawful responses to them.[104] As a result, international politics, in proving itself unable to adopt a comprehensive definition, may be provoking even broader claims to pre-emptive self defense.

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103 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, U.N. ESCOR, Comm'n on Human Rights, 61st Sess., para. 36, Doc. No. E/CN.4/ 2005/60 (2005).

104 For further discussion of terrorism and international law, see Reisman, *Legal Responses to International Terrorism*, 22 Hous. J. Int'l L 3 (1999).

Chapter 5

The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy

Terry D. Gill

I Introduction

The adoption by the United States of a doctrine of pre-emptive, or even preventive, self-defense as part of its national security strategy, and its partial reliance upon that doctrine to justify the recent war against Iraq, has caused a great deal of controversy at both the diplomatic level and among international legal scholars relating to the permissibility of anticipatory or preventive self-defense in advance of an armed attack.[1] While much legal opinion seems to be in broad agreement that self-defense would be permissible in response to an immediate and manifest threat of an attack,[2] opinion diverges sharply on whether self-defense would be permissible in response to potential threats of an attack and, more especially, whether the notion of an immediate threat needs to be reexamined in the light of changed circumstances, such as terrorist threats and the possible use of weap-

1 National Security Strategy of the United States at www.whitehouse.gov/nsc/nss.html. A number of justifications were advanced by the US Government for the use of force against Iraq. Among these were references to the necessity of preventing Iraq from engaging in an attack with weapons of mass destruction upon the United States, US interests in the Middle East, or neighboring States, as well as the proliferation by Iraq of such weapons to terrorist movements. See "Pre-emption, Iraq and International Law" Comments by W.H. Taft IV and T.F. Buchwald in the *Agora* section of 97 *AJIL* (2003) 567.

2 A significant number of scholars oppose any notion of anticipatory or preemptive self-defense prior to the actual launching of an armed attack. These include, *inter alia*, I. Brownlie, *International Law and the Use of Force Between States* (1963), 275-78; Bothe, "Terrorism and the Legality of Pre-emptive Force" in 14 *EJIL* (2003) no. 3, 227 and Randelzhofer, "Article 51" in B. Simma (ed.) *The Charter of the United Nations: A Commentary* (2nd ed. 2002), 803. Another group of scholars takes the position that anticipatory self-defense is permissible within the strict limits of the *Caroline* criteria, e.g. C. Greenwood, "International Law and the Pre-emptive Use of Force" in 4 *San Diego International Law Journal* 7 (2004); D. Bowett, *Self-Defense in International Law* (1958) at 185-86; T. Franck, *Recourse to Force* (2002), 97 *et seq.*; and Waldock, "The Regulation of the Use of Force by Individual States in International Law" in 81 *RCADI* (1952), 451 *et seq.* at 462-64.

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ons of mass destruction by terrorist organizations and so-called rogue regimes.[3] Other points of controversy include such questions as what constitutes an immediate threat of an armed attack, what is the proper interpretation of the relationship between Charter law and customary law relating to self-defense, and what is the proper and desirable relationship between the right of self-defense and the rest of the law governing the use of force?

This article will address these questions, hopefully contributing to this topical debate through a combination of legal reasoning and an examination of State practice. The starting point is that self-defense is a right, grounded in both Charter and in customary law, which allows some degree of anticipatory action to counter a clear and manifest threat of attack in the immediate, or at least proximate, future, within the confines of the well-known and widely accepted 1837 *Caroline* incident criteria, relating to necessity, immediacy and proportionality.[4]

In this context, it is submitted that these criteria still provide a workable and acceptable framework for analysis, but are not a substitute for analysis itself. Those criteria must be applied in context, taking into account the credibility and urgency of a specific threat, the consequences of suffering the incipient or probable attack and the availability, or lack thereof, of feasible alternatives to the taking of action in self-defense. In short, the *Caroline* criteria must be applied in the light of other factual and legal considerations and were never meant to be, nor can they be seen in isolation, as mere abstractions, without due regard for the relevant circumstances of each particular situation. To demonstrate this, it will be necessary to examine a number of examples from State practice in which varying degrees of anticipatory action in self-defense were applied. Consequently, much of this article will be devoted to an examination of the permissible limits to the exercise of anticipatory self-defense, taking into account the analytical framework provided by the *Caroline* criteria and the relevant circumstances of each particular case or scenario which is used.

Following this examination of State practice in relation to the limits of anticipatory self-defense and the question of the relevance and functions of the *Caroline* criteria, an analysis will be conducted of the shortcomings in the National Security Strategy of the United States, particularly, of the challenge it poses to the contemporary *jus ad bellum* in attempting to redefine the notion

3 Since the events of "9-11", a third body of opinion has emerged within the debate over the parameters of self-defense. It suggests that pre-emptive action is justified not only within the traditional limits of the *Caroline* doctrine against immediate and manifest threats, but also to counter threats which are more remote in the future. See e.g. Sofaer, "On the Necessity of Pre-emption" in 14 *EJIL* (2003) no. 2, 209; and the comments by Taft and Buchwald referred to in n. 1, *supra*.

4 The *Caroline* incident was referred to by the International Military Tribunals in Nuremburg and Tokyo, in debates in the UN Security Council and in academic literature relating to self-defense. See nn. 28, 37, 42 and 44 and accompanying text *infra*.

of self-defense and its place and function within the contemporary legal regime concerning the use of force, including the UN collective security system. The article concludes with a discussion of temporal aspects of self-defense in the context of the rules and principles governing the use of force, in particular the respective roles of self-defense and the UN collective security system.

To avoid possible confusion, some preliminary terminological clarification is useful. The term "preemptive self-defense" will be used here to denote the exercise of self-defense in relation to manifest threats of armed attack which are in progress or at the point of being launched. "Preventive action" or "preventive self-defense" refers to the exercise of self-defense in relation to threats of attack which are somewhat more remote in time, but are nevertheless manifest or at least reasonably probable under the circumstances prevailing at the time.

The phrases "anticipatory self-defense" or "anticipatory action" apply to both variants. None of these terms are meant to refer to action undertaken in response to the mere possibility of an attack being launched at some indeterminate point in the future in response to a threat which has not yet manifested itself in any substantial sense. "Immediacy" is the notion of an immediate or imminent threat of attack within the context of anticipatory self-defense, although secondary consideration will be given to the term as one of the conditions for the exercise of self-defense in a more general sense.[5] This article will be rounded off by a number of final conclusions.

II The Legal Basis of the Right of Self-Defense

A Substance of the Right of Self-Defense and its Relationship to Article 2(4) and Chapter VII of the Charter

The starting point for any discussion of the substance of self-defense and its place within the contemporary *jus ad bellum* is the prohibition of the use of force contained in Article 2(4) of the Charter and in customary international law. The prohibition of the use of force has been the linchpin of the international legal

5 Immediacy can be used in two different contexts. Firstly, it occurs in relation to the concept of an imminent or immediate threat of an attack within the context of anticipatory self-defense. This usage will be explored in this article. Secondly, immediacy can be interpreted as a requirement for taking action in self-defense within a short span of time subsequent to an attack in order to distinguish self-defense from reprisal. Used in the latter sense, immediacy is often seen as one of the requirements for the exercise of self-defense alongside necessity and proportionality. See in relation to this latter context, *inter alia*, Y. Dinstein, *War, Aggression and Self-Defence*, (2nd ed. 1997) 202, 215, 219-20 and 235-37; Ago, "Addendum to Eighth Report on State Responsibility", (1980) II (1) *ILC Yearbook* 13 at 69; and Schmitt, "Preemptive Strategies in International Law" in 25 *Mich. J. Int'l Law* (2003) 513 at 533. Immediacy used in this sense will be given secondary consideration in this article. See paragraph 4 *infra*.

system since the Charter came into force in 1945. Although subjected to differing interpretations by scholars, and violated on numerous occasions, it nevertheless remains an almost universally accepted fundamental rule of international law and relations, one widely recognized as having a *jus cogens* character.[6] Much controversy has centered on whether the prohibition was intended to bar uses of force not explicitly treated as exceptions in the Charter, such as humanitarian intervention and national liberation struggles. Since those topics have no direct bearing on the scope of the right of self-defense, they need not concern us here, beyond stating that legal opinion is in wide agreement that the only clearly recognized exceptions to the prohibition are those the Charter sets forth – the maintenance of collective security by or through Security Council mandate and self-defense. Consequently, any use of force at the inter-State level which does not qualify as action by or on behalf of the Security Council in the maintenance of collective security or as a lawful exercise of the right of self-defense is *prima facie* illegal, although there may be extenuating circumstances in relation to cases of humanitarian intervention, or support for "national liberation" which must be taken into account in assessing what the legal consequences of such cases should be.[7] The right of self-defense is predicated upon the notion that every State has the "inherent" right to defend itself. Article 51 of the Charter was something of an afterthought, and did not figure in the original drafts of the Charter. It was only included relatively late in the *traveaux* leading to the Charter's adoption at the behest of Latin American States seeking a guarantee of the legality of regional collective self-defense arrangements, such as the Act of Chapaltupec.[8] This collective variant on the right of self-defense allows for States to assist each other in response to an armed attack on the basis of either a pre-existing treaty providing for mutual assistance, or an *ad-hoc* request.[9]

Since self-defense is an exception to the prohibition, some authors argue that it must be applied strictly in accordance with Article 51's text.[10] This is an understandable position, for, as a rule, legal doctrine prescribes that exceptions to general rules should be applied restrictively.[11] However, this approach ignores both the drafting history of Article 51 and the fact that it was never intended to

6 See *e.g.* Dinstein, *op. cit. supra* n. 5 at 101-16.

7 See n. 74 *infra.*

8 Bowett, *supra* n. 2, 182-3, L. Goodrich, E. Hambro and A. Simons, *Charter of the United Nations* (1969), 342-44; Waldock, *supra* n. 2, 503-04. The Act of Chapaltupec was concluded on 22 March 1945 and provided for mutual assistance between the Inter American States in the event of external aggression and was published in *Dept of State Bull.* XVI, 967-70.

9 Dinstein, *supra* n. 5, 249, O. Schachter, *International Law in Theory and Practice* (1991) 155.

10 *E.g.*, C. Gray, *International Law and the Use of Force* (2002) 86-7.

11 R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed. 1992) Vol. 1 "Peace", Parts 2-4 at 1279.

completely codify the law of self-defense. Instead, it primarily sought to safeguard the right of mutual assistance provided for in regional self-defense agreements and delineate the relationship between the right of States to exercise self-defense and the system of collective security contained in Chapter VII of the Charter. This relationship is spelled out in detail in Article 51, while the substance of the right is merely mentioned. No reference is made as to what constitutes an armed attack, when such an attack can be said to have begun, or any of the other conditions, such as necessity and proportionality.

Consequently, the right of self-defense cannot be interpreted solely on the basis of Article 51 of the Charter. Where Article 51 is specific it will clearly prevail, as for instance in subjecting the exercise of self-defense to the requirement of an armed attack, or in providing for the Security Council as *the* ultimate arbiter of the continued necessity of the exercise of self-defense. Moreover, Article 51 should not be seen in isolation from Article 2(4) of the Charter, and this applies to the right of self-defense in a more general sense. However, where Article 51 is incomplete, as in leaving open what constitutes an armed attack and when an attack has commenced, or silent, as in relation to other requirements governing self-defense, recourse must be had to customary law as a means of complementing the Charter *lex scripta*. This applies both to pre-Charter customary law as well as post-Charter customary law relating to self-defense, unless it can be conclusively demonstrated that such custom has come into disuse or would be in conflict with the Charter.

Furthermore, without clear evidence that an older customary rule has been replaced by a newer one, there is no reason to automatically assume the demise of pre-charter customary law relating to self-defense as a matter of legal methodology of Charter interpretation.[12]

Having established that self-defense is a right having a dual customary Charter basis and that Article 51 was intended to embed that right into the Charter system of collective security in conjunction with the Charter prohibition of the use of armed force, it is necessary to address what this means in terms of self-defense's place within that overall system.

Since Article 2(4) of the Charter prohibits the use of force, it follows that self-defense is a right of States, acting individually or collectively, to respond to illegal force, with legally sanctioned force aimed at repelling the attacking party. As such, only one "side" to a conflict can have the right of self-defense. There is no self-defense against self-defense, or self-defense against action carried out on another legal basis, such as the maintenance of collective security by or through

12 This follows from the general doctrine of interpretation of sources. I. Brownlie, *Principles of Public International Law* (4th ed. 1990), 3-4; Jennings and Watts, *supra* n. 11, 25-26; R. Bernhard, "Customary International Law" in *Encyclopedia of Public International Law* (2003), Vol. 7, 61-62.

a mandate of the UN Security Council or regional organization.[13] Furthermore, since self-defense is an exception to the overall prohibition of inter-State force, it follows that it may in principle be conducted on the territory of the State(s) whence the attack originated and in international sea and airspace, in addition to the defending State's own territory. The territory of neutral or non-belligerent States is inviolable, except when it is being used as a launching pad for attacks or as a base of operations which contributes to the attack.[14]

Nothing in either Article 51 or customary law says that attacks can only be carried out by States. Although the presumption at the time the Charter was drafted was that States were the logical candidates to carry out aggression and Article 2(4) is addressed to States, the right of self-defense is not restricted to attacks carried out by States.[15] Any act of force which can be deemed to constitute an armed attack can trigger the right of self-defense, irrespective of whether such an attack is carried out by official State organs, by a State acting indirectly through other agents, such as armed bands, militias, terrorist groups and so forth, or by a non-State entity which is capable of mounting an attack on its own. Nothing in either Article 51 or in customary law restricts the right of self-defense to responses against attacks which are carried out by official organs of another State. However, it is clear that only States can exercise the right of self-defense under international law. Other forms of self-defense, such as that of individuals against illegal assault, are subject to the rules governing self-defense under national law.[16]

Article 51 is silent (or at best only indicative) regarding what constitutes an armed attack, or, indeed, other criteria for the exercise of self-defense, such as necessity and proportionality. This is one clear example of the complementarity between the customary and Charter law relating to self-defense. We will return to those criteria further on in this article, but it is important to point this complementarity out, even at the risk of some repetition, in view of the ongoing

13 See *e.g.* Dinstein, *supra* n. 5, 177.

14 The territorial scope of self-defense is, moreover, subject to proportionality, which can have geographical connotations alongside other considerations. See e.g. Dinstein, *supra* n. 5, 175 *et seq.* and Schachter, *supra* n. 9, 153-54.

15 See, *inter alia*, N. Schrijver, "Responding to International Terrorism: Moving the Frontiers of International Law for 'Infinite Justice'" in 48 *Netherlands International Law Review* no. 3 (2001), 271 ff; *ASIL Insights*, www.asil.org, "Terrorist Attacks on the World Trade Centre and the Pentagon" comments by Kirgis *et al.*; T.D. Gill, "The Eleventh of September and the Right of Self-Defense" in W.P. Heere (ed.) *Terrorism and the Military: International Legal Implications* (2003), 24-30.

16 Self-defense as a legal concept has its roots in natural law doctrine. In that context, it makes no clear distinction between personal self-defense and self-defense at the international level. See e.g. Bowett, *supra* n. 2, 3-5 and Dinstein, *supra* n. 5, 176. However, in (modern) positive law they are distinct rights. See in addition to these sources, *inter alia*, Bryde, "Self-Defense" in R. Bernhardt, *Encyclopedia of Public International Law*, Vol. 4, 212; Brownlie, *op. cit. supra* n. 2, 216 *et seq.*

controversy and confusion regarding the relationship between the two sources containing the law of self-defense.

Where Article 51 is not silent is on the relationship between the right of self-defense and the UN collective security system. It is clear, both from the text of this provision and the intentions of the framers of the Charter, that self-defense was intended to function as a more or less temporary adjunct to the power and authority of the Security Council to take action to maintain or restore international peace and security through the taking of effective collective measures to that end.[17]

The collective security system as envisaged in Chapter VII of the Charter provides the Security Council with broad discretion and extensive powers to take a variety of measures in response to threats to, or breaches of, international peace, including the proactive use of force against an aggressor.[18] However, this does not take the place of the right of self-defense unless and until the Council determines to act. Until the Council takes the necessary measures to restore international peace and security, there can be no doubt that a State faced with an attack retains the full right to defend itself or to assist another State (or other States) confronted with an attack on the basis of a request or other form of consent, within the customary law limitations on self-defense. Of course any action taken in self-defense must be reported to the Security Council and may find itself subject to its scrutiny, and ultimate sanction or disapproval.[19] Essentially, the Council can do one of three things in the face of a State which has invoked the right of self-defense. The Council can decide to endorse the invocation and take action to assist the State which has done so. In such a case, the Council's action will complement the measures taken in self-defense, or even subsume the States self-defense measures into a broader collective effort to restore international peace and security. A simple endorsement is just that, while further reaching collective measures will function alongside the State's action in self-defense, unless the Council determines otherwise.

The second option open to the Council is to censure the State's invocation of self-defense as illegal or inappropriate under the circumstances. The Council can even disallow a State which has a right to invoke self-defense from continuing to exercise that right, provided it takes the measures necessary to restore

17 See, *inter alia*, Articles 1(1), and 51 of the Charter. This is especially clear from the wording of Article 51 and is often referred to in the literature. See *e.g.* Dinstein, *supra* n. 5, 208; Waldock *supra* n. 2, 495; and Gray, *supra* n. 10, 104-5.

18 See *e.g.* Dinstein, *supra* n. 5, 279 *et seq.*; Goodrich, Hambro & Simon, *supra* n. 8, 293 *et seq.*; Koskenniemi, "The Place of Law in Collective Security" in N. White (ed.) *Collective Security Law* (2004), 5; Greenwood, *supra* n. 2, 19 and Frowein and Krisch "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" in B. Simma (ed.) *The Charter of the United Nations* (2nd ed. 2002), 701 *et seq.*

19 Dinstein, *supra,* n. 5, 203-04.

peace and security or the attacker ceases and desists from continuing with its attack and provides the necessary cooperation to assure the discontinuance of its attack. If neither of these is forthcoming, the attacked State retains its right of self-defense. Security Council measures aimed at restoring international peace and security must have that effect before they legally deprive a State of its right of self-defense.[20]

The third possibility has occurred most often. In this scenario, the Council fails to act, or is unable to act, beyond perhaps simply condemning the attack or noting the existence of a breach of the peace, because of the (threat of a) veto. This was the situation during most of the Council's first forty-five years. Even now, in the post-Cold War era, there are any number of reasons why the Council may fail to act in response to a threat to or breach of the peace, although that is less likely than previously. In the event the Council takes any action short of effective measures aimed at restoring international peace, or fails to take action at all, a State faced with an armed attack retains the right to act in self-defense, either individually or collectively with other States. However, while it is up to the State which invokes self-defense to do so in the first instance, it is the Council which ultimately has the last word, provided it is prepared to back its words with action if demanded by the situation. Any action in self-defense will be subject to the Council's ultimate legal and political approval or condemnation, or failing that, the international community's more general approval or disapproval.[21] This is what Professor Dinstein has referred to as the "two phase rule" governing self-defense.[22] It is this incorporation of self-defense into the system of the Council's overall primary responsibility for the maintenance of international peace and security which is the most important feature of Article 51 of the Charter, not any real or imagined intention to significantly alter the substance of that right through its partial codification into the Charter.[23]

B The Dual Treaty-Customary Basis of Self-Defense and the General Criteria for the Exercise of the Right

In the preceding section, we have determined that self-defense is a right grounded in both Charter and customary law and examined its place within the overall Charter system regulating the use of force. In that context it was pointed out that the primary purpose underlying the inclusion of Article 51 was to safeguard the

20 *Id.* 206-07. See also, *inter alia*, Schachter, *supra* n. 9, 401-04; Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter" in 26 *Neth. Yrbk Int'l Law* (1995) 33, at 90 ff.

21 Schachter, *supra,* n. 9, 146-50; Waldock *supra*, n. 2, 495.

22 Dinstein, *supra*, n. 5, 203-04.

23 Bowett, *supra*, n. 2, 184-85; Waldock, *supra*, n. 2, 496-97.

right of mutual assistance provided for in regional self-defense treaties, and more especially, to incorporate self-defense into the Charter system regulating the use of force, rather than to set out the criteria governing its exercise. For an indication of the criteria and conditions governing exercise of self-defense, we must necessarily turn to customary law, both that which existed when the Charter was drawn up and that which has emerged since then.

The text of Article 51 predicates the exercise of the right of self-defense upon the occurrence of an armed attack.[24] However, Article 51 gives us no indication as to what constitutes an armed attack, or still less, when such an attack can be said to have commenced or to have been completed. It is clear from an examination of the *traveaux preparatoires* that less attention was devoted to these questions than to the safeguarding of the right of collective self-defense, which was seen as a category somewhat distinct from individual self-defense.[25] There is no evidence that the drafters intended to alter the right of self-defense as it then existed in customary law, or to substitute Article 51 in its place.[26]

Nevertheless, a school of interpretation has emerged which purports to limit the exercise of self-defense to a strict and literal interpretation of the text of Article 51.[27] The problem with this approach, aside from the fact that it ignores the drafting history, is that it relies on a text which is ambiguous and incomplete. It is impossible, relying solely on Article 51, to determine what is meant by the term "armed attack", or even the phrase "if an armed attack occurs", much less to gain an indication of other conditions that govern the use of force in self-defense.

There can be little doubt that the right of self-defense has customarily included at least some degree of anticipatory action, using the well known *Caroline* incident as a framework for reference. This was certainly the case in 1945 when the Charter was drafted, as is evidenced by the reliance of the International Military Tribunals in Nuremberg and Tokyo upon that precedent in decisions relating to 1940 the German invasion of Norway and the Declaration of War

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24 The text of Article 51 reads in relevant part as follows: "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 ...." For a discussion of the notion of an armed attack, see, *inter alia*, Dinstein *supra* n. 5, 182 *et seq.*; Randelzhofer, "Article 51" in Simma, *supra* n. 2, 792 *et seq.;* and Gill "The Law of Armed Attack in the Context of the Nicaragua Case" in 1 *Hague Yrbk Int'l Law* (1988), 30 ff.

25 See sources cited in n. 8 *supra*. See additionally, Kearley, "Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent", in 3 *Wyoming Law Review* 663, 680-82.

26 See the sources cited in nn. 8 and 23 *supra.*

27 Among the authors who rely upon a strict and literal interpretation of Article 51 are, *inter alia*, Brownlie, *supra* n. 2, 271-72; Gray, *supra* n. 10, 98-99; and Cassese, *International Law* (2nd ed. 2005) 254-55.

by the Netherlands (East Indies) against Japan immediately subsequent to the attack on Pearl Harbor.[28] Without any evidence which would indicate that this has changed, there is little reason to assume that at least some degree of anticipatory self-defense no longer exists within customary international law. The scope of the anticipatory dimension is examined later.

Some indication of what constitutes an armed attack in a more general sense appears in the International Court of Justice's *Nicaragua* judgment.[29] In that decision, the Court, relying heavily upon the General Assembly's "Definition of Aggression" declaratory resolution and the particular circumstances of the *Nicaragua* case, determined that an armed attack consisted of a significant direct use of force by one State against another, as well as the sending by or on behalf of a State of armed bands, militias and the like to carry out armed actions when such activities were comparable in scale and effects to a conventional armed attack carried out by regular forces. In addition, the possibility was admitted that the substantial involvement of a State in actions carried out by armed bands, irregulars and so forth, could constitute an armed attack under the same provision. Other forms of support which fell short of this threshold were deemed not to constitute an armed attack, irrespective of their effect upon the target State.

This rather restrictive rendition of an armed attack was heavily criticized at the time by a number of the judges in dissenting opinions, as well as by numerous commentators,[30] including the present writer, as being unrealistic and for failing to take into account that other considerations could lead to different results under different circumstances. In addition, evidence which emerged later concerning Nicaragua's conduct indicates that the Court may have been mistaken in accepting at face value its version of the facts.[31]

Be that as it may, the *Nicaragua* decision, while authoritative, should not be seen as solving the question of what forms of armed action, and involvement and support for insurgencies, terrorist acts and the like, constitute an armed attack

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28 See Bowett, *supra* n. 2, 141-44. For the Nuremburg Judgment relating to the relevance of the *Caroline* criteria to the German plea of preventive self-defense in relation to its invasion of Norway, see *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (HMSO 1946), 28-30. For the declaration of war by the Netherlands on Japan, see *Judgment of the International Military Tribunal for the Far East*, 994-5.

29 *ICJ Reports* 1986, 14, para. 195, 103.

30 In addition to the dissenting opinions of Judges Jennings and Schwebel, see, *inter alia,* Dinstein, *supra* n. 5, 192-94 and 199-202; Hargrove, "The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense" in 81 *AJIL* 135 (1987); Franck, *supra* n. 2, 62-3. For a *critique* of aspects of the Court's Judgment by the present author, see Gill *op. cit. supra* n. 24, 45-50.

31 See T. D. Gill, *Rosenne's The World Court: What It Is and How It Works*, 6th rev. ed., (2003) 125.

which would trigger the right of self-defense. Significantly, the Court refrained from pronouncing upon the question of anticipatory self-defense.

More recently, in the *Oil Platforms* decision, the Court set a high burden of proof on the State invoking the right of self-defense, without clearly defining the standard of proof, and offered a number of rather ambiguous indications concerning the threshold for an armed attack.[32] However, despite a somewhat deceptive numerical majority in the *dispositief,* a careful reading of the judgment and the individual opinions reveals a heavily divided Court on both the interpretation of many self-defense issues, as well as the propriety of even pronouncing upon them. These considerations should be taken into account in treating this decision as authoritative precedent on issues of self-defense.[33]

What does become clear, however, is that an armed attack, however defined, is a strict requirement for the exercise of self-defense. It is submitted that the Court's approach in *Nicaragua* and *Oil Platforms* is overly abstract, unrealistic and somewhat imbalanced, in that it relies too heavily on theoretical definitions of an armed attack, rather than taking sufficient account of the relevant circumstances. The Court is further prone to take denials of involvement in armed action by the (alleged) attacker too much at face value, while expecting the State which invokes self-defense to provide conclusive evidence not only of its own conduct, lack of alternatives and motives, but also those of the attacking party.

In addition to the requirement of an armed attack, or a (probable) impending attack, in cases of anticipatory self-defense, there is little controversy regarding the further requirements of necessity and proportionality. These have long been accepted in customary law and are echoed in both of the abovementioned

32 See *e.g.* 42 ILM (2003) 1334 for the ICJ Judgment in the *Oil Platforms* case. For the Court's pronouncements on the burden of proof in relation to the existence of an armed attack on the US reflagged tanker *Sea Isle City* by an anti-ship missile allegedly fired from the Iranian held Fao Peninsula and a mine attack on the US warship *USS Samuel B. Roberts*, see paras. 53-61 at 1355-57 and paras. 69-71 at 1359-60. The Court indicated that the evidence was respectively "suggestive" and "highly suggestive" in relation to those two incidents, but insufficient to establish Iranian involvement. The Court did not indicate what the requisite burden of proof is to establish involvement in an armed attack. This and other aspects of the Court's judgment were vigorously criticised by a number of the judges in their individual opinions. See, *e.g.*, Judge Higgins, *id.* 1384-86, Kooymans, *id.* 1396-97, Buergenthal, *id.* 1413-16, and Owada, *id.* 1424-25.

33 The Court's decision was taken by 14-2 votes on the question of whether the US action against Iranian oil platforms was justified under the law relating to the use of force *and* on the finding that the US had not breached its obligations relating to the freedom of commerce under a 1955 bilateral FCN Treaty. By joining these two issues into one paragraph of the *dispositief*, the optical illusion was created of near unanimity. This was not the case. On the other hand, there can be no doubt that a significant majority within the Court found the US reliance on self-defense unwarranted.

Court decisions, although one finds little indication of what they mean in practice in either decision.[34]

This is not necessarily as problematic as it might sound, since both criteria obviously have to be applied in relation to the relevant circumstances. Nevertheless, some indication of what they mean in a general sense is unavoidable, leaving discussion of their application to anticipatory self-defense, and of the notion of immediacy, to later in this article.

Necessity relates to the existence of an ongoing armed attack, a credible threat of an impending armed attack or the clear probability of a (renewed) attack, as well as to feasible alternatives to taking armed action in self-defense.[35] The existence of an armed attack can consist, in addition to the actual use of force, of the illegal ongoing occupation of territory, military preparations for continuing operations and so forth. Feasible alternatives can include, *inter alia*, the acceptance of a ceasefire, the negotiated withdrawal of forces, the discontinuance of hostile activity, the adoption and implementation of effective collective measures by the Security Council or, in some cases, the possibility of forestalling an incipient or impending attack by the use of alternative means, such as law enforcement.

Proportionality in connection with self-defense relates both to the overall scale and effect of the attack, and to what is required under the circumstances to repel it and put an end to the threat of further attacks. If an attack is simply an isolated incident, restricted in scale, locale and time, self-defense will correspondingly be limited to what is necessary to ward off the attack. If, however, an armed attack consists of a series of related incidents over a period of time, proportionality would allow for a larger scale response aimed at putting an end to what is in effect a phased attack. In the case of a large scale attack designed to significantly disrupt the target State, or take over (part of) its territory, proportionality would allow waging a full scale war in self-defense to reduce or eliminate the attacker's capacity to conduct military operations, or otherwise continue the attack. This could necessitate, in some cases, the total defeat of an attacking State and the replacement of its government with one which is ready to meet its international obligations.

The essential feature of self-defense is its purpose of ending the illegal situation posed by the armed attack. A State may use the necessary counter-force to achieve that end, but no more than necessary under the circumstances. This is what defines it and distinguishes it from other forms of the use of force, both

34 For the Court's references to necessity and proportionality in the *Nicaragua* decision, see *op. cit. supra* n. 29, para. 194 at 103. For the Court's references to these criteria in relation to the *Oil Platforms* decision, see *supra* n. 32, 1362.

35 Necessity and proportionality as criteria for the legal exercise of the right of self-defense can trace their roots back to at least the *Caroline* incident (see sec. C below). For references to and some description of necessity in the literature see, *inter alia*, Dinstein, *supra* n. 5, 202-3, and Gray, *supra* n. 10, 105-8.

legal and illegal. This has always been its essential characteristic under customary law and it remains so today.

C The Caroline *Case as the Starting Point and Dividing Line in the Discussion of the Temporal Dimension of Self-Defense*

While there are some international lawyers who, relying on a literal textual interpretation of Article 51, reject the possibility of any form of anticipatory self-defense altogether, most authorities and States are prepared to concede the possibility of some degree of anticipatory action within what are frequently referred to as the "strict criteria" of the *Caroline* case.[36] The *Caroline* incident (a more accurate term, since it never came before any court or tribunal) is generally regarded as the reference point for any discussion of anticipatory self-defense, as well as the criteria governing the use of force in self-defense more generally. The incident has been commented upon so frequently that it is hardly necessary to go into great detail about what occurred.[37] The correspondence between Secretary of State Webster, the representative of the British Crown, Lord Ashburton, and the British diplomatic representative to the United States, Mr. Fox, is primarily relevant for two reasons.

Firstly, it laid out the general criteria and framework of analysis for the exercise of self-defense, which included anticipatory self-defense in pre-Charter customary law. The acceptance by both the British and American governments of the principle that self-defense was relevant in situations where the necessity to act in anticipation of a threatened (incipient or probable) armed attack was "instant, overwhelming, leaving no choice of means and no moment for deliberation" clearly indicates that anticipatory self-defense was an accepted part of traditional customary law.[38]

Secondly, the reference to this general framework for analysis and these criteria by both the Nuremberg and Tokyo Tribunals demonstrate that they were still considered customary law as the Charter was being drafted and enacted.[39]

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36 For example of authors adhering to the strict or literalist approach to Article 51 see nn. 2 and 27 *supra*. Examples of authors who acknowledge or support a right of anticipatory self-defense are provided in n. 2 *supra*. Another authority within this group includes Judge Dame Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994), 242-43.

37 See, *inter alia*, M. Byers, *War Law* (2005) 53-4; Brownlie, *op. cit. supra* n. 2, 42-3; Dinstein, *supra* n. 5, 243-4; Franck, *supra* n. 2, 97-98, *etc.* The most authoritative article on the *Caroline* incident remains without doubt that by Jennings, "The Caroline and McLeod Cases" in 32 *AJIL* (1938) 82 *et seq.* The primary source for the *Caroline* incident is the exchange of correspondence between Webster and Fox in 29 *BFSP*, 1137-8 and Webster and Ashburton in 30 *BFSP*, 195 *et seq.*

38 Jennings, *supra* n. 37, 92.

39 See n. 28 *supra.*

Since most authorities accept this as a given, and because there is no convincing evidence that the *Caroline* framework of reference or criteria have fallen into disuse or have been replaced by a new rule of customary or conventional law (since Article 51 of the Charter was never intended to have this effect), we can safely assume that *Caroline* still forms part of the customary law relating to self-defense.

However, the *Caroline* framework and criteria have been subjected to reinterpretation and rejection on a number of other grounds, especially in light of recent events. On the one hand, a group of authors has consistently rejected any form of anticipatory self-defense, notwithstanding its recognition as customary law at the time the Charter was being drawn up.[40] Another group, while acknowledging the *Caroline* criteria, takes the position that it only would apply to incipient attacks or to those already launched, but which have yet to reach their point of impact.[41] A third group accepts, albeit to different degrees, the proposition that *Caroline* allows for anticipatory action in the face of an immediate, or at least a reasonably proximate, threat of attack which has not yet been launched, but is very likely to be launched within the near future.[42] Finally, a fourth group, that has emerged since 11 September 2001, argues that the concept of "immediacy" has to be reinterpreted in the light of new circumstances, such as the threat posed by terrorists and "rogue regimes" suspected of possessing, or seeking, weapons of mass destruction. This group would allow for anticipatory action in response to the hypothetical possibility that an attack may occur at some indeterminate point in the future. It is a position taken in the US September 2002 National Security Strategy (NSS) and by those authors who have come out in support of it.[43]

This admittedly oversimplified summary of the positions regarding the continuing relevance of the *Caroline* criteria raises a number of questions concerning the interpretation of such an incident and general statement of principles.

The first of these is what *Caroline* actually says regarding the possibility of taking anticipatory action. Does *Caroline* limit the exercise of self-defense to

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40 Among those who reject anticipatory action altogether are the sources referred to in nn. 2 and 27 *supra*. Authors who concede the possibility of anticipatory or interceptive action strictly within a restrictive sense of responding to an incipient attack or one which has been initiated, but has not yet crossed an international frontier or reached its target, include Dinstein, *supra* n. 5, 188-190, and perhaps Waldock, *supra* n. 2, 497-98.

41 Authors who concede the possibility of anticipatory or interceptive self-defense in relation to incipient attacks include Dinstein, *supra* n. 5, 188-90, and, perhaps, Waldock, *supra* n. 2, 497-98.

42 Authors who take the position that *Caroline* allows for anticipatory action in response to a clear threat of an attack which has yet to be initiated include Bowett, *op. cit.* n. 2 at 185-86; Franck *op. cit.* n. 2, 97 *et seq.*; Greenwood, *op. cit.* n. 2, 13-14, and Higgins, *op. cit.* n. 36, 242.

43 *Supra,* nn. 1 and 3.

situations in which an attack has actually commenced, but has yet to reach its target, as the rejectionists of anticipatory self-defense argue? Was this the state of the law, either at the time of the *Caroline* incident or in 1945 when it was applied by the International Military Tribunals? If so, when does an armed attack actually commence? If, on the other hand, *Caroline* applies to threats of attacks, how immediate do they have to be? Would this include threats which are more remote in time than the period immediately preceding the actual launching of an attack? If so, how much more remote and does this include potential threats, as supporters of the current US NSS contend? If not, should immediacy be reinterpreted in the light of (supposedly) changed circumstances?

More fundamental, perhaps, is the question of how a precedent such as *Caroline* should be viewed in the first place. Were Secretary Webster's words meant to serve as guiding principles to be interpreted in the light of all relevant circumstances or a set of abstractions which froze the issue of anticipatory self-defense into the confines of the nineteenth century prose used to resolve a particular diplomatic incident?[44]

44 The *Caroline* incident was but part, albeit an important and at the time emotive one, of a larger set of issues which complicated the relations between Great Britain and the United States. These include, *inter alia,* the resolution of a frontier dispute dating back to the American War of Independence involving the border between America's New England States and British North America. Neither side was interested in a military confrontation, although, if handled differently, the *Caroline* incident could easily have resulted in war. Webster as Secretary of State sought to resolve the incident in such a way that America's territorial integrity and sensitivities would be respected and British freedom of action to intervene militarily into the US territory along the long and lightly defended US-Canadian border would be curtailed as far as possible. As the weaker party in the controversy, these goals were reflected in the very restrictive definition of self-defense used by Webster in his letter of 24 April 1841 to the British Envoy to the United States, Mr. Fox (repeated later in his correspondence with Lord Ashburton). The reply by Ashburton acknowledging the parameters of self-defense, while skillfully insisting that the British action had met the conditions set by Webster, was intended to facilitate an amicable solution and contribute to an overall settlement of the issues besetting Anglo-American relations. Their mutual commitment to restraint and the achievement of a compromise solution resulted in the Webster-Ashburton Treaty of 1842, which effectively resolved the outstanding controversies affecting the relations between the two countries. This would not have been possible without a face-saving compromise on the *Caroline* and McLeod issues which satisfied the interests of both parties. It should be emphasized that while the *Caroline* incident took place at a time that States were still legally free to resort to war, the United States and Great Britain were not at war when the incident took place, nor did they want to go to war. Consequently, Great Britain required a legal justification for taking armed action on US territory as a "measure short of war", which is the reason behind the diplomatic correspondence subsequent to the incident, and, more to the point, why this incident has had a continuing legal significance to the present day in an area when the use of force is subject to legal regulation. For an authoritative treatment of the diplomacy surrounding the *Caroline* incident within the context of the overall complex dispute see in addition to the sources cited

An answer to these questions can only be found by looking more closely at actual practice regarding anticipatory self-defense, rather than simply treating Webster's phraseology in the *Caroline* incident as a sort of mantra in support of any particular interpretation of whether anticipatory self-defense exists or how far it may extend.

In doing so, one must be aware that every approach has its own particular limitations, and that interpretations of historical events, both distant and recent, will inevitably vary. Nevertheless, some attempt should be made if the question of what constitutes customary law is to mean more than an exercise in pure scholasticism that treats a particular choice of words as determinative.

Since we are dealing with the question of anticipatory self-defense in customary law, this will involve looking more closely at a number of examples of State practice in which self-defense was claimed, or actually exercised, in advance of an actual armed attack. The examples chosen will include some which occurred shortly before the Charter was adopted and some which have taken place since then. Among the examples are incidents characterized by varying degrees of preemption and in which varying degrees of reliance were placed upon anticipatory self-defense as a justification. In addition to the examples of actual State practice, some discussion of the controversy surrounding the US NSS has been included. This examination combines both discussion of how State practice relates to anticipatory self-defense and some legal reasoning of a more general nature. Both will figure prominently in the attempt to answer the questions regarding the significance of *Caroline* and its present day application to the controversy surrounding anticipatory self-defense.

III The Temporal Dimension of the Right of Self-Defense I: The Status of Self-Defense in Customary Law

A Introductory Remarks and Methodology Employed

We will now turn to an examination of anticipatory self-defense in State practice, covering the period from 1940 through the Third Gulf War of 2003. This period, extending over some sixty years, covers the immediate pre-Charter period, as well as the period since the Charter has come into force. Examples selected include a variety of situations in which anticipatory force was used. In each, the relevant facts will be set out briefly and a number of questions will be examined: the degree of immediacy involved in relation to the nature and credibility of the threatened or incipient attack; the availability of feasible alternatives to the taking of some form of anticipatory action; the probable consequences of failing to take action; and the consequences of the action taken, including the reaction

in n. 37 *supra*, K.E. Shewmaker (ed.), *Daniel Webster "The Completist Man"* (1990), 203 *et seq.*

of the international community. Where necessary, other relevant considerations will be addressed. After this examination of State practice has been conducted, a number of general considerations and conclusions will be discussed.

B An Examination of the Exercise of Anticipatory Self-Defense in State Practice

i The Neutralization of the French Fleet by the Royal Navy in 1940

In the spring of 1940, a disaster befell the Allies in Western Europe. The German *Wehrmacht*, employing a new concept of mobile warfare known as *Blitzkrieg*, succeeded in overrunning the Netherlands. It captured the powerful Belgian frontier fortress of Eben Emael, quickly crushed Belgian resistance, and began to surround the main Allied forces, which were deployed in Northern France and Belgium. Within a matter of a few weeks, the British Expeditionary Force was evacuated from Dunkirk, and the Maginot Line had been almost completely encircled. Paris fell on 14 June and the new French Government under Marshal Petain entered into an armistice on 22 June 1940.[45]

Under the terms of the armistice, all of France except the Southern third, minus the Atlantic coast, came under German occupation. That portion of the country continued to function as a semi-independent rump State known as unoccupied or Vichy France, so called because its seat of government was located in the sleepy spa town of Vichy. In addition to the unoccupied portion of Metropolitan France, the Vichy Government maintained control over the extensive French overseas empire and the powerful French fleet, with its principal bases located in the Mediterranean at Toulon and in French North Africa. In addition, a number of French warships were located in French overseas possessions further afield and in British or British controlled ports. The armistice terms further stipulated that part of the French fleet would continue to be stationed in French overseas possessions to enable the Vichy Government to maintain control over the French overseas empire. The bulk would return to Unoccupied France and retain its autonomy under German and Italian inspection and overall supervision.[46]

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45 Two excellent accounts of the Battle of France and the Low Countries can be found in A. Horne, *To Lose a Battle: France 1940* (Penguin Edition 1979), 245 *et seq.,* and Wm. L. Shirer, *The Collapse of the Third Republic* (Heinemann Edition 1970), 582 *et seq.*

46 The terms of the Armistice Agreement are dealt with in Shirer, *supra* n. 45, 862-3, and W.S. Churchill, *The Second World War* (abridged Penguin edition 1989) 312-5. The relevant provision in relation to the French Fleet was Article 8, which read in part: The French Fleet, excepting the units necessary for safeguarding French colonial interests "shall be collected in ports to be specified and there demobilized and disarmed under German or Italian *control*" (Churchill, *op. cit.* 315). The word "control" (Fr. "con-

During the years preceding the outbreak of war, France had built its fleet with the support of successive governments, under the guidance and leadership of Admiral Jean Darlan, to become the world's fourth largest navy. The fleet included a number of newly-designed and constructed battleships, which were among the fastest and most powerful warships afloat and had been specially built to counter the threat posed by the newest class of German "pocket battleships". Some were operational, while others were in the final stages of completion. In addition, the French fleet included an aircraft carrier, a sizeable number of fast modern cruisers and a large submarine force. Aside from countering the threat posed by German surface raiders, its principal task in the period between the outbreak of the war in 1939 and the conclusion of the armistice in June 1940 had been to maintain control over the Mediterranean and keep a watch on the large Italian Navy.[47]

With the conclusion of the armistice and the occupation of French Channel and Atlantic ports, together with the entry of Italy into the war on Germany's side, the strategic situation and balance of forces at sea, upon which Great Britain depended for its survival, shifted dramatically to Britain's disadvantage. Instead of being able to count on the French Navy as a powerful ally which would assist the Royal Navy in maintaining control of the vital sea lanes, the British were now confronted by the combined force of the German and Italian Navies, as well as the prospect of the French fleet controlled by a nominally independent but German dominated government at best, and potentially falling under direct German and Italian control at worst.

In the period immediately preceding the armistice, Prime Minister Churchill had personally sought the assurance of Admiral Darlan that he would not allow the French fleet to fall into the hands of the Germans. Churchill had urged Darlan to take the fleet out of reach of the Axis powers by sending its most powerful warships to French overseas possessions in the Western Hemisphere, a request which Darlan seems to have considered seriously, but decided against once the Armistice Agreement was concluded and he was given the important Ministry of

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trôle") may well have partially contributed to British anxiety in relation to the fate of the French vessels. In English the term denotes a "restraining power", "authority" or "government", while in French the term denotes "inspection" or "supervision", which is how I have translated it in the text. See in this respect Lukacs, *op. cit.* n. 50 *infra*, 161.

47 The comparative strength of the French Fleet in relation to other major naval powers at the outbreak of the war is analyzed in R.E. Dupuy and T.N. Dupuy, *The Encyclopedia of Military History* (2nd Rev. Ed. Published by Jane's 1986), 1052 and 1127. A complete description of all French war vessels is given in P. Auphan and J. Mordal, *La Marine Française dans la Seconde Guerre Mondiale* (1967) in Annex 1, 607, *et seq.* For the role of the French Navy in the period between September 1939 and June 1940, see the latter work, 55-71. For Darlan's role in building up the French Navy, see Churchill *op. cit.* 313.

the Marine, in charge of both the fleet and most of the overseas colonies.[48] One of the prime considerations behind Hitler's decision not to occupy all of France and allow the French to maintain control over their overseas empire and fleet was preventing the French Government from withdrawing from Metropolitan France and continuing to fight alongside Great Britain from its overseas bases. It was an economical way to keep the fleet and overseas empire out of British hands and under German influence and supervision, if not outright control.[49]

Although there is no evidence of concrete plans to try to take direct control of the French fleet at the time, this possibility was uppermost in Churchill's mind from the moment the Armistice Agreement was concluded, for it brought most of the fleet back to Metropolitan France under German and Italian supervision and within striking distance of the Germans. Churchill harbored no illusion of the sacrosanctity of any agreement entered into by the Nazi leadership and was not convinced of the Vichy Government's willingness to vigorously resist a German attempt to seize the fleet, or its ability to do so even if it wanted to. Because the Germans had demonstrated their ability to carry out daring and difficult lightning strikes during their invasion of France and the Low Countries, Churchill and his cabinet had little doubt of their ability to seize control of the French fleet if they wished. Were this to happen, Great Britain would not only have been forced to completely withdraw from the Mediterranean, but would have potentially been faced with the loss of overall naval superiority, which would have inevitably resulted in its defeat.[50]

These considerations brought Churchill to what he described as one of the most painful decisions he had to take during the war: the neutralization, or, if necessary, the destruction of the French fleet in its overseas bases and in British or British controlled ports before it could return to Metropolitan France out of reach of the Royal Navy. While a significant part of the French Navy was already located in France, the majority of its most powerful vessels were still in French overseas bases or in British or British controlled ports. The window of opportunity was extremely narrow. If the British were going to strike, they would have to do so quickly.[51]

Churchill gave the order to carry out *Operation Catapult* on 3-4 July 1940. This entailed the takeover of French warships in British ports and the neutral-

48 On Churchill's contacts with Darlan in general and specifically in relation to the position of the French Fleet in the days immediately preceding the armistice, see *id.* 313-4. On the probable effect of Darlan's appointment as Minister of Marine, see *id.* 314. See also R.O. Paxton, *Vichy France: Old Guard and New Order* 1940-1944 (1972).

49 Paxton, *op. cit. supra,* n. 48, 7-19; and Shirer, *op. cit.* n. 45, 852, *et seq.*

50 Churchill, *op. cit,* n. 46, 315. See also, J. Lukacs, *The Duel*: *10 May-31 July 1940: The Eighty-Day Struggle Between Churchill and Hitler* (1990), 160 *et seq.* and Dupuy and Dupuy, *op. cit.* n. 47, 1063-4.

51 Churchill in *id.* 415-6. Churchill described the decision to take action to prevent the French Fleet carrying out the terms of the Armistice as a "Greek Tragedy".

ization or, if necessary, destruction of those located in British and French overseas bases. The first part of the plan went relatively smoothly. Within a matter of hours British sailors and marines succeeded in seizing French naval vessels in British ports with minimal loss of life. The success of this part of the operation only confirmed Churchill in his conviction of the necessity of action, for what the British could do, could also be accomplished by the Germans.[52] The neutralization of the powerful French squadrons located in Alexandria and the French West Indies was also accomplished bloodlessly, with the local French commanders accepting the British ultimatum to accept the supervised demobilization of their vessels in the face of overwhelming British naval superiority.[53]

The rest of *Operation Catapult* took a different course. British Vice Admiral Somerville was dispatched from Gibraltar on 1 July 1940 with orders to deliver an ultimatum to French Admiral Gensoul commanding the main French strike force at Mers-el-Kebir, located close to the port of Oran in French North Africa. The most powerful vessels in the French Navy were located there, including the modern battle cruisers the *Dunkerque* and *Strasbourg*. The ultimatum offered three alternatives: join the British and continue the fight against the Axis; sail under British escort to either the French West Indies or to an American port and be demobilized; or scuttle the vessels under British supervision. Failure to agree would force the British to open fire.

The French commander was given until sunset on 3 July to consider the terms. In his communication with the Vichy Government, he failed to mention the second alternative. He received orders from Vichy to resist and try to escape, which he proceeded to carry out once the ultimatum expired. The British opened fire, destroying or heavily damaging the bulk of the French squadron, although the battleship *Strasbourg* succeeded in escaping with significant damage to Toulon, together with an escorting cruiser. Some 1300 French sailors died and 340 were wounded, but the British neutralized the most important segment of the French fleet – albeit at a heavy cost in French lives. It should not be forgotten that the French and British had been allies until a few short weeks earlier, and that the British took action very reluctantly. Needless to say, the entire operation was viewed in a different light by most French. Some members of the Vichy Government saw it as grounds for declaring war on Great Britain, although more prudent counsel prevailed.[54] Vichy was in no position to wage war and would have lost whatever bargaining position it had, if it assumed the role of a minor German ally.

What about the broader repercussions? The action certainly cemented the will of both the British public and political elite to continue resistance against the seemingly overwhelming Axis, "alone if need be" in the words of Churchill.

52 *Id.* 316.

53 Dupuy and Dupuy, *supra* n. 47, 1064.

54 Paxton, *supra* n. 48, 56-7.

The Prime Minister's announcement of the operation in the House of Commons received a tumultuous response, and Great Britain faced the prospect of siege, possible invasion, and the opening of the "Battle of Britain" with renewed confidence.[55] Spain and Portugal were given a strong inducement to remain neutral, despite the pro-Fascist leanings of their governments. Even members of the Fascist Italian Government, such as Count Ciano, Mussolini's son-in-law and Italy's Foreign Minister, were privately impressed by Britain's show of resolve and demonstrated capacity to act, although this had little overall impact upon Italian conduct in the war.[56] Most importantly, the United States Government was both relieved at the removal of a potential threat to its own security and favorably impressed with the success of the operation. President Roosevelt's policy, which favored providing material assistance to Great Britain short of actually entering the war, was strengthened. The British operation went some way in assisting him against those who felt such assistance would be wasted effort.[57]

Most noteworthy for our discussion is that no major non-belligerent nation (other than Vichy France) condemned the action as either unnecessary or illegal. From a strictly legal perspective, Great Britain had struck a major blow against a government with which it was not at war, and which until recently had been its ally. France was within its legal rights to seek an armistice under the best terms it could obtain. The terms of the Armistice Agreement did not provide for a surrender of the French fleet to German and Italian control, which would have made it a lawful target under the laws of war. There were no concrete indications at the time, nor has any evidence emerged since, that the Germans had any immediate plans to try and seize direct control of the French fleet,[58] although that was an option they could consider. Still, this was in legal terms a case of preventive, or at best preemptive, self-defense. There was certainly no question of intercepting a German move to seize the French fleet, much less of an attack by that fleet on Great Britain itself, nor of any other legal ground other than (anticipatory) self-defense, which would justify the British action against a defeated non-belligerent State like Vichy France.

This brings us to the question of the legality of the British action in terms of anticipatory self-defense. Despite the lack of concrete evidence of a German invention to try to seize control of the French fleet, there can be little doubt that the threat to Great Britain's security which was posed even by that possibility

55 Lukacs, *supra* n. 50, 163.

56 *Ibid.* See also *Ciano's Diary* (Heinemann translation 1947) 274 (entry for 4/7/1940). Ciano's comment was: "For the moment it proves that the fighting spirit of His Britannic Majesty's fleet is quite alive, and still has the aggressive ruthlessness of the captains and pirates of the seventeenth century".

57 Auphan and Mordal, *op. cit.* n. 47, 194, quoting Cordell Hull on the impression the British action made upon the United States Government and public. See also Lukacs in *id.* 162.

58 A point that Churchill admits in his memoirs. See Churchill, *op. cit.* 315.

was immediate. Once the fleet had returned to Metropolitan France and come under German and Italian supervision, it would have been virtually impossible for the Royal Navy to have reached it. The chances of success without the risk of prohibitive losses in both men and material would have been virtually negligible. As stated earlier, the window of opportunity to carry out this operation, with the greatest chance of success and least prospect of unnecessary loss of lives, was extremely narrow. Hence, under the specific conditions prevailing at the time, the potential threat of the French fleet coming under German control was immediate enough to justify anticipatory action in self-defense.

There were likewise no feasible alternatives to the course of action Churchill chose. The alternatives offered the French commanders were honorable, reasonable and, in fact, the only ones the British could offer under the circumstances. If the French fleet had come under German control, it would have been too late, even if that only happened months later. The threat posed by that possibility can only be described as overwhelming, since it would have almost inevitably meant British defeat, especially in the first year following the fall of France.

These factual considerations, applied in context with the *Caroline* criteria, justify the British action as a lawful exercise of anticipatory self-defense. The case also is a clear indication that anticipatory self-defense was accepted as lawful in principle under the customary law existing only a few years before the Charter was adopted. There is no indication that the law underwent any significant change in this respect prior to the adoption of the Charter.

ii The Six Day War of 1967

In the late spring of 1967, as tensions mounted steadily in the Middle East, events moved inexorably in the direction of renewed war between Israel and its Arab neighbors. These included the closing of the Straits of Tiran to all maritime traffic bound for the Israeli port of Eilat (the Suez Canal had long been closed to traffic bound to or from Israel), the expulsion by Egypt of the UN peacekeeping force (UNEFII) stationed in the Sinai Peninsula along the Israeli-Egyptian border, and the formation of a joint command between Egypt and Syria. These events were accompanied by speeches in which President Nasser of Egypt expressed his determination to end the presence of the Israeli State once and for all by "driv[ing] the Jews into the sea". In addition, there was an upsurge in *fedayeen* attacks from across the Sinai border into Egypt and the deployment of Egyptian troops into forward positions along that border, which had been vacated by the departing UNEF troops.[59]

59 On the Six Day War generally, see J.N. Moore (ed.) The *Arab-Israeli Conflict*, Vl. II (Readings) (1974) and III (Documents) (1977). For a concise evaluation of the events leading up to the conflict, see Franck *supra* n. 2, 101-2. For an assessment of the com-

Diplomatic efforts by Israel in the United Nations and elsewhere to at least partially restore the *status quo ante* were unsuccessful. The UN Secretary General took the position that he had no choice but to accede to the Egyptian demand that UNEF be withdrawn, since it was dependent upon Egyptian consent to carry out its functions. There was obviously no question of the Security Council providing a mandate for UNEF to carry on without Egyptian consent under the prevailing political conditions.

Cold War divisions characterized the situation. Initiatives aimed at forming a multinational naval force to restore and maintain Israel's maritime communications through the Straits of Tiran also foundered as a result of these political divisions and concern that a regional crisis might develop into a broader East-West confrontation.

The situation became graver when Jordan announced its support for Egypt and Syria and entered into a military alliance with them. This meant that Israel was now surrounded by potential adversaries, who together possessed an overwhelming numerical superiority in numbers of available combat troops, tanks, armored vehicles and artillery, including surface-to-surface missiles capable of striking at Israeli population centers. This was now compounded by a precarious geographical position; at one point the Israeli-Jordanian border along the West Bank extended to only twelve miles from Israel's Mediterranean coastline, opening the possibility that the country could be cut in two if the Jordanian Army succeeded in driving a wedge between Israel's northern and southern halves.[60]

Although the unfavorable geographical situation and numerical inferiority were somewhat compensated for by the qualitative superiority of the Israeli Air Force, Israel was confronted with a large Egyptian Air Force which was equipped with a sizeable number of modern Russian built combat aircraft. If Israel was going to ensure a successful defense, and probably its very survival against what appeared to be an increasingly likely attack within the near future, its best option was to try to take out the Egyptian Air Force on the ground before any offensive was mounted. Once an attack was underway, it would be much more difficult to avoid large scale casualties among the Israeli population in view of the proximity of its major population centers to the borders and the lack of strategic depth.

If Israel succeeded in gaining air superiority by destroying a large portion of the Egyptian Air Force before it could attack or disperse, it would have a good chance of defeating its adversaries in detail.[61]

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parative numerical and adversaries, as well as an analysis of the military aspects of the conflict, see Dupuy and Dupuy *supra* n. 47, 1230 *et seq.*

60 Egypt and Jordan concluded a mutual assistance treaty on 30 May 1967. An Egyptian general was immediately dispatched to Jordan to take command of Arab forces on the Jordan front, see Dupuy and Dupuy *supra* n. 47, 1230 *et seq*.

61 *Id.* 1231.

These considerations led Israel to strike pre-emptively in anticipatory self-defense. On the early morning of 5 June, its air force, flying low to avoid Egyptian radar, destroyed the bulk of Egypt's modern combat aircraft and air defenses on the ground within a matter of hours. Having established air superiority, the Israeli armed forces were able to drive through the Egyptian positions in the Sinai and reach the Suez Canal, while simultaneously successfully taking the initiative on the Jordanian and Syrian fronts. After several UN Security Council resolutions which called on the parties to accept a cease-fire without apportioning blame on either side had been ignored, the parties to the conflict finally accepted a unanimous call by the Security Council for a cease-fire on the evening of 10 June 1967.[62]

How was the Israeli pre-emptive strike viewed at the time and what were its immediate repercussions? The overwhelming majority of opinion was favorable and in support of the Israeli action as a reasonable and lawful exercise of anticipatory self-defense. Attempts to have the Israeli pre-emptive strike condemned in both the Security Council and the General Assembly failed by large majorities.[63] It is significant that during the debates, reference was made to the *Caroline* criteria by a number of delegates, indicating that many States saw the Israeli action as a lawful exercise of anticipatory self-defense, rather than assuming that it may have had its legal basis on some other grounds, as has been submitted by a number of authorities since then, a question we will return to presently in this discussion.

A further indication that the Israeli action was viewed as lawful at the time can be found in the terms of the well known Resolution 242, which was adopted by the Security Council on 22 November 1967, and is still widely seen as providing the framework for an overall settlement of the conflict. There is no mention of any condemnation of the Israeli action, nor even a reference to any illegality in Israel's occupation of the territories it had gained control of as a result of the Six Day War. Instead, both parties were called upon to reach a lasting overall settlement on the basis of an acceptance of Israel's right to security, in exchange for a return of (most of) the land it had occupied as a consequence of the war. This would seem to be an implicit acknowledgement of the legality of Israel's action which takes into account the circumstances which led to it. Resolution

62 *Id.* 1232-3. See also Franck, *supra* n. 2, 102-3.

63 Franck *op. cit. supra* n. 2, 103, points out that the Soviet draft resolution condemning Israel only gained support from four of the Council's 15 members. The Special Emergency Session of the General Assembly also failed to adopt various draft resolutions condemning Israel, with a draft submitted by a group of non-aligned States (A/L/522) receiving 53 votes in favor, 46 opposed and 20 abstentions. It was thereby rejected since it failed to gain the necessary two thirds majority vote. See Franck in *id.* at 104. An earlier Soviet draft resolution containing stronger condemnatory language had been rejected on 4 July 1967 by 71 votes opposed, 22 in favor and 20 abstentions. (A/L/521). See *United Nations Yearbook* 1967, 209.

242 received the wide support of the international community. Had the general opinion regarding the Israeli action been different, it seems safe to say that this resolution would have been differently worded, for example, by including stiffer language directed at Israel that reflected the general tenure of General Assembly resolutions directed at Israel. Whatever one's views regarding the subsequent conduct of both parties, or regarding Israel's policies in the Occupied Territories, they should not lead to *ex-post* assessments of the Israeli recourse to anticipatory self-defense, or of how the international community viewed it at the time.

Turning to application of the *Caroline* framework and criteria in the light of the relevant circumstances, the first question to be addressed is whether we are dealing with an example of anticipatory self-defense, or whether the Israeli action had another legal basis which would explain its general acceptance. Some authorities have opined that the Israeli action could be seen as an exercise of belligerent rights in the context of an ongoing armed conflict against States with which Israel was in a technical state of war. Another possibility put forward is that Israel responded to an actual attack which had already commenced, rather than an immediate threat of one, making its action one of "regular", rather than anticipatory self-defense.[64]

Both of these arguments are implausible at best and artificial and unconvincing at worst. To be sure, Israel had been in a technical state of war with its Arab neighbors (and still is with the exceptions of Egypt and Jordan which have since signed formal peace treaties) since its inception in 1948. However, that does not change the fact that this technical state of war has been characterized by long periods in which no significant inter-State hostilities have taken place, interspersed with four short, intensive international armed conflicts. To argue that any of the respective parties has the right to reopen hostilities at any moment of its choosing on the basis of belligerent rights is to fly in the face of various armistice agreements, cease-fire orders and Security Council resolutions rejecting such claims over a long period. Nor does the absence of a formal armistice or cease-fire agreement provide an automatic exception to this, if in fact a *de-facto* material armistice has been in effect for any significant period of time.[65]

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64 Various authorities have opined that the Israeli preemptive strike of 5 June 1967 was an exercise of regular rather than anticipatory self-defense. These include Gray, *op. cit.* n. 10 *supra* at 112, M. Shaw, *International Law* (3rd ed. 1991) 694 and Dinstein, *op. cit.* n. 5 *supra* 55 *et seq.*

65 On this point, I respectfully disagree with Professor Dinstein's views as set out in *op. cit.* n. 5 *supra* at 55-6. To be sure a cease-fire is not necessarily synonymous with peace, nor can it on its own end a technical state of war. However, a prolonged cease-fire can consolidate into a situation of relative normalcy. It is even possible that a cease-fire comes into place by the conduct of the parties, rather than through mutual agreement or formal acceptance of a Security Council cease-fire resolution. In any case, once a cease-fire has become a *de-facto* armistice, it is no longer open to the parties to reopen hostilities at a moment of their choosing.

Likewise, the contention that Israel responded to an actual attack, rather than to the prospect of a probable attack in the near future, is to stretch the meaning of the term to the limit. To be sure, Israel's neighbors were expressing hostile intent by engaging in preparations for an attack and destruction of Israel as a State (and possibly its people), but no attack had been launched at the moment Israel struck.

It is also true that by closing the Straits of Tiran to Israeli maritime commerce, Egypt had initiated a partial blockade, or rather intensified an existing blockade, since the land borders between Israel and its Arab neighbors, as well as the Suez Canal, had long been closed to any traffic bound to or from Israel. However, Israel's air and sea communications through the Mediterranean were still unaffected, and Israel was neither facing strangulation nor economic ruin as a result of Egypt's act. While a blockade can sometimes be tantamount to an armed attack, it is not just any blockade that can amount to such an attack, and particularly not one of a partial nature, such as the one that had been in effect against Israel since closure of the Straits. Many examples of partial blockades or closing of frontiers since 1945 have not been seen as constituting armed attacks; there was no reason to treat this one as a special case constituting an armed attack. If Egypt had attempted to cut Israel's sea and air communications completely, the situation would have been different; but no such action had occurred at the time Israel decided to take pre-emptive action.[66]

Taking the above considerations into account, the most reasonable conclusion is that while there were clear indications of a probable impending armed attack, none had yet been launched, or even put into motion at the time Israel decided to take anticipatory action by destroying Egypt's offensive capability. The upsurge in *fedayeen* incursions from across the Egyptian border would have justified a proportionate response designed to neutralize this threat, not a full scale war.

Hence, Israel's pre-emptive strike is an almost textbook example of anticipatory self-defense in the face of an immediate threat of an armed attack, rather than one of response to an actual attack, or even interception of an attack which had already been launched, but had not yet reached its target. The majority of authorities share this conclusion.[67]

If Israel's action was one of anticipatory self-defense, the next question is how it measured up to the *Caroline* framework and criteria. The answer is that

66 An example of such a partial blockade which, while hostile and illegal under the Four Power Agreements relating to the Occupation Regime in Germany, was not treated as an armed attack, was the Berlin Blockade of 1948-9. The action closed off land communications between the Western Zones of Germany and Berlin, but left the air corridors unaffected. This blockade was far more serious than the closure of the Straits of Tiran, but was not viewed as a *casus belli*.

67 This is the view of a large number of authorities and is best summed up by Franck, *op. cit.* n. 2 *supra*, 104-5.

Israel's action is an example of a reasonable and justified recourse to anticipatory self-defense under the circumstances. That the threat was immediate would seem to hardly require further explanation. Egypt, Jordan and Syria had taken a number of steps which clearly pointed to their likely intention and capability to launch an attack in the immediate future. Whether or not they would have actually struck, or were merely engaging in a dangerous game of bluff and hostile rhetoric is irrelevant. By initiating an acute crisis and making preparations they created an immediate threat justifying the Israeli response. No State can reasonably be expected to take the risk that adversaries which have pronounced their intention to wage a war of annihilation, and made corresponding preparations, are bluffing.

Likewise, the threat posed was certainly credible. The formation of a joint command, movement of troops into forward positions, numerical superiority and the probability of high civilian casualties if the Arab States did strike first combined to pose a threat which was both credible and overwhelming.

It is also clear that Israel had no feasible alternatives to taking anticipatory military action. Once its diplomatic efforts had failed, it could expect no effective effort by the UN or anyone else that would have resolved the situation. If it restricted its response to the taking of preparations on its own territory, it would not be ensured of avoiding disaster. Once an attack was launched, Israel would be at a serious disadvantage due to its lack of strategic depth and forced to accept the prospect of its cities becoming a battleground. In short, its options were nearly non-existent.

Finally, Israel's action was proportionate in relation to the threat it faced. The Israeli armed forces drove back its adversaries to positions which ensured its security against renewed attack and provided it with a favorable bargaining position in any subsequent negotiations. That this has not resulted in a lasting peace settlement is irrelevant to the issue at hand. In short, the Israeli pre-emptive strike of June 1967 was a clear example of justified anticipatory self-defense.

iii The 1981 Israeli Strike against the Osirak Nuclear Reactor

In June 1981, the Israeli Air Force carried out a successful surgical strike against an Iraqi nuclear reactor located at Osirak near Baghdad. The reactor had been purchased from France in 1975 and was not yet operational at the time the strike. Although, under the terms of the purchase agreement between France and Iraq, the Osirak facility was subject to IAEA inspection in accordance with the 1963 Nuclear Non-Proliferation Treaty, Israel had reason to believe that Iraq had violated the agreement and was in fact engaged in a program aimed at the production of weapons grade nuclear material.

Although Israel had protested the sale of a nuclear reactor to Iraq, and had attempted to dissuade France from going through with the agreement and made its concerns known in various diplomatic fora, its efforts to prevent the deliv-

ery of nuclear technology to Iraq had been unsuccessful. Israel understandably regarded Iraq as an implacable hostile State which would pose a grave threat to its security, and possibly survival, if it were to acquire nuclear weapons. At the time, Iraq's formidable military potential was growing rapidly. Moreover, though its may seem strange today, it is worth remembering that Iraq enjoyed a very favorable diplomatic position at that time, which rendered the prospect of Israel successfully enlisting effective Security Council support for the containment of Iraq's nuclear weapons program and regional power ambitions remote.[68]

The United States viewed Iraq as a bulwark against Iranian revolutionary religious extremism, while France had intensive commercial and diplomatic ties with the country and the Soviet Union had long been a traditional ally. Finally, Israel almost certainly must have taken into consideration that a successful strike against the Osirak nuclear facility would become infinitely more difficult once the reactor became operational. From its point of view, it had to prevent Iraq gaining access to nuclear weapons technology by any means, even at the cost of diplomatic isolation and legal condemnation. It chose to act at what appeared to be the most favorable moment from a military strategic perspective before the possibility to act unacceptably narrowed or passed.[69]

In the event, the Security Council and the international community roundly condemned Israel's action. Its invocation in the Council of the right to anticipatory self-defense was unanimously rejected. It is, however, significant that in doing so many delegates did not reject the concept of anticipatory self-defense *per se*, but rather Israel's reliance on it under the circumstances. Israel's reliance upon anticipatory self-defense was rejected explicitly by a number, and implicitly by a majority, of delegates, as not meeting the *Caroline* criteria of immediacy and lack of feasible alternatives. This rejection can be seen as at least conditional support for the concept of anticipatory self-defense by a wide segment of the international community, provided the conditions laid down in the *Caroline* framework have been plausibly met.[70] At the time, it was clearly the view of the international community that Israel had failed to meet this test.[71] Although many have modified their opinion in the light of subsequent events, it remains an

68 In the aftermath of the Iranian Revolution, the US, while officially neutral in the war between Iraq and Iran that had begun in September 1980 while US diplomatic hostages were being held in Tehran, viewed Iran as the greater threat to Middle Eastern security and stability. The USSR had a formal treaty of Friendship with Iraq and had supplied the bulk of its already formidable arsenal, while France maintained close commercial ties with Iraq and was also a significant supporter of Iraq's diplomatic position in 1980-1, see D. Hiro, *The Longest War: The Iran-Iraq Military Conflict* (1989), 71 *et seq.*

69 Franck, n. 2 *supra*, 105. See also A.M. Weisburd, *Use of Force: Practice of States Since World War II* (1997), 287-89.

70 Greenwood, *supra* n. 2, 14.

71 S.C. Res. 487 of 19/6/81 adopted unanimously.

incontrovertible fact that the Israeli strike against the Osirak nuclear facility was deemed illegal at the time.

This brings us to the question whether the Israeli action was justifiable in fact, either at the time or in retrospect, as a lawful exercise of anticipatory self-defense on the basis of the *Caroline* framework and criteria. Even if one takes into account the difficult dilemma which Israel faced – the prospect of a hostile neighbor gaining access to nuclear technology combined with a remote chance of preventing this through diplomacy within the immediate future – it is hard to see how Israel's strike can be judged lawful.

There was no evidence of an Iraqi intention to attack Israel in the foreseeable future. There was not even conclusive evidence that Iraq was acquiring, much less on the point of developing, a nuclear weapons capability when the Israeli action was carried out. The fact that we now know more about Iraq's ambitions to obtain nuclear and other weapons of mass destruction and about the nature of the erstwhile Iraqi regime does not change this, although it does make Israel's action more acceptable in historical terms. Nevertheless, as has been pointed out, much of what we know about Iraqi ambitions and its propensity to engage in "antisocial behavior", such as invading neighbors and massacring its own citizens with chemical weapons, had yet to be revealed. Neither the Israeli Government, nor anyone else, could foresee in 1981 what has occurred since then. *Ex-post* assessments of the Iraqi threat and the nature of its government do not substitute for evaluations of the necessity of Israel's action at the time. Circumstances which were known at the time must prevail over historical hindsight. Any other approach would make it virtually impossible to assess the legality of a use of force, anticipatory or otherwise. On the other hand, it is reasonable to take subsequent events into account to the extent that they mitigate the unlawfulness of an act which was rightly determined to be illegal at the time.

It is submitted that this should be the outcome of an overall assessment of Israel's strike against the Osirak nuclear facility for a number of reasons. Israel knew that Iraq was an implacably hostile adversary and had little reason to believe that its purchase of a nuclear reactor was economically necessary, in view of its vast petroleum reserves, or that it would refrain from producing nuclear weapons at the first opportunity. The strike was carried out surgically and proportionally, being directed solely at eliminating the potential threat posed by the reactor. Moreover, Israel had little prospect of gaining diplomatic support in the Security Council or elsewhere for an initiative aimed at preventing Iraq from gaining access to nuclear technology, at least within the foreseeable future.

While these factors go a considerable way towards making Israel's action understandable, they did not make it legal at the time, nor do they make it legal in the light of what we have subsequently learned. Israel was not faced with threat of attack by a nuclear armed Iraq within the short or medium term. Consequently, Israel's action was rightly judged unlawful at the time. Israel did not, nor could it, produce clear evidence of more than, at the most, a potential threat to its security.

To the rest of the international community, Israel's action appeared to be precipitate and unnecessary. Even if the *Caroline* criteria and framework for assessment provide for the possibility of anticipatory action against potential threats under special circumstances, they cannot be stretched to the extent that they would justify preventive action against the mere possibility that a State might obtain a nuclear weapon and be in a position to use it at some completely indeterminate future moment.

On the other hand, Iraq's conduct since 1981 should not be ignored either. If the international community would have known, or even seriously suspected, what has come to light, it is highly unlikely that Israel's action would have been condemned, certainly not as universally as was the case at the time. This goes a considerable way towards mitigating the illegality of Israel's action. In the present author's view, Israel's action was illegal, but both understandable and, ultimately, partly justifiable in historical terms.

iv The Gulf War of 2003

The most recent Gulf War was conducted by the United States and the United Kingdom to remove Saddam Hussein and his close associates from power and to enforce compliance with UN Security Council resolutions relating to Iraq's partial disarmament. It remains highly controversial, and has been widely commented upon in international legal literature. A number of possible legal justifications have been advanced for the invasion and resulting overthrow of Saddam Hussein's government. They include as the primary legal justification Security Council Resolutions 678, 687 and 1441 and the failure of Iraq to fully cooperate with the Council's efforts to ensure its disarmament over more than a decade.

Another possible legal justification put forward is that the United States and United Kingdom had the right to reopen hostilities against Iraq on the basis of the law governing armistices and cease-fires, contained in the 1907 Hague Convention on Land Warfare and customary law. This line of reasoning views the recent conflict as a continuation of the 1991 conflict on the basis of a breach of the armistice / cease-fire terms by Iraq. A breach, so the argument goes, enables the other principal belligerents (the US and the UK) to reopen hostilities. This line of argument is related to, but distinct from, that one which suggests existing Security Council resolutions provide a legal basis for military action against Iraq, in that it relies on a separate legal basis, the law governing armistices and cease-fires, rather than the resolutions themselves, as a justification for military action.[72]

72 The official arguments relating to the justification of the invasion of Iraq are to be found *inter alia* in statements by members of the US and UK Governments immediately preceding and subsequent to the opening of hostilities in March 2005. See *e.g.* the Advice of the UK Attorney General, Lord Goldsmith, at www.number-10gov.

There are reasonable arguments both for and against these two possible justifications. Neither of these possible justifications directly relate to the concept of self-defense – anticipatory or otherwise – or to the topic of this article. Consequently, they will receive no direct attention beyond stating that, on balance, they do not appear to provide a convincing legal basis for the invasion and military occupation although admittedly they are not wholly devoid of merit.[73]

Additional arguments unrelated to self-defense, such as the undoubted oppressive nature of the Iraqi regime and its long record of serious human rights violations, or the desirability of removing a government which has proven itself

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uk, available via www.answers.com/topic/2003-invasion-of-Iraq. For more extensive legal analysis of the arguments relating to the use of force against Iran from the perspective of the present US Administration, see the comments by W.H. Taft and T.F. Buchwald (respectively Legal Adviser of the US Dept. of State and Asst. Legal Adviser for Political-Military Affairs at the US Dept. of State) and J. Yoo (Former Deputy Assistant Attorney General at the Office of Legal Counsel of the US Dept. of Justice) in the "Agora" Section of 97 *AJIL* (2003), 577 *et seq.* For an informative and generally objective account of the factual evidence relating to Iraq's alleged possession of weapons of mass destruction and the possible legal implications thereof, see D. McGoldrick, *From '9-11' to the Iraq War 2003* (2004), 96 *et seq.* For the presentation by US Secretary of State Colin Powell on the evidence of alleged Iraqi non-compliance with S.C. Resolution relating to disarmament, see www.whitehouse.gov/releases/2005. (http://www.whitehouse.gov/infocus/nationalsecurity/).

73 The arguments for and against accepting the legality of the invasion on the basis of (pre)existing S.C. Resolutions and/or violation of the cease-fire imposed by the UNSC in S.C. Res. 687 are set forth in the aforementioned "Agora" Section of 97 *AJIL* (2003). See also the views of Sofaer and Bothe in 14 *EJIL* (2003) cited in nn. 3 and 2 *supra* respectively. My own view, in a nutshell, is that neither S.C. Res. 1441 viewed on its own, nor viewed in conjunction with S.C. Res. 678 and 687, gave the US and UK a right to unilaterally take military action (beyond localized force protection in response to an immediate threat to units enforcing the S.C. embargo and no-fly zones), much less to conduct a full scale invasion and occupation of Iraq, without further S.C. authorization.

Likewise, neither the US nor the UK had the right to re-initiate hostilities on the basis of a unilateral breach of the cease-fire provisions of S.C. Res. 687, which had been implemented by the *Council* as a whole *vis-à-vis* Iraq and had superseded the interim cease-fire arrangements between the Coalition Forces and the Iraqi Government. On the other hand, the record of Iraqi non-compliance with previous S.C. Resolutions and its obstructionist behavior over a long period, coupled with the widely held perception immediately preceding the invasion in March 2003 that Iraq still probably possessed some weapons of mass destruction should not be discounted, although these factors did not make the invasion lawful. If the invasion had been resisted by chemical or other weapons of arms destruction, or had WMD been uncovered in the subsequent occupation period, this would have gone a long way towards mitigating the unlawfulness of the US/UK military action. However, as is well known, no such weapons have been encountered and any mitigation such a discovery might have rendered must remain in the realm of historical "might have beens".

an obstacle to peace and stability in the region, will likewise not be discussed, beyond stating that they are generally seen as even less legally persuasive.[74]

However, one line of reasoning put forward in justification of the war on the basis of anticipatory self-defense is the threat posed by the alleged actual or potential link between Saddam Hussein's government and international terrorism, as well as the possibility that Iraq could have provided support to Al Qaeda in obtaining weapons of mass destruction which might be used in an attack on the United States or its allies. We turn to that now, momentarily deferring discussion of the broader implications of what is sometimes referred to as the "Bush Doctrine" of pre-emptive self-defense.

In relation to the facts known at the time the US initiated military action against Iraq in the spring of 2003, or which have emerged since, the matter is straightforward. There were no indications, beyond mere allegations, that Iraq had any significant links to Al Qaeda or similar terrorist organizations, or was in any way associated with the attack of 11 September 2001. Neither the evidence presented at the Security Council in the weeks preceding the invasion, nor any which has emerged since, has provided anything indicating the existence of a relationship between Iraq and Al Qaeda or 11 September 2001. Nor have any indications emerged that Iraq was establishing (or even contemplating) any such link. In the absence of credible evidence of such links, the conclusion regarding the legality of action in anticipatory self-defense against Iraq is overwhelmingly that it could not be justified on that basis.[75]

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74 Humanitarian intervention is a highly controversial and very extensively debated possible legal basis for the use of force outside the context of the UN collective security system. However, even those authorities who support the possibility that humanitarian intervention is legal, or could be to some extent justified, usually do so on the basis of the existence of an acute situation in which the right to life of a significant part of a State population is being violated (or threatens to be violated), such as was the case in Northern Iraq in the aftermath of the Second Gulf War in 1991, in Rwanda in 1994, or Kosovo in 1999. This is in contrast to the prospect of military intervention to overthrow a despotic regime and promote democracy, which has far fewer supporters. This is even truer in relation to State practice. For recent treatment of humanitarian intervention see *inter alia,* Byers, *op. cit. supra* n. 37, 85 *et seq.*, Franck, *op. cit.* n. 2 *supra* 174 *et seq.* and S. Chesterman, *Just War or Just Peace* (2001). For the present author's views on the topic, see "Humanitarian Intervention Legality, Justice and Legitimacy" in *The Global Community Yearbook of International Law and Jurisprudence* 2004, Vol. II (2005) 51 *et seq.*

75 The "Report of the National Commission on Terrorist Attacks upon the United States" (The 9-11 Commission) concluded, regarding the question of an alleged link between Al Qaeda and Iraq, that there was "no credible evidence that Saddam Hussein had assisted Al Qaeda in preparing for or carrying out the 9-11 attacks" (quote from www.answers.com/topic/2003-invasionofIraq). For the Report itself, see www.gpoaccess.gov/911, specifically chapter 10 "Wartime", para. 10.3 "Phase Two and the Question of Iraq". See also McGoldrick, *supra* n. 72, 17-20.

C Some Preliminary Conclusions Regarding the State Practice in Relation to Anticipatory Self-Defense

In the preceding section, we examined a number of situations stretching over a period of some sixty years in which a claim of anticipatory self-defense played a central or prominent role. The examples chosen were the most illustrative of the scope of, and limitations on, the right to take anticipatory action. They also provide a key to understanding how the *Caroline* criteria work in practice – not as a static checklist or as a verbal straitjacket to be taken literally, but as a set of guiding principles which provide a framework for assessment applied in the light of the relevant circumstances, based upon the information available at the time.

This becomes clear if one looks at how these incidents relate to Secretary Webster's well-known formula, "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation". This formula has often been understood to apply exclusively to situations in which there is a virtual certainty that an attack has been initiated, but has yet to reach its point of impact. At most, it is a question of minutes or hours away rather than days or weeks. However, this is not the way *Caroline* has been applied in practice. To further illustrate, we must take a closer look at our examples of State practice, and at other situations in which the *Caroline* framework for assessment and criteria for anticipatory action were applied.

Our first example was the British action to neutralize the French fleet in 1940. As we have seen, the United Kingdom was confronted with a grave situation in the summer of 1940 following the forced evacuation of the British Army from Dunkirk, the loss of most of its heavy equipment and the fall of France. One distinct possibility was that the French fleet could be used by Germany to gain overall naval superiority and mount a successful invasion – or cut Britain's lifelines and starve it into submission. In the event, Hitler was reluctant to mount an invasion and put off that possibility for a variety of reasons until the opportunity passed. It does not appear that he seriously considered the possibility of using the French fleet to gain the naval superiority that the British leadership so feared. Instead, he probably gave the fleet little consideration, aside from its usefulness in achieving a favorable armistice with France.

However, this is historical hindsight. The British Government did not know, nor could it, what was going through Hitler's mind or what plans Germany might have for continuing the war. At the time, it appeared very possible that Germany could and would attempt to gain control of the French fleet in order to mount a successful invasion. Although the British Government had no concrete information indicating Germany was actually contemplating such action, it was a distinct possibility which they had to take into account. Failure to do so could very well have ended in defeat. In other words, under the specific circumstances existing in the summer of 1940, the threat posed by the distinct *possibility* that Germany *could* gain control over the French fleet was "immediate, overwhelming,

leaving no choice of means and no moment for deliberation". It was reasonable for Britain to assume that such an attempt could be made at any time once the bulk of the French fleet had returned to France and came under Axis supervision under the terms of the armistice. It was also reasonable for Britain to assume that once such an attempt was made it would be too late. It was reasonable, therefore, for Britain to forestall this possibility at the only time it was assured of a clear possibility of success.

The same could be said of the decision of the Tokyo Tribunal not to view the Declaration of War by the Netherlands (East Indies) on 8 December 1941 as an excuse for the Japanese invasion, which in the event only occurred weeks later (Japanese forces did not move against the Dutch East Indies until mid-January 1942 after achieving their initial objectives elsewhere in the Pacific and South East Asia). The Japanese strike on Pearl Harbor on the preceding day and the opening of its offensive across the Pacific were clear indications that the Japanese intended to gain control over the entire Pacific and South East Asia region. Under those circumstances, it was reasonable for the Dutch Government to assume that it was only a matter of time before the Dutch East Indies would be invaded and to take the step of declaring war in the hope of mounting some kind of joint defense with the United States, Britain and Australia, rather than waiting to be picked off in piecemeal fashion. The fact that this joint defense failed to thwart the Japanese invasion is irrelevant in legal terms.

Turning to the Six Day War, it is equally clear that the reason why it is generally considered a classic example of a lawful anticipatory self-defense is based less on any clear evidence of impending attack, than on the fact that under the circumstances it was reasonable for Israel to take the course of action it did. The conduct of Israel's neighbors in creating a crisis, engaging in preparations for a potential attack, and uttering hostile pronouncements formed an immediate threat which justified Israel's anticipatory action in self-defense. Irrespective of whether such an attack was in fact on the point of being launched, or ever would have been, Israel had every reason at the time to believe that there was a high possibility, that an attack would be mounted in the near future. How near was unknown, but under the circumstances that fact hardly mattered. Likewise, it was clear that waiting would only increase Israel's vulnerability, without any likelihood that the situation would resolve itself.

In short, immediacy in relation to anticipatory self-defense is not primarily a question of time, but one of the existence of a credible threat of probable (or in some cases potential) attack, which together with necessity and the absence of feasible alternatives, make anticipatory action justifiable or even imperative. While time is a relevant consideration, it is not the only one, nor necessarily the most important.

The remaining two examples do not meet the test of lawful anticipatory action. The first, the Israeli air strike, essentially fails on the question of the existence of a credible threat, based on the information known at the time. Even if

Israel had reason to believe Iraq would try to circumvent the terms of its purchase agreement and the IAEA inspection procedures, and would further attempt to develop and produce nuclear weapons, the situation presented did not constitute a credible threat of an attack within the foreseeable future for which no alternative courses of action were available. It normally takes a State years between gaining access to nuclear technology and producing nuclear weapons. With this in mind, and taking into account the uncertainty of Iraqi intentions at the time, it seems fairly clear that Israel was not confronted in 1981 with the prospect of even a potential Iraqi nuclear attack for which no feasible alternatives to military action were available. Subsequent events go a considerable way in justifying Israel's decision to strike preemptively, but they do not make it lawful.

This seems if anything truer of the US decision to invade Iraq in 2003, at least insofar as that action was based on the right of (anticipatory) self-defense. Whatever other justifications there might have been, there was no credible evidence of any Iraqi intention or preparation to attack the United States, either on its own, or in concert with or in support of any terrorist group or organization.

These two examples fail to meet the criteria for the lawful exercise of anticipatory self-defense because they were neither persuasive nor reasonable under the circumstances. At the time, too many uncertainties existed regarding threats and alternative courses of action appeared to be present.

D The "Bush Doctrine", Self-Defense and the UN Collective Security System

The "Bush Doctrine" of preventive self-defense was set out in the US National Security of September 2002. This doctrine is flawed in a number of ways, some of which have received significant attention and some of which have been largely ignored. Firstly, it is mistaken in taking as its starting point the position that anticipatory self-defense is dependent upon an outmoded concept of imminent threat in the form of "a visible mobilization of armies, navies and air forces for an attack".[76] There was no question of such a mobilization forming an immediate threat in the original *Caroline* incident which, after all, only involved one Great Lakes steam vessel and a handful of active American participants in a rebellion across the border in British Canada. Nor was this the case with regard to all subsequent examples of State practice, such as the neutralization of the French fleet by the Royal Navy in 1940, or the 2001 US led campaign in Afghanistan.[77]

76 See n. 1 *supra.*

77 The invocation of the right of the United States to exercise self-defense in reponse to the attack of 11 September 2001 and the ensuing use of force against *Al Qaeda* and its Taliban host and ally in Afghanistan was recognized or condoned by the UN Security Council and a variety of other States and international organizations. Likewise, most international legal authorities have expressed agreement that the exercise of self-defense against Afghanistan was lawful as such, notwithstanding

In the former example, there was no question of any mobilization of the French Navy for an attack on Great Britain, rather the mere existence of the French fleet, combined with the distinct possibility that it might fall into the wrong hands, constituted immediacy. In the latter, the existence of a significant Al Qaeda presence and infrastructure in Afghanistan with the knowledge and support of the Taliban, together with the occurrence of a series of attacks in the past and the likelihood of further attacks in the foreseeable future, met the immediacy criterion; there was no question of a conventional mobilization of armed forces in the sense referred to above. To be sure, such a mobilization is one way in which immediacy can be manifested, as was the case in relation to the Six Day War. Yet it is not, nor has it ever been, a necessary precondition for the exercise of anticipatory self-defense.

This may appear to some a rather nit-picking criticism, were it not for the fact that the statement is a prelude to a much more serious flaw in the reasoning of the "Bush Doctrine". The NSS goes on to state that "the concept of an immediate threat needs to be redefined to take account of new capabilities and objectives of today's adversaries". It further states that "in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather".[78]

The essential problem with this reasoning is that, taken together and seen in context, it not only seems to imply that the existing concept of anticipatory self-defense is inadequate to deal with contemporary threats, without offering any evidence that this is so, but also seems to reject the basis of the right of self-defense (and the contemporary *jus ad bellum* as a whole) on the basis of a perceived, but never really argued, much less proven, inability to address both real and potential threats. Finally, the "Bush Doctrine's" reasoning attempts to shift the parameters of immediacy, and the notion of anticipatory self-defense itself, to deal with a vague new concept of inchoate threats which could manifest themselves at some point in the future, instead of concrete or probable threats of attack within the foreseeable future. If the implication of this is that the existing right of self-defense is inherently incapable of dealing with situations in which the United States, or any other State for that matter, might find itself in, it is based on an incorrect premise and a fundamental misreading of the scope of the right

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criticism of various aspects of the conduct of the military campaign by some. See S.C. Res. 1368 (2001) and 1373 (2001). A significant number of States both inside and outside the NATO alliance have provided various forms of military, logistical and diplomatic support to the US effort to eradicate *Al Qaeda's* bases in Afghanistan. For support in doctrine, see, *inter alia,* Greenwood, *supra* n. 2 and the sources cited in n. 15 *supra.* The US-led campaign was both reactive and, at least to some extent, anticipatory, in that it was directed towards not only responding to the attack of "9-11", but also towards forestalling future attacks. See in this respect *e.g.* Greenwood, *op.cit.* 21 *et seq.*

78 NSS Document cited in nn. 1 and 72 *supra* at 15

of self-defense. Self-defense, combining both Charter and customary law, has long included the right to take anticipatory action against concrete and credible threats of attack, either from States or from other sources, irrespective of the nature of the attack (conventional, irregular or "asymmetrical") or the type of weapons concerned (WMD or "other" weapons). Obviously, the right to take (anticipatory) action in self-defense is not unlimited. It is predicated upon the principles of necessity and proportionality, interpreted in relation to the nature of the threat and the availability, or lack thereof, of feasible alternatives which would adequately address the threat. These are not outmoded concepts, and need not be seen as overly restrictive or necessarily condemning a State to a purely reactive posture.

The preceding examination of State practice demonstrates that the *Caroline* criteria should not be seen as preventing a state from taking the necessary action to forestall concrete and credible threats of attack within the foreseeable future. The concepts of immediacy and necessity are capable of being applied flexibly and in relation to a wide variety of situations. But they are also fundamental. Without them, there would be no limits to the use of force under the guise of self-defense.

If, however, the implication put forward in the US NSS is that self-defense is or should be relevant to situations in which only the general possibility of attack from an indeterminate source and at some indeterminate point in the future exists, a total redefinition of the entire concept of self-defense and the complete replacement of the present legal system governing the use of force would result. Self-defense however defined, has always been linked to the existence of a concrete (threat of an) attack within at least the foreseeable future. While this is not necessarily the immediate temporal future in the sense of minutes, hours or even days, the principles of immediacy and necessity are central to the concept of self-defense itself and cannot be open ended as the NSS implies.

It seems clear from the foregoing that the position put forward in the NSS fails on at least two counts. Firstly, the existing right of self-defense is in fact capable of being applied to contemporary threats and is adequate to counter such concrete threats of attack. Secondly, self-defense is not relevant in situations where no such concrete threat of attack exists.

Under the contemporary legal system, the use of force other than in self-defense can only be undertaken by the Security Council, or by a regional organization or a (coalition of) State(s) acting under the authorization of the Council. The Council has extensive powers to take any measures it determines are required, including the use of military force to deal with situations other than self-defense in response to an attack or concrete threat of attack. To be sure, it has not always used those powers effectively. Room remains for considerable improvement in its effectiveness and legitimacy. One possibility would be to work towards some kind of coherent international security strategy to deal with the general long term problems of the possibility of proliferation of weapons of mass destruction,

international terrorism and the underlying structural problems which contribute to and aggravate these phenomena.[79] This is a task beyond the capacity of any single State or group of States, but it would complement the efforts and policies of States seeking to address such problems. The option does not even seem to be considered in the NSS. Indeed, it makes no mention of the UN collective security system at all. This is an additional reason why it has generated so much discussion.

The answer to this challenge to the present legal structure governing the use of force is twofold. Firstly, it is necessary to reach a realistic understanding of the scope and limits of self-defense which takes into account the possibility of anticipatory action in response to concrete threats of attack. It would include situations involving persuasive evidence of probable attack within the foreseeable future (in accordance with the *Caroline* criteria), but would not seek to extend the concept to situations where no concrete threat exists. Nor would it substitute self-defense for collective security. Secondly, a serious attempt to utilize the Charter's collective security system is required in situations not covered by self-defense. This would include an effort by the Council and the broader international community to work out a coherent strategy, and the means to implement it, for dealing with threats to international security to which no generally acceptable concept of self-defense applies.

The United Nation's collective security system and a realistically interpreted right of self-defense grounded in customary and Charter law combine to form a potentially effective legal and political structure capable of dealing with a wide variety of situations. Before abandoning this structure, it seems reasonable to try to adapt it to meet current and future threats to international security and to individual States.

79 One reasonable attempt which has been made to address the problems of the UN in general and the UN collective security system in particular, as well as provide a framework and starting point for a coherent "international security strategy" is the Report of the "High-level Panel of Experts on Threats, Challenges and Change" drawn up at the request of UN Secretary-General Anan and transmitted to the UN General Assembly for consideration at its annual session in September 2005 as UN Doc. A/59/565 of 2 December 2004. The Report addresses the relationship of (anticipatory) self-defense to the UN collective security system in its Part Three at 53 *et seq.* While the suggestions made in the Report regarding this relationship and the parameters of self-defense are not above criticism and were not acted upon by the General Assembly at its 2005 annual session, this does not mean they do not deserve serious consideration. The Report offers a useful stating point for a debate concerning the role of the UN collective security system and its relationship with self-defense, one which should be taken up at the earliest possible time.

IV The Temporal Dimension of the Right of Self-Defense II: Immediacy as the Dividing Line between Self-Defense and Reprisal

A Introductory Remarks

Immediacy in the context of the *Caroline* criteria for anticipatory self-defense is synonymous with the existence of an imminent or immediate threat of an armed attack. It is not primarily a question of time, but rather the existence of a credible threat of probable or, in some cases, even potential attack. The specific, factual circumstances of each particular situation are determinative.

We now turn to immediacy in a more general sense, as one of the core criteria (alongside necessity and proportionality) for the use of force in self-defense.[80] In this regard, immediacy is often seen as the dividing line between self-defense and armed reprisal. According to this approach, immediacy implies a duty on the part of the defending State to exercise the right of self-defense very shortly after the armed attack. Any armed response not meeting this requirement would instead constitute an armed reprisal, which is generally considered illegal under contemporary international law. In this paragraph, we examine whether such a requirement in fact forms part of the right of self-defense.

B Immediacy as an Independent Criterion for the Exercise of the Right of Self-Defense

The contention that self-defense is subject to a requirement of immediate exercise can be traced to two sources. The first is a common association of the international law of self-defense with the concept of personal self-defense against illegal assault under domestic criminal law. The second is the understandable desire to distinguish between the right of self-defense under the Charter and customary international law from the concept of armed reprisal, which has no legal basis under contemporary international law.[81]

With regard to the first of these reasons, it would appear that even where no direct link is claimed to exist between the international and domestic law rights of self-defense, much thinking regarding the former is influenced by the scope and limitations of the latter variant. Under the domestic criminal law, self-defense is generally a narrow ground for justifying what would otherwise be

80 See n. 5 and accompanying text *supra.*

81 On the illegality of punitive armed reprisals, see *inter alia* Dinstein, *supra* n. 5, 215-16 (where he distinguishes between defensive and punitive armed reprisals) and Barsotti, "Armed Reprisals" in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 79 *et seq.* See also the reference to the illegality of (peace time) armed reprisal in UNGA Res. 2625 (xxv) of 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (the "Friendly Relations" Declaration).

criminal behavior. It is temporary and restricted. The foundational premise is, of course, that the State bears the responsibility and sole right to maintain public order and uphold the domestic legal order. Of course, not all States are capable of fulfilling these responsibilities. However, the more stable and well ordered a society and its State structure, the more restrictive the right of self-defense under domestic law is likely to be.

It is almost impossible to imagine a domestic criminal law scenario in which an individual would be justified in taking action in self-defense other than either at the moment an illegal assault took place or (perhaps) just immediately before or after it occurred. Once any appreciable amount of time had lapsed, it would be extremely difficult to legally justify any type of violent response.

However, the right of States to exercise self-defense under international law cannot be compared to the domestic rights of individuals. Despite the common roots of the two variants in natural law doctrine, they are completely distinct, operating within totally different contexts and environments.

International relations and the corresponding international legal order are characterized by a degree of decentralization and horizontalism which radically differ from a well ordered and stable domestic legal order. Individuals are not States and the Security Council is by no means a world government exercising control over an established and effective criminal justice system.

As to the second source, the question is whether the distinction between legitimate self-defense and illegal armed reprisal lies principally in the lapse of time between an attack and response, or whether other factors, such as the response's nature, purpose and objective, are in fact more important. While self-defense and armed reprisal are both forms of self-help, and thereby have certain common characteristics, they are distinct in terms of purposes and objectives. The purpose of self-defense is to ward off and, if necessary, defeat an attack. Armed reprisals redress an injustice and mete out punishment to the wrongdoer. The grey area between self-defense and reprisals is sometimes referred to as "defensive armed reprisals", arguably a particular type of self-defense blending elements of both.[82] In any case, the question of whether a particular action qualifies as self-defense depends primarily on whether such action was necessary to ward off an

82 This is the position taken by Dinstein, *op. cit.* 215 *et seq.* While his arguments are generally persuasive, there seems to be a certain inconsistency in his support of defensive armed reprisals on the one hand and his rejection of anticipatory action – or at least his restriction of such action to what he refers to as "interceptive" self-defense. If defensive armed reprisals form part of self-defense, it must be so primarily because they are directed towards the prevention of further or recurring attacks at some point in the future. By its nature, such action includes an element of anticipatory self-defense which is not necessarily restricted to the interception of an attack that has been initiated. An example of such an exercise of self-defense which was both partly a defensive armed reprisal and partly an act of anticipatory self-defense was the US and Allied response to the "9-11" attack by means of a counter attack against Al Qaeda and the Taliban in Afghanistan, referred to in n. 77 *supra*. It seems to this

ongoing (or deter a continuing) attack, and not whether the response immediately followed the attack.

There are various reasons why immediacy applied in this sense should not serve as a litmus test for whether a particular action qualifies as self-defense rather than reprisal. The first is that self-defense is not subject to such a requirement under either customary law or the Charter. In many situations, States may not be in a position to respond immediately. Reasons could include a lack of military preparedness, the time involved in deploying forces over large distances, an imbalance in military capabilities between the attacking and defending States, the need to consult with allies, and so forth. One particular circumstance might be a so-called indirect attack carried out covertly or through third parties such as armed bands, terrorist groups and the like, acting under the direction of or in cooperation with a State. In such cases, it will not always be clear who authored the attack, so the victim will have to assure itself and other States and international actors that its response in self-defense is actually directed against those responsible (and is based on reasonable evidence).[83]

The second reason why immediacy does not serve as a requirement that defensive action must follow an attack quickly or not at all lies in the underlying purpose and rationale of self-defense. Although linked to the first set of considerations, it is in fact fundamental. An armed attack is a serious threat to a State's independence and integrity – so serious that it gives rise to the only clearly accepted exception to the prohibition of the use of force. There is no persuasive reason why a State should be expected to forfeit its rights to integrity and independence simply because it is not in a position to instantly respond militarily. To accept such a condition would be tantamount to accepting a gross inequality in the international legal rights of States. A powerful State with the means to

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author that it is more a question of the reasoning used than the conclusions reached by different routes that separate our respective positions.

83 For problems relating to evidence of the source of attacks – especially indirect attacks – in the face of denials and related conduct, see nn. 30-32 *supra*. It is submitted that there must be credible and persuasive evidence as to the source of a particular attack. This is perhaps even more the case in relation to the exercise of anticipatory self-defense, where the possibility of error (based upon faulty or incomplete information or intelligence) is self-evident. However, this does not signify that the evidence should be held to the same standard as in criminal proceedings. It would be unreasonable to impose such a high burden of proof in relation to inter-State self-defense. Where a State can make out a "case" based on persuasive evidence which is "highly suggestive", to use the terminology of the ICJ in the *Oil Platform* case, there is in principle a basis of taking action in self-defense, including anticipatory self-defense. This is *a fortiori* the case when a State has contributed to a perception on the part of the reacting State that it approves, condones or otherwise threatens the reacting State by its own conduct. In any case, it should be clear that mere denial of responsibility should not be taken at face value any more than mere allegations of responsibility that are unsupported by further evidence should be.

respond instantly would have more right to defend itself than one less able to do so. This is not an acceptable outcome, nor one reflecting the underlying purpose of self-defense or, for that matter, of the Charter itself.

In sum, while immediacy serves as a core element of self-defense, it must be interpreted reasonably. First, it should not be confused with the right of self-defense in domestic criminal law. Second, a State must be allowed the necessary time to overcome practical and legal hurdles before it decides to react. The determining factor is the purpose and nature of its reaction, not whether it takes action within an artificially short time span. Whether one sees immediacy used in this sense as an independent criterion alongside necessity and proportionality, or as forming part of the criterion of necessity is immaterial; the point is that a State exercising self-defense should do so within a reasonable period, on the basis of persuasive evidence and with a view towards thwarting or, where necessary, overcoming the attack and removing the threat of further attack.

V Final Conclusions

In this article we have examined the "temporal dimension" of self-defense. We have also looked at the questions and challenges posed by the National Security Strategy regulating the use of force and in those contexts looked at the relationship between self-defense and the collective security system of the United Nations. With regard to anticipatory self-defense, a right to take such anticipatory action has long existed under customary international law. It continues to exist under the Charter. Long-standing State practice spanning over sixty years following adoption of the Charter, together with significant evidence of the *opinio juris* in the form of the *Caroline* criteria as a set of guiding principles, support its continual vitality.

The examples analyzed above make it clear that full account must be given to the relevant circumstances of each specific situation. In doing so, the concept of an immediate or imminent threat of attack reveals itself as a flexible one. It allows a State to take anticipatory action when there is persuasive evidence of the existence of a probable or, in exceptional circumstances, even a potential threat of attack within the foreseeable future. It is equally clear that although this concept is flexible, it is not open ended, for it does not allow taking anticipatory action absent a credible threat of attack, nor would it permit preventive action against the mere possibility of attack at some indeterminate point. This is why the 2002 US NSS, sometimes referred to as the "Bush Doctrine", has proven to be so controversial; its acceptance would totally rewrite the legal system governing the use of force. The better alternative consists of reasonably applying the existing law of anticipatory self-defense with utilization of the UN collective security system.

It is equally essential to reasonably interpret the requirement of "immediacy". Such an interpretation must not restrict defensive measures to mere reaction, or interception of, an attack, but rather includes actions of a truly antici-

patory character in the face of a clear and concrete threat of an attack within the foreseeable future, subject, of course, to the additional *Caroline* criteria of necessity and proportionality. That is the limit of self-defense for it to remain such. In relation to threats and situations which do not constitute such threats of attack, there can be no role for self-defense. That is why the notion of preventive self-defense in relation to inchoate threats possibly occurring at some indeterminate future point, as advanced in the "Bush Doctrine", is inconsistent with acceptable interpretation of the right of self-defense.

With regard to immediacy as a general criterion, no requirement exists for defensive action to be exercised or risk forfeiture immediately following an armed attack. Acceptance of such a requirement would in some cases force a State to attempt self-defense when it was at a severe disadvantage, or cause it to act on the basis of incomplete information. It would ignore military, political, and legal realities. Moreover, it is inequitable, and violates one of the central tenets of the international legal system – that sovereign States enjoy equality, independence and security.

The right of self-defense must reflect the realities of the international system and the aspirations of the international community. International law provides States with the "inherent" right to defend themselves, while making the exercise of that right subject to legal regulation within generally accepted principles and terms of assessment. It is submitted that Secretary Webster's formulation of these guiding principles, when applied in context, does just that. The principles hold as true today as when they were first set out over a century and a half ago.

Chapter 6

Responding to Transnational Terrorism under the *Jus ad Bellum*: A Normative Framework

Michael N. Schmitt *

On April 5, 1986, terrorists bombed Berlin's La Belle discotheque, a bar frequented by US military personnel. One American soldier and one Turkish woman were killed and nearly 200 other patrons injured. Prior to the attack, US intelligence intercepted communications to the Libyan Peoples Bureau in the city ordering an attack on Americans. Other intercepts, collected both before and after the bombing, further substantiated Libyan involvement.

Ten days later, the United States responded with Operation El Dorado Canyon, a strike involving some 200 aircraft targeting terrorist and Libyan government facilities in Tripoli and Benghazi, including a residence of Libyan leader Muammar el-Qadaffi. The international reaction was overwhelmingly critical. The United Nations General Assembly "condemned" the attack as "a violation of the Charter of the United Nations and of international law,"[1] while Secretary General Javier Perez de Cuellar publicly "deplored" the "military action by one member state against another."[2] The reaction of individual States, with the notable exceptions of the United Kingdom (from which some of the aircraft launched) and Israel, was likewise unsupportive.[3] Indeed, aircraft based in the

* The views expressed in this article are those of the author in his private capacity and are not meant to necessarily reflect those of the United States or German governments.

1 GA Res. 41/38 (Nov. 20, 1986).

2 Elaine Sciolino, *Attack on Libya: The View from Capital Hill.* New York Times, Apr. 16, 1986, at A17.

3 For instance, Shimon Peres, the Israeli Prime Minister, stated "the American action benefited the whole free world, which was becoming more and more a victim of irresponsible terrorism. It is good that a major power like the United States took steps to cut off the arm of the terrorists, at least one of them." Jonathan Broder, *Israelis Praise It While Arabs Vow to Avenge It,* Chicago Tribune, Apr. 16, 1986, at A9. On the reaction to the strike, see W. Michael Reisman, *International Legal Responses to Terrorism,* 22 Houston Journal of International Law 3, 33-34 (1999) for a description of the international reaction. See also Stuart G. Baker, *Comparing the 1993 U.S Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51,* 24 Georgia Journal Of International and Comparative Law 99 (1994).

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United Kingdom had to transit the Strait of Gibraltar because the United States could not secure overflight rights from countries, including NATO ally France, along the most direct route to the target area.[4]

Fifteen years later, on 11 September 2001, member of al Qaeda, a shadowy terrorist network operating from some 60 countries, seized control of four aircraft, flying two into the World Trade Center, and a third into the Pentagon. The fourth crashed in Pennsylvania following a valiant attempt by passengers to regain control of the aircraft. In all, nearly 3,000 people died, the citizens of over 100 nations. The financial impact of the attack has been estimated in the hundreds of billions of dollars.[5]

The United States and its coalition partners responded on October 7th by attacking both al Qaeda and Taliban targets in Afghanistan. Not only did the international community refrain from condemning Operation Enduring Freedom (OEF), but many States provided verbal and material support. The United Nations and other intergovernmental organizations treated the 9/11 terrorist strikes as meriting military action in self-defence, even as the United States ousted the Taliban regime, which no credible source cited as behind the attacks. There is little question but that the international normative understandings regarding the application of the *jus ad bellum*, that component of international law which governs when States may resort to force, had changed dramatically.[6]

This contribution to honour Professor Yoram Dinstein on the occasion of his 70th birthday explores the relationship between terrorism and international law under the *jus ad bellum*. It is a particularly apposite topic, for Professor Dinstein has authored the seminal text on the topic, *War, Aggression and Self-Defence*.[7] Now in its 4th edition, it has become a classic in the nearly two decades since its release.

With regard to terrorism, Professor Dinstein has added a separate section on armed attacks by non-State actors to the current edition of his tome. Other aspects of the text relevant to terrorism have also been revised. Such revisions are far from surprising. Large-scale transnational terrorism compelled the inter-

4 Military aircraft are permitted transit passage through international straits, i.e., a strait in territorial waters (including overlapping territorial waters of multiple States) linking two parts of the high seas (or exclusive economic zones). See The Commander's Handbook on the Law of Naval Warfare (NWP 1-14M; MCWP 5-2.1; COMDPUB P5800.7) (1995), at para. 2.3.3.1.

5 The Comptroller of New York City estimated the cost to the city alone at $95 billion. Richard Wray, *NY Counts Cost of 9/11*, The Guardian Unlimited, Sept. 5, 2002, at www.guardian.co.uk/september11/story/0,11209,786326,00.html. Financial losses and the cost to the US government dwarfs that figure.

6 For a discussion of such issues, see Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 Israel Yearbook on Human Rights 53 (2002).

7 Yoram Dinstein, War, Aggression and Self-Defence, (4th ed., Cambridge, 2005).

national community to discover a normative architecture governing the legal bases for counterterrorism that had theretofore been rather obscure. Specifically, although traditionally viewed as a matter for law enforcement, States and intergovernmental organizations now style terrorism as justifying, with certain conditions, the use of military force pursuant to the *jus ad bellum*. It is not so much that the law has changed as it is that existing law is being applied in a nascent context. In law, as in all other aspects of international security, what one sees depends on where one stands.

I The *Jus ad Bellum* Schema

Set out in the United Nations Charter, the *jus ad bellum* schema is linear. Pursuant to Article 2(4), States Party to the Charter agree to "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."[8] There are two universally accepted exceptions to the prohibition.

A Security Council Mandate

The first occurs when the Security Council determines pursuant to Article 39 that a breach of the peace, act of aggression, or threat to the peace exists.[9] Having made such a determination, and having attempted to resolve the situation through non-forceful measures as required by Article 41 (or determining that they would prove fruitless),[10] the Council may authorize the use of force to maintain or restore international peace and security pursuant to Article 42.[11] Such actions are known variously as Chapter VII, peace enforcement, or collective security operations.

8 UN Charter, art. 2(4).

9 UN Charter, art. 39. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

10 UN Charter, art. 41. "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

11 UN Charter, art. 42. "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

In the eyes of the Security Council, international terrorism qualifies as a threat to international peace and security. It made exactly that finding the very day after the attacks of September 11th. In Resolution 1368, the Council "[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security."[12]

Note the scope of the Council's characterization of *any* act of international terrorism as a threat to international peace and security. It did so again on 28 September in Resolution 1373, which encouraged international cooperation in the fight against terrorism, specifically through implementation of international conventions.[13] The Resolution further "[u]nequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security ...."

On 12 November, the Council adopted Resolution 1377, to which a Ministerial level declaration on terrorism was attached. The declaration branded international terrorism "one of the most serious threats to international peace and security in the twenty-first century," declared it "a challenge to all States and to all of humanity," reaffirmed the Council's "unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed," and called on "all States to intensify their efforts to eliminate the scourge of international terrorism."[14] Since then, the Security Council has characterized terrorist attacks as threats to international peace and security with

12 SC Res. 1368 (Sept. 12, 2001).

13 SC Res. 1373 (Sept. 28, 2001). The resolution "reaffirmed" Resolution 1373, as well as SC Resolution 1269 (Oct. 19, 1999), which had "[u]nequivocally condemn[ed]all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security." See also SC Res. 1455 (Jan. 17, 2003); SC Res. 566 (Oct. 8, 2004); SC Res. 1526 (Jan. 30, 2004); SC Res.1535 (Mar. 26, 2004); and SC Res.1617 (July 29, 2005).

14 SC Res. 1377 (Nov. 12, 2001). In 2003, the Council, meeting at the Foreign Minister Level, adopted a similar declaration. SC Res. 1456 (Jan. 20, 2003). At the 2005 Security Council Summit, Resolution 1624 (Sept. 14, 2005) was adopted, again calling on Member States to intensify their domestic and international efforts to combat terrorism.

great regularity: Bali (2002),[15] Moscow (2002),[16] Kenya (2002),[17] Bogotá (2003),[18] Istanbul (2003),[19] Madrid (2004),[20] London (2005),[21] and Iraq (2005).[22]

It is, therefore, irrefutable that international terrorism constitutes a qualifying condition precedent to Article 42 action. On repeated occasions, the Council, exercising its Chapter VII powers, has encouraged, and sometimes required, States to cooperate in combating international terrorism. Most notably, in Resolution 1373, it obliged them to, *inter alia*, prevent the financing of terrorism; criminalize the collection of funds for terrorist purposes; freeze the financial assets of anyone who participates in, or facilitates, terrorism; and take any steps necessary to prevent terrorist acts, including passing early-warning information to other States. Drawing on the recent Taliban experience, the Resolution additionally instructed States to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;" "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;" and "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."[23]

Although the Security Council has never expressly mandated the use of force in response to terrorism, it has taken measures short of that remedy. For instance, the Council directed non-forceful sanctions against both Libya and Sudan during the 1990s for their support of terrorism.[24] And in 1999 it imposed sanctions on the Taliban because, among other reasons, the regime was providing safe haven to Osama bin Laden and allowing him and his associates "to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations."[25]

15 SC Res. 1438 (Oct. 14, 2002).
16 SC Res. 1440 (Oct. 24, 2002).
17 SC Res. 1450 (Dec. 13, 2002).
18 SC Res. 1465 (Feb. 13, 2003).
19 SC Res. 1516 (Nov. 20, 2003).
20 SC Res. 1530 (Mar.11, 2004).
21 SC Res. 1611 (July 7, 2005).
22 SC Res. 1618, (Aug. 4, 2005).
23 SC Res. 1373 (Sept. 28, 2001).
24 SC Res. 748 (Mar. 31, 1992) (Libya); S.C. Res. 1054 (Apr. 29, 1996) (Sudan).
25 SC Res. 1267 (Oct. 15, 1999).

The sanctions included a ban on flights to and from Afghanistan and an international freeze on Taliban assets. Further sanctions were imposed in 2000 and a sanctions monitoring mechanism was established in 2001.[26]

Few would contest the power of the Security Council to take the further step of authorizing force to counter terrorism, should it so deem necessary. It is important to understand that the Council enjoys unconditional authority to determine both when a situation constitutes a threat, breach, or act of aggression and whether to mandate the use of force in response. Once the Council grants a mandate, it is irreversible except by decision of the Council itself or upon occurrence of a termination condition, such as a cessation date, set forth in the Resolution in question.[27] No review mechanism exists to effectively challenge the Council's decision.

This being so, it would be entirely within the Security Council's prerogative to determine that any terrorist related action amounted to a threat to international peace and security necessitating a forceful response. As an example, from 1998 through 2001, the Council frequently censured the Taliban regime over terrorism related issues.[28] At any time during that period, the Council could have authorized the use of force against the Taliban, either to coerce the regime into compliance with its wishes or to remove it from power. It elected to not take such a dramatic step, even after the attacks of September 11th. But the point is that the Council enjoyed the discretion to do so and, in the future, it may opt to exercise said power in the face of transnational terrorism posing catastrophic risks to the global community.

B Self-Defence

When the United States, United Kingdom and other States attacked Afghanistan in 2001, they averred self-defence as the operation's legal basis. Self-defence constitutes the second express exception to the Charter prohibition on the use of

26 SC Res. 1333 (Dec. 19, 2000); SC Res. 1363 (July 30, 2001).

27 An example of expiration involved the UN Preventive Deployment Force (UNPREDEP) in the Former Yugoslav Republic of Macedonia. Its mandate, initially set out in SC Res. 983 (Mar. 31, 1995), expired on February 28, 1999. China vetoed the resolution seeking extension, a move widely regarded as retaliation for Macedonia's establishment of diplomatic relations with Taiwan.
A resolution may also fall into desuetude when circumstances have so changed that the underlying logic and purpose of the resolution no longer resonate. However, absent that condition or a new resolution repudiating the original resolution "a presumption of continuity is plausible." See Adam Roberts, *Law and the Use of Force in Iraq,* Survival, June 2003, at 31, 43.

28 SC Res. 1193 (Aug. 28, 1998); SC Res. 1214 (Dec. 8, 1998); SC Res. 1267 (Oct. 15, 1999); SC Res. 1333 (Dec. 19, 2000); SC Res. 1363 (July 30, 2001).

force. A form of self-help in international law, it is a customary international law norm codified in Article 51 of the United Nations Charter.

> 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.

Note that self-defence may be exercised individually or collectively. Since not every State participating in OEF had been attacked on September 11th, the Coalition operations launched on October 7th amounted to both collective defence and individual self-defence.

Operation Enduring Freedom was not the first instance of the United States claiming self-defence as a right in forcefully countering terrorism, although in previous decades it typically addressed transnational terrorism through the prism of law enforcement.[29] The international reaction to such assertion of self-defence has evolved steadily, an evolution that reflects a clear shift in the normative expectations regarding exercise of the right.

Recall Operation El Dorado Canyon in 1986, mentioned at the outset of this article. Following the attack, President Reagan announced the United States had acted defensively: "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 UN Charter."[30] As noted, the international community generally balked at this justification.

The United States again claimed the right to react to terrorism in self-defence when it uncovered an assassination plot against former President George

29 In 1988, President George H.W. Bush elected not to respond militarily when terrorists blew up Pan American flight 103 over Lockerbie, Scotland. 270 died in the attack. Instead, the United States mobilized international pressure that led to prosecution by a Scottish court sitting in the Netherlands. Extradition and criminal prosecution of those involved in the World Trade Center bombing, particularly Sheik Omar Abdel Rahman, was the chosen course of action.

30 President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in Department of State Bulletin, June 1986, at 1-2. See also, White House Statement, in Department of State Bulletin, June 1986, at 1. A suggestion that the motive was retaliation created some confusion: "Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible....".

Bush in 1993. In reporting to the Security Council that US forces had replied by launching cruise missiles against Iraqi intelligence facilities, Madeline Albright, US Ambassador to the United Nations, stated "I am not asking the Council for any action…but in our judgment every member here today would regard an assassination attempt against its former head of state as an attack against itself and would react."[31] International reaction was certainly more muted than it had been in response to El Dorado Canyon, a fact no doubt influenced by Iraq's status as an international pariah in the aftermath of events that had precipitated the First Gulf War, as well as that nation's non-compliance with the terms of the cease-fire.

In 1998, the United States again claimed a right to use defensive force following the bombings of US embassies in Nairobi and Dar-es-Salaam. Albright, now Secretary of State, announced that "[I]f we had not taken this action, we would not have been exercising our right of self-defense ...."[32] A number of States, including Iran, Iraq, Libya, Pakistan, and Russia, condemned the response, which consisted of cruise missile strikes against terrorist camps in Afghanistan and a pharmaceutical plant in Sudan allegedly tied to terrorism.[33] However, a stream of criticism distinguishing between the two targets foreshadowed a shift in international normative expectations regarding forceful State responses to transnational terrorism. The League of Arab States, for example, criticised the strike into Sudan while offering no comment on that against targets in Afghanistan.[34] At the United Nations, Sudan, the Group of African States, the Arab League, and the Group of Islamic States asked the Security Council to investigate the Sudan attack, but remained silent over the companion operations against Afghanistan-based targets.[35] Perhaps most tellingly, in nearly every case, censure focused not

31 Stanley Meisler, *U.N. Reaction Mild As U.S. Explains Raid*, Los Angeles Times, June 28, 1993, at A1.

32 Michael Lacey, *Self-Defense or Self-Denial, The Proliferation of Weapons of Mass Destruction*, 10 Indiana International and Comparative Law Review 293, 295 (2000), citing Secretary of State Madeleine K. Albright, Interview between Albright and CBS-TV Nightly News with Dan Rather Aug. 21, 1998.

33 Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 American Journal of International Law 161, 164-65 (1999).

34 Letter from the Charge d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), UN Doc. S/1998/789

35 Letter from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), UN Doc. S/1998/786; Letter from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council (Aug. 25, 1998), UN Doc. S/1998/802 (conveying Group of African States request); Letter from the Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), UN Doc. S/l 998/791 (conveying League of Arab States request); Letter from the Charge d'Affaires A.I. of

on the fact that a forceful response to a terrorist attack had been mounted, but rather on a belief that the Sudan attack was based on faulty intelligence. In other words, there was implied acceptance of a State's right to react forcefully to terrorism pursuant to the law of self-defence, so long as the action is based on reliable information.

The acceptability of resorting to military force in response to transnational terrorism crystallized in the aftermath of 9/11. Prior to that event, many in the international legal community would still have urged that the international law of self-defence referred only to "armed attacks" by States or armed groups acting on behalf of a State. Violent acts by non-State actors remained the province of law-enforcement.

However, within a day of the attacks, and at a time when no one was suggesting a State was behind them, the Security Council adopted Resolution 1368, in which it recognized the inherent right of individual or collective self-defence.[36] This action suggested that the Council now understood the law of self-defence as extending to terrorism, at least of the kind mounted on September 11th. Lest the resolution be styled merely an emotive reaction to the events of the previous day, on 28 September the Council again affirmed the right of self-defence in Resolution 1373.[37] Other international organizations took exactly the same approach. For instance, both NATO and the Organization of American States activated the collective defence provisions of their respective treaties.[38] So too did Australia vis-à-vis the ANZUS Pact.[39] Bilateral support for the prospective US exercise of its self-defence rights was equally widespread, as 27 nations granted overflight and landing rights to US military aircraft and 46 issued declarations of support. Quite simply, it was universally accepted that a military response in self-defence would be appropriate and lawful.

On October 7th, US and Coalition forces launched that response. US Ambassador to the United Nations John Negroponte contemporaneously noti-

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the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), UN Doc. S/1 998/790 (conveying Group of Islamic States request).

36 SC Res. 1368 (Sept. 12, 2001).

37 SC Res. 1373 (Sept. 28, 2001).

38 North Atlantic Treaty, Apr. 4 1959, art. 5, 63 Stat. 2241, 2244, 34 UNTS 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 1700, 21 UNTS 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001).

39 Security Treaty, Sept. 1, 1951, US-Aust.-N.Z., art. IV, 3 UST 3420, 3423, 131 UNTS 83, 86; Brendan Pearson, *PM Commits to Mutual Defence*, Australian Financial Review, Sept. 15, 2001, at 9.

fied the Security Council, as required by Article 51, that the United States was exercising its right to self-defence.

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on 11 September 2001.
>
> … Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defense requires further actions with respect to other organizations and other States.
>
> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.
>
> In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan ....[40]

Despite the fact that the attacks fell on not only al Qaeda, but also the *de facto* government of Afghanistan, the Taliban, criticism was nowhere to be heard. On the contrary, support for the operations was effusive. The United Kingdom participated from the beginning, and Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.[41] Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi

40 Letter from The Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, Oct. 7, 2007, UN Doc S/2001/946.

41 Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 American Journal of International Law 237, 248 (2002).

Arabia, Tajikistan, Turkey, and Uzbekistan opened airspace and provided facilities to support operations.[42]

Further, the claim of the right to act in self-defence engendered *de minimis* controversy. China and Russia endorsed the operations, as did Arab states such as Egypt.[43] International organizations were likewise sympathetic to the position. The European Union "confirmed its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council."[44] The United Nations Security Council continued to adopt resolution after resolution reaffirming the right to self-defence, thereby implicitly accepting the Coalition operations as legitimate and lawful.[45] Even the Organization of the Islamic Conference seemed to approve, simply urging the United States not to expand operations beyond Afghan territory.[46]

Of course, that the United States had acted militarily in self-defence did not preclude it and its partners around the world from taking other measures. For instance, the Security Council imposed financial sanctions on Afghanistan in Resolution 1373, Saudi Arabia and the United Arab Emirates broke off diplomatic relations with the already isolated regime, and the largest international cooperative law enforcement effort in history was (and continues to be) mounted to identify, locate, arrest, and prosecute terrorists. However, with 9/11, international law became unequivocal vis-à-vis the propriety of using armed force to counter transnational terrorism. The military has been added as yet another arrow in the quiver of international counter-terrorism strategy.[47]

Self-Defence Against Non-State Actors: Despite a paucity of scholarly or policy attention to self-defence against armed attacks by non-State actors acting autonomously from a State, extension of the right to such situations is supportable as a matter of law, not mere political expediency. In particular, note that Article 51 makes no mention of the nature of the entity that commits the offending armed attack, whereas the Article 2(4) prohibition on the use of force specifically refers to "Member states" acting in their "international relations" (i.e., against other States). This suggests there is no limitation on the use of defensive force

42 *Id.*

43 *Id.*

44 Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2001, at 1, SN 4296/2/01 Rev. 2.

45 *E.g.*, SC Res. 1378 (Nov. 14, 2001); S.C. Res. 1386 (Dec. 20, 2001); S.C. Res. 1390 (Jan. 28, 2002).

46 Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke*, Washington Post, Oct. 11, 2001, at A21.

47 Of course, the military is used in many nations for counter-terrorist purposes. What is new is the treatment of counter-terrorism as a classic military operation rather than "assistance to law enforcement."

against entities other than States, a position supported by the fact that neither Article 39 nor 41, which appear in the same chapter as 51, refer to States. Indeed, the Security Council has never restricted enforcement actions to those directed against States. For instance, it has created international tribunals to prosecute individuals charged with crimes against humanity, war crimes, and genocide.[48] It would be incongruous to suggest that Article 51 should be interpreted differently.

Curiously, the International Court of Justice appears to have done just that in its Advisory Opinion on *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories*.[49] There, the majority opined that Article 51 was irrelevant because Israel did not avow that the terrorist attacks the wall was intended to thwart were imputable to a foreign State.[50] In doing so, the Court seemed to strictly apply, without directly referencing, its holding in *Military and Paramilitary Activities in and against Nicaragua.* In *Nicaragua*, the Court found that actions of irregulars could constitute an armed attack if they were "sent by or on behalf" of a State and if the "scale and effects" of the action "would have been classified as an armed attack . . . had it been carried out by regular armed forces"[51]

Judges Higgins, Kooijmans, and Buergenthal rejected the majority position, correctly pointing to: 1) the absence of mention of a State as the originator of an armed attack in Article 51 and 2) the clear intent of the Security Council to treat terrorist attacks as armed attacks (expressed, e.g., in Resolutions 1368 and 1373).[52] Moreover, the question in the two ICJ cases differed materially. In *Nicaragua*, the issue was when did a State's support of guerrillas justify imputing their acts to the State, such that the victim could respond in self-defence (individually or collectively) directly against the supporter. The Court did not address the issue at hand in the *Wall* case, i.e., whether the actions of a non-State actor justified the use of force directly against that actor in self-defence.

In this regard, the one point of agreement in the *Wall* opinion was that acts against which the State is responding in self-defence have to be mounted from outside the State (unless they can be imputed to another State) before triggering the right to self-defence. The majority used this as a second basis for rejecting Israel's claim to self-defence. It distinguished the situation "contem-

48 International Criminal Tribunal for the Former Yugoslavia, SC Res. 827 (May 25, 1993); International Criminal Tribunal for Rwanda, SC Res. 955 (Nov. 8, 1994).

49 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (International Court of Justice, July 9, 2004), 43 International Legal Materials 1009 (2004).

50 *Id*. at para. 139.

51 *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. US), Merits, 1986 ICJ Rep. 14 (June 27), at para. 195.

52 Separate Opinion of Judge Higgins, para. 33; Separate Opinion of Judge Kooijmans, para. 35; Declaration of Judge Buergenthal, para. 6.

plated by Security Council Resolutions 1368 (2001) and 1373 (2001)," arguing that "Israel exercises control in the Occupied Palestinian Territory" and "the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."[53] Judges Buergenthal and Higgins both (correctly) contested the Court's extension of the principle to occupied territories. In their view, attacks originating therein meet the external attack criterion.[54] The caveat of occupied territory aside, though, terrorism occurring wholly within the State does not implicate the right of self-defence. Rather, it falls within the purview of domestic criminal law and, in certain circumstances, the law of non-international armed conflict.

The Nature of an "Armed Attack": It is now clear that terrorists may launch armed attacks as that phrase is understood in the Article 51 context. However, this leaves open the question of what constitutes an "armed attack."

Article 2(4) prohibits certain "uses of force", whereas the Article 51 condition precedent is an "armed attack." The distinction is constitutively logical. The Charter was meant to create an organization and set norms that would "save succeeding generations from the scourge of war."[55] Thus, the drafters set a low threshold for prohibited uses of force by States, while establishing a higher one before a State could use defensive force, absent United Nations acquiescence. In light of the different standards, uses of force that do not rise to the armed attack level must a priori exist. Although Article 2(4) applies only to States, the difference is relevant to this inquiry because there would perforce be "uses of force" by terrorists that would not activate the right to self-defence, thereby limiting the victim State's response to one of classic law enforcement measures.

In 1974, the General Assembly embraced the notion of a gap, albeit in the context of a use of force not amounting to an act of aggression. Article 2 of the Resolution on Aggression stated that the Security Council could "conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."[56] In Article 3(g), it included as an example of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." By this standard, there are self-evidently uses of armed force that do not rise to the level of aggression because they are insufficiently grave.

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53 Wall, *supra* note 49, para. 139.

54 Separate Opinion of Judge Higgins, para. 34; Declaration of Judge Buergenthal, para. 6.

55 UN Charter, pmbl.

56 GA Res. 3314 (XXIX) (Dec. 14, 1974), annexed Definition of Aggression.

In *Nicaragua*, the International Court of Justice specifically addressed the gap when it distinguished between "the most grave forms of the use of force (those constituting an armed attack)" and other "less grave forms."[57] In 2003, the Court, in *Case Concerning Oil Platforms*, referred approvingly to the "most grave forms" approach.[58]

The *Nicaragua* Court found that arming guerrillas and providing them logistic support might be a use of force, but did not constitute an armed attack.[59] As noted, it also stated that armed attacks were actions of particular "scale and effects," distinguishing them from "mere frontier incidents(s)",[60] a distinction Professor Dinstein famously dismisses.

> [U]nless the scale and effects are trifling, below the de minimis threshold, they do not contribute to a determination whether an armed attack has unfolded. There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks."[61]

In the context of State-on-State hostilities, there is much to recommend Professor Dinstein's rejection of the Court's suggestion that violence must rise above a certain level.[62] Yet, the Court's scale and effects criterion makes sense in the case of non-State actors. For States, the only options in the face of attack are self-defence (including the collective variant) and Security Council enforcement action. Since the Council has a less than august record in coming to the rescue of States under

57 Nicaragua, *supra* note 51, para. 191.

58 *Oil Platforms* (Iran v. US), Merits, 2003 ICJ Rep. 161, para. 51 (Nov. 6), 42 International Legal Materials, at para. 51.

59 Nicaragua, *supra* note 51, para. 195.

60 *Id.*

61 Dinstein, *supra* note 7, at 195.

62 One wonders if the criticism would have been tempered had the Court included a State intent requirement. At the risk of oversimplifying, an armed attack is an intentional military attack or other intentional act resulting in, or designed to result in, immediate violent consequences (such as a computer network attack causing physical damage). [For a discussion of this point, see Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework,* 37 Columbia Journal of Transnational Law 885-937 (1999).] Viewed in this way, the distinction between training guerrillas and sending them out to do one's bidding makes sense. It also explains the Court's rather curious, and certainly confusing, reference to frontier "incidents." Frontier incidents are usually brief encounters between forces facing each other across a border. They seldom represent a conscious strategic decision to initiate international armed conflict. Rather, they tend to be unplanned or, at most, communicative in nature. In the latter case, the intent is often to *avoid* conflict by signalling the seriousness of the dispute at hand. Of course, the fact that an incident does not amount to an armed attack in the Article 51 sense does not deprive those facing the violence of their right to defend themselves in individual self-defence.

attack, the notion of limiting a State's recourse to defensive force is disquieting. By contrast, a rather robust law enforcement regime exists to deal with minor attacks by terrorists and other non-State actors. This being so, the Court's "scale and effects" requirement is far less worrisome in the case of terrorism.

The right to act in self-defence against terrorists is not unfettered. All defensive uses of force, including those directed against non-State actors, must meet three criteria – necessity, proportionality, and immediacy – that derive from the 19th Century "Caroline Case" and the ensuing exchange of diplomatic notes between the United States and United Kingdom. There, Secretary of State Daniel Webster opined that defensive actions must reflect a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation."[63] The ICJ has recognized the applicability of the first two criteria on multiple occasions. In *Nicaragua*, the Court confirmed their status as customary international law.[64] It extended them to Article 51 self-defence in the advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.[65] Lest there be any doubt, the Court confirmed the requirements in its *Oil Platforms* judgement.[66]

The Necessity Criterion: The first of the principles, necessity, requires there to be no viable option other than force to deter or defeat the armed attack. This is a critical criterion in the context of terrorism. If law-enforcement measures (or other measures short of self-defence) will assuredly foil a terrorist attack *on their own*, forceful measures in self-defence may not be taken. The issue is not whether law enforcement officials are likely to bring the terrorists to justice, but instead whether, with a reasonable degree of certainty, law enforcement actions alone will protect the target(s) of the terrorism. For instance, if members of a terrorist cell can confidently be arrested, that action must be taken in lieu of a military attack designed to kill its members. Factors such as risk of the terrorists eluding capture and the degree of danger involved in the capture are certainly relevant.

Not only must there be confidence of success, law enforcement must alone be capable of deterring or defeating the threat (or ongoing attack) before actions in self-defence are ruled out. The attacks of September 11th triggered the most intensive international law enforcement operations in history, largely targeted at al Qaeda and its affiliates. Yet, al Qaeda remained active, launching numerous spectacular attacks in the wake of 9/11. This being so, it is plain that military operations launched in self-defence against the organization and its operatives met the necessity criterion.

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63 30 British & Foreign State Papers 193 (1843), *reprinted in* R.Y. Jennings, *The Caroline and McLeod Cases,* 32 American Journal of International Law 82, 89 (1938).

64 Nicaragua, *supra* note 51, para. 194.

65 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, (July 8), at para. 41.

66 Oil Platforms, *supra* note 58, paras. 43, 73-74, 76.

The Proportionality Criterion: The proportionality criterion addresses the issue of how much force is permissible in self-defence. It is widely misunderstood. Proportionality does not require any equivalency between the attacker's actions and defender's response. Such a requirement would eviscerate the right of self-defence, particularly in the terrorist context. For instance, terrorists may conduct a series of isolated bombings, yet the only way to preclude follow-on attacks, since surprise is their *modus operandi*, would be major air strikes against their base camps. Surely, it would be absurd to suggest that the greater use of force by the victim State is unlawful.

Instead, proportionality limits defensive force to that required to repel the attack. This may be less or more than used in the armed attack that actuated the right to self-defence; in essence, the determination is an operational one. The availability of other options, especially law enforcement, would in part determine the permissible quantum and nature of the force employed. To the extent that law enforcement is likely to prevent follow-on attacks, the acceptability of large-scale military operations drops accordingly.

The Immediacy Criterion: The third criterion, immediacy, imposes a temporal limitation on self-defence, both in advance of an attack and following one. The first issue is when does the right to act in self-defence mature? Professor Dinstein has conspicuously criticized notions of a right to anticipatory self-defence, i.e., defensive actions in anticipation of an attack. Instead, he asseverates that such actions may be "interceptive" at most. Professor Dinstein explains that "an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is 'imminent' and practically 'unavoidable.'"[67]

Professor Dinstein's view of "in progress" is markedly broad.

> The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack. It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove the immaculate conception of self-defence.[68]

It is so broad that it embraces many actions that other scholars might well label "anticipatory".

Ascertaining when the "die has been cast" in instances of terrorism will prove far more challenging than in the case of attacks launched by States. With attacks by States, there are often transparent activities of indications and warnings (IW) value: heightened political tensions, call-up of reserve forces, movement of forces towards the border, stand-down of air units, warships putting to

67 Dinstein, *supra* note 7, at 191.

68 *Id.*

sea, etc. Although it may be impossible to know the precise moment the blow will fall, the opponent will usually have a rough sense of when the attacker might cross the Rubicon. This is especially true in an era of global mass media, instant communications, and commercially available satellite imagery.

Terrorism affords no such transparency. On the contrary, a defining characteristic of terrorist attacks is the absence of warning. As the target State usually enjoys a dramatic advantage in force capabilities, surprise is typically the only option available to counter the terrorist group's asymmetrical disadvantage. Ominously, given growing terrorist access to weapons of mass destruction, miscalculation as to when a terrorist group is entering the Rubicon's waters may prove catastrophic.

This was a point expressly made in the 2002 US National Security Strategy. In that document, President Bush argued that the confluence of transnational terrorism and weapons of mass destruction necessitated a rethinking of the concept of anticipatory self-defence

> 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. 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 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.[69]

As a practical matter, the President was, of course, correct. In the unique circumstances of 21st century terrorism, target States will seldom know where and when an attack is to occur until it is too late. Yet, it would be foolhardy to wait until the launch of a particular terrorist strike before acting in self-defence.

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69 The White House, The National Security Strategy of the United States of America (Sept. 2002), at 15.

How, then, should the legality of interceptive (anticipatory) counter-terrorist actions be measured? International law must always be interpreted in light of the context to which it is being applied and with sensitivity to the underlying purpose of the norm in question. In particular, as a form of self-help, self-defence has to be construed in a way that renders it meaningful; self-help must help.

In the context of terrorism, it is essential to bear the very *raison d'etre* of terrorist groups – conducting violent attacks on States and/or societies – in mind when assessing the propriety of anticipatory action. Even though the timing and location of an attack may be uncertain, there is near certainty that an attack will be conducted since that is the group's very purpose. This fact distinguishes armed attacks conducted by States from those mounted by terrorists. States perform useful functions in the international system; indeed, the global architecture relies on States. That being so, a *rebuttable* presumption that States will act in accordance with international norms, especially those governing the use of force, attaches – hence the normative concerns about acting precipitously in self-defence.

Such presumptions cannot logically attach to terrorist groups. On the contrary, an *irrebutable* presumption that the organization will act outside the law should be at play. This reality shapes the interpretation of what it means to say a terrorist group has crossed the Rubicon. Under such circumstances, it is reasonable to characterize the convergence of two factors as the "launch" of a terrorist attack justifying interceptive (anticipatory) action: 1) formation of a group with an avowed purpose of carrying out attacks, and 2) acquisition (or material steps towards the acquisition) of the means to carry out such an attack. A combination of will and capability must coincide.

Lest there be concern this standard sets the threshold for action in self-defence too low, recall that immediacy is but one of the three criteria applicable in defensive actions. In particular, necessity, with its requirement that law enforcement not suffice to prevent terrorist acts, serves as a brake on precipitous actions by the State. Combining these requirements, interceptive (anticipatory) self-defence against terrorists is appropriate and lawful when a terrorist group harbours both the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks. It is action during the last viable window of opportunity a State has to defend itself. In the shadowy and secretive world of transnational terrorism, that window can close long before a terrorist strike takes place. Stated bluntly, when the opportunity presents itself, it may be necessary, and lawful, to kill a terrorist that you cannot capture, even though you do not know precisely when and where he or she will strike.

The other side of the coin is the question of when terrorists may be struck *after* they act. This is an important query, for, in most terrorist acts, the attackers escape. When they do not, as in the case of suicide bombings, the organization of which they are members lives on.

Professor Dinstein has sagely contended that although "[w]ar may not be undertaken in self-defence long after an isolated armed attack," "a war of self-defence does not have to commence within a few minutes, or even a few days, from the original attack.…[E]ven when the interval between an armed attack and a recourse to war of self-defence is longer than usual, the war may still be legitimate if the delay is warranted by the circumstances."[70] In other words, he reasonably suggests a test of reasonableness in light of the circumstances prevailing at the time.

But this is a State-centric analysis. It presumes that at a certain point self-defence is inappropriate because States should defer to non-forceful means of settling their disputes. Such a presumption does not apply to cases of transnational terrorism; the terrorist group would disband if it did not intend to continue the violence. Unlike States, and by definition, the mere existence of the group means the dispute between it and the State(s) will remain violent. The one exception is a terrorist group that morphs into a political organization, as some have suggested (too optimistically) Hamas is doing.

This being so, it does not make sense to treat multiple terrorist strikes by the same terrorist organization (or network such as al Qaeda) as isolated acts to which the law of self-defence applies separately. Rather, it is more appropriate to characterize them as a continuous attack, much as individual and distinct tactical engagements coalesce into a military campaign. Just as there are tactical pauses in military campaigns, so related terrorist attacks are often separated by periods during which the terrorist regroup and plan their next attack. For instance, experts trace attacks by al Qaeda against US assets back at least to the early 1990s. Sadly, they will likely stretch some distance into the future.

Considered in this way, the immediacy criterion applies only to the first in an anticipated series of attacks. The remainder comprise a continuing terrorist campaign entitling the State to an extended period of self-defence. The criteria of necessity and proportionality continue to apply, for measures such as law enforcement may remain viable and useful. In this sense, a defensive "war" against a terrorist group differs from an all-out "war" of self-defence in response to, e.g., a major invasion by the military forces of a neighbouring State. In the latter case, the application of the criteria of necessity and proportionality differs, for necessity is self-evident once the attacker crosses the border and concerns about proportionality recede as the State's survival is placed at risk.[71]

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70 Dinstein, *supra* note 7, at 242–243.

71 The International Court of Justice hinted at this point in its Nuclear Weapons Advisory Opinion: "[T]he Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake." Nuclear Weapons, *supra* note 65, para. 97.

The Situs of Counter-terrorist Operations: More sensitive than the issue of when counterterrorist operations may be mounted is that of where they may occur. Obviously, a State may conduct them on its own territory or the territory of another State that has consented. Thus, for instance, the 2002 strike against al Qaeda operatives in Yemen with the consent and cooperation of Yemeni intelligence was lawful, at least as to its venue.[72] Counter-terrorist operations may also occur on the high seas, for it is accepted customary international law that States may engage in military action beyond the territorial waters of neutral States, so long as they act with due regard to the rights of others.[73]

But when can such operations be mounted *without* the consent on the State on which they take place? The dilemma is that the question involves two conflicting international law rights, self-defence on the part of the victim State and the right of territorial integrity enjoyed by the State on which the terrorists are located. Territorial integrity is a core principle of international law, one expressly codified in Article 2(4)'s prohibition on the use of force. The sanctity of borders precludes any non-consensual penetration of another sovereign's territory.[74] On the other hand, self-defence is also a core right in international law codified in the Charter. It is deemed so central to the State-based paradigm that States are allowed to use force to effectuate it.

In assessing these two relevant aspects of international law, it is useful to recall that when international law rights collide, one need not prevail over the other. Rather, an accommodation should be sought between them that best maximizes and balances their respective underlying purposes.

Assume for the sake of analysis that the State where the terrorists are located is not so complicit in the terrorism that it may be treated as having conducted the armed attacks itself, an issue that will be dealt with later. Rather, it either lacks the means to put an end to the terrorist activities on its soil or does not have the will to do so. In the latter case, the "host" State may sympathize with the group's aims, benefit from its presence,[75] or fear retaliation if it moves against the organi-

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72 See text accompanying footnotes 94-95, *infra*.

73 NWP 1-14, *supra* note 4, para. 2.4.3.

74 See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations: "Every State has a duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues." GA Res. 2625 (XXV) (Oct. 24, 1970). The resolution was adopted by acclamation. There are several possible exceptions, such as rescue of nationals abroad and humanitarian intervention.

75 As in the case of the al Qaeda, which supported the Taliban in its conflict with the Northern Alliance.

zation. Whatever the case, if the "host" State's territory is unqualifiedly inviolable, the victim State might be deprived of any effective defence. This is particularly so with terrorism. Due to the secretive planning, surprise launch, and at times suicidal execution that characterize it, pre-emptive action may be the only viable defence.

Professor Dinstein labels such actions "extra-territorial law enforcement." He explains:

> Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.[76]

As he correctly notes, the assertion of such a right is far from exceptional. Quite to the contrary, the Caroline incident, the touchstone of the law of self-defence,[77] involved extra-territorial self-defence. Forces under British command crossed into New York when British official protestations that rebels were being supported from US territory during the Mackenzie Rebellion of 1837 fell on deaf American ears. As noted by Lord Ashburton, who was negotiating with US Secretary of State Daniel Webster regarding the affair,

> I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?[78]

A contemporary example of "taking the battle to the enemy" in foreign territory without the consent of the territorial sovereign was, of course, Operation Enduring Freedom. For the sake of analysis, put aside the issue the Taliban's involvement in the attacks against the United States and whether it justified military action directly against the Taliban. That issue will be addressed in due

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76 Dinstein, *supra* note 7, at 247.

77 For instance, the International Military Tribunal at Nuremberg cited the standard when rejecting the argument that Germany invaded Norway in self-defence in 1940. International Military Tribunal at Nuremberg, Judgement (1946), 1 IMT 171, 207.

78 R.Y. Jennings, *The Caroline and McLeod Cases*, 32 American Journal of International Law 82, 82 (1938) [quoting Lord Ashburton to Mr. Webster, July 28, 1842, Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, vol. 30, at 195].

time. Instead, and somewhat artificially, consider only the penetration of Afghan territory to attack al Qaeda.

The Security Council had, on repeated occasions prior to 9/11, demanded that the Taliban police its own territory. In Resolution 1267 of October 1999, for instance, it insisted that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice." Included was a specific demand that the Taliban turn over Osama bin Laden.[79] It reiterated its demands in December 2000.[80]

Once attention focused on al Qaeda as the culprit in the September 11 attacks, the United States insisted on Taliban cooperation in eradicating the al Qaeda presence in Afghanistan. Some demands were conveyed through Pakistan, which had maintained relations with the Taliban and thereby served as a useful intermediary. Others were made publicly, such as that expressed by President Bush during an address to a joint session of Congress: "Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating."[81] Following a final ultimatum on October 6,[82] the President ordered US forces into action the next day.

The overture to Operation Enduring Freedom illustrates a further facet of the requisite balancing between self-defence and territorial integrity. As in the *Caroline* case, the aggrieved party, the United States, conveyed demands that the territorial State take action to put an end to the threat emanating from its territory. The US led coalition, like the British over 160 years earlier, only attacked once it had afforded the "host" State, Afghanistan, ample opportunity to rectify the intolerable situation. This approach represents a fair accommodation of that State's right to territorial integrity. A State taking defensive action cannot be deprived of its right to defend itself, but at the same time must allow the host State a reasonable opportunity to remedy matters before suffering a non-consensual violation of its territory.

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79 SC Res. 1267 (Oct. 15, 1999). The previous year it had also demanded that the "Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice." SC Res. 1214 (Dec. 8, 1998). See also SC Res. 1193 (Aug. 28, 1998).

80 SC Res. 1333 (Dec. 19, 2000).

81 Address Before a Joint Session of the Congress on the United States, Response to the Terrorist Attacks of September 11, 37 Weekly Compilation of Presidential Documents 1347, 1347 (Sept. 20, 2001).

82 President's Radio Address, 37 Weekly Compilation of Presidential Documents 1429, 1430 (Oct. 6, 2001).

Lest it seem overly aggressive to allow a victim State to violate another's borders, recall that States have an obligation to police their territory, ensuring it is not used to the detriment of others. In the classic 1927 Permanent Court of Justice case, *The S.S. Lotus*, John Basset Moore, writing in dissent (on other grounds), noted that "it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people,"[83] citing for support the 1887 US Supreme Court case *United States v. Arjona*.[84]

In 1949, in its first case, *Corfu Channel,* the International Court of Justice addressed the issue head on.[85] The facts are pertinent. In May 1946, Albanian shore batteries fired on two British cruisers transiting the Corfu Strait, in Albanian waters. The UK claimed the ships were entitled to pass through the strait in innocent passage, a contention contested by the Albanians. The British sent word that in the future they would return fire if fired upon. That October, four British warships transited the Corfu Strait. Although previously swept, two struck mines, resulting in the loss of 45 lives. When London transmitted a Diplomatic Note stating it intended to sweep the channel, Tirana replied that doing so would violate Albania's sovereignty. In November, the British Navy swept the channel, cutting 22 mines, all of German make.

The Court faced two questions: 1) Is Albania responsible for the explosions, such that it has a duty of compensation, and 2) Did the UK violate international law through its naval actions in October and November? As to the first, the Court concluded that since the mines could not have been laid without Albania's knowledge, it bore responsibility based on "certain general and well recognized principles," including "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of others."[86] With regard to the second, the October passage need not detain us. However, the November action was styled by the British as, in part, self-help. The Court rejected the argument, noting, "respect for territorial sovereignty is an essential foundation of international relations," but qualifying this finding with the caveat that Albania's "failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes" were "extenuating circumstances."[87]

The Court's opinion is relevant in two regards. First, it makes clear that State A has a duty to prevent its territory from being used in a manner that negatively affects an international law right of State B. Applied to terrorism, State A must not allow its territory to serve as a terrorist base of operations or sanctuary, or be used in any other manner that would facilitate terrorism against

83 *S.S. Lotus* (Fr. v. Turk.) 1927 PCIJ (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

84 *United States v. Arjona,* 120 US 479 (1887).

85 *Corfu Channel Case* (UK v. Alb.), 1949 ICJ Rep. 4 (1949).

86 *Id*. at 22.

87 *Id*. at 55.

State B. Second, although highlighting the centrality of territorial sovereignty, the Court's reference to extenuating circumstances demonstrates that the right is conditional. Although less than obvious in the written opinion, in *Corfu Channel* the Court balanced competing rights by determining that the right of innocent passage must yield to the right of territorial sovereignty, at least to the extent that force may not be used to secure the former.

The International Court of Justice again turned to the issue of responsibility in *United States Diplomatic and Consular Staff in Tehran*.[88] The facts are notorious and well known. In November 1979, Iranian radicals seized the US Embassy in Tehran and the Consulates in Tabriz and Shiraz, taking hostage American diplomats and other US citizens. Although the United States requested assistance from the Iranian government, none was forthcoming. On the contrary, the Iranian government soon expressed support for the seizure. The United States mounted a failed rescue attempt in April 1980. After 444 days in captivity, the Iranians released the hostages on the day President Ronald Reagan was sworn in as President.

The Court held that Iran's failure to protect the diplomatic premises and subsequently take action to free the hostages violated not only the 1961 and 1963 Vienna Conventions on Diplomatic Relations and Consular Relations respectively, but also "obligations under general international law."[89] As to the failed rescue attempt, it expressed concern that the United States had acted despite the existence of a provisional order directing no action be taken by either side that might aggravate tensions. However, it noted that the US action had no bearing on Iran's responsibility for failure to protect the diplomatic facilities and staff. Thus, again we see the Court emphasizing that States shoulder a legal obligation to safeguard the interests of other States against acts committed from their soil, at least when they have the means to do so.

Aside from the ICJ opinions, a number of other sources support the obligation to police one's own territory. Article 2(4) of the International Law Commission's 1954 *Draft Code of Offences against the Peace and Security of Mankind*, for instance, provides that "[t]he organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions," is an offence against "the peace

88 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (US v. Iran), 1980 ICJ Rep. 3 (May 24).

89 *Id*., para. 62. Vienna Convention on Consular Relations, Apr. 23, 1963, 21 UST 77, 596 UNTS 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95.

and security of mankind."[90] Note the depiction of mere "toleration" as a crime in international law.

The same prescription appears in the 1970 General Assembly Resolution, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. It provides that "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."[91] In 1994, the Assembly addressed the subject of terrorism directly in its *Declaration on Measures to Eliminate Terrorism*. By the terms of the resolution, States may not "acquiesce" in "activities within their territories directed towards the commission of [terrorist] acts." More to the point, they have affirmative "obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism."[92] The resolution goes on to delineate specific measures to achieve these aims. Although "soft law," these instruments plainly evince a broad consensus that States bear a duty to act against terrorists located on their territory.

Recall that the Security Council also spoke to the issue, for example, when it directed the Taliban to take action against al Qaeda and other terrorist groups operating from Afghanistan. In a more general sense, Resolution 1373, drafted in the immediate aftermath of 9/11, amounted to a watershed in terms of imposing requirements on States to combat terrorism. In particular, States are now prohibited from providing "any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists" and obligated to, *inter alia*, "[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; and [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."[93]

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90 Draft Code of Offences against the Peace and Security of Mankind, [1954] 2 Year Book of the International Law Commission 150, UN Doc. A/CN.4/SER. A/1954/Add.1.

91 Declaration of Friendly Relations, *supra* note 74.

92 GA Res. 49/60 (Dec. 9, 1994), annexed Declaration, paras. 4-5.

93 SC Res. 1373 (Sept. 28, 2001).

Thus, an assessment of the lawfulness of penetrating borders to conduct anti-terrorism operations involves more than a "simple" balancing of two conflicting international law rights. It also entails breach (whether intentional or due to an inability to comply) of a duty owed other States by the State on whose territory the terrorism-related activities are occurring. Analysis will soon turn to the issue of when the actions of the "host" State merit treating that State as if it had itself conducted an "armed attack." But the inaction of that State in policing its territory is relevant to determining when its borders may be crossed to conduct counter-terrorist operations.

Limits on Cross-border Operations: The understandable hesitancy to sanction violation of another State's territorial integrity must be tempered by the fact that doing so in self-defence is only permissible once that State has failed in its duty to police that territory, either volitionally or unavoidably. Given the serious affront to territorial integrity, the "right" to cross the border must be interpreted very narrowly. The victim State must make a demand on the "host" State to satisfactorily cure the situation (i.e., comply with the duty described above), and the latter must be afforded sufficient opportunity to do so, at least to an extent consistent with the realities the victim State's effective defence. It may not strike any targets of the "host" government, nor anything else unconnected with the terrorist activity. Indeed, if it does so, it will have committed an armed attack against the host State, which would in turn allow that State to lawfully use force against the intruders in self-defense. Of course, since the State conducting the operation is, to the extent it remains within the limitations, exercising a legitimate international law right, the host State may not interfere with said operations. If it does, that State commits an armed attack, thereby permitting the counterterrorist operation to expand to government personnel and facilities constituting military objectives under international humanitarian law (since an international armed conflict now exists in light of the interstate hostilities).

Further, the intrusion must be limited in time, space, and purpose. As soon as the menace has effectively been quashed, the counterterrorist units must withdraw. Further, the operation must be limited geographically to the minimum territorial infringement consistent with mission success. Both requirements derive from the principle of proportionality in the law of self-defence. Finally, the operation must be intended solely to accomplish a counter-terrorist purpose. It cannot, for instance, be a subterfuge designed to assist one side in a civil war, intimidate the "host" State, etc. Of course, if such a result is the concomitant consequence of the action, so be it; but it cannot be the underlying purpose.

The United States is conducting operations along these lines. At times, it does so with the cooperation, or at least blessing, of the State on whose territory they are mounted. For instance, and as briefly mentioned earlier, in 2002, a CIA operated Predator unmanned aerial vehicle (UAV) launched a Hellfire missile to destroy a vehicle in which Qaed Senyan al-Harthi, a senior al-Qaeda member, was riding. Al-Harthi had been involved in the bombing of the USS

Cole in 2000 and, given his role in the organization, was a key player in current and future operations.[94] Yemeni intelligence cooperated in the strike.[95] Given Yemeni consent and the clear need to act defensively, the operation met the criteria outlined above. Al-Harthi was complicit in previous terrorist attacks and surely intended to continue operations against the United States; in that sense, he was engaged in an ongoing campaign, thereby rendering the US strike legitimate under the immediacy criterion. It was necessary in that lesser alternatives such as law enforcement were not viable at the time and there was no certainty that later law enforcement actions would have put him behind bars before he could attack again. Finally, it was proportionate, for no lesser use of force would have sufficed to kill or neutralize al-Harti, nor was any practically possible in the circumstances.

More recently, the United States conducted air strikes in Pakistan targeting Ayman al-Zawahiri, al Qaeda's second in command. The unsuccessful January 2006 operations, which killed 18 civilians, sparked nationwide protests. Pakistan's President, Pervez Musharraf, condemned the operation, stating, "It is an issue of our sovereignty and of our people's sensitivities…We're against such strikes." He also denied that Pakistan had provided the intelligence necessary to conduct them.[96]

Such claims must be taken with a grain of salt. Musharraf is conducting a delicate balancing act between support for US counterterrorism efforts and avoidance of domestic unrest and isolation in the Muslim world. Of course, although Pakistan's intelligence agencies and military have been cooperating closely with their US counterparts in the war on terror, "plausible deniability" is often an integral component of such involvement. Indeed, recall that President Bush visited Pakistan in March, in part to demonstrate appreciation for Musharraf's support. This would have been a strange visit to have made if the United States had in fact brazenly violated Pakistani territory.

However, taking President Musharraf's public stance at face value, the attack would nevertheless have arguably fallen within the normative framework set forth. Al Zawahiri is a highly elusive linchpin in the continuing al Qaeda campaign against the United States. Opportunities to "take him out" rarely present themselves, and, given the remoteness of the Banjur region, the prospects of a mounting a successful operation to capture him were slim to non-existent. Had the United States taken the time to coordinate its operations with Pakistan (assuming for the sake of analysis that it did not), it would have risked missing

94 *Profile: Ali Qaed Senyan al-Harthi*, BBC News World Report, Nov. 5, 2002, at news.bbc.co.uk/2/hi/middle_east/2404443.stm.

95 Anthony Dworkin, *The Yemen Strike*, Nov. 14, 2002, at www.crimesofwar/onnews/news-yemen.html.

96 Katrin Bennhold, *Musharraf Condemns U.S. Strikes in Pakistan*, International Herald Tribune, Jan. 27, 2006, at 7.

the opportunity to act, which, apparently, it did in any event. Pakistan's security forces lacked the assets to mount a timely attack with high confidence. As Musharraf himself noted when commenting on the affair: "We cannot compare our capabilities with the U.S." Finally, the use of a CIA controlled Predator to conduct the attack was certainly the least invasive option available.[97]

That the operation was unsuccessful is of only slight relevance. In assessing the lawfulness of military operations, the crux of the issue is the reasonableness of having acted in the circumstances based on information reasonably believed reliable at the time. There has been no convincing evidence that the United States' belief that it had al Zawahiri in the cross-hairs was precipitous or ill-reasoned. Of course, there is the matter of the resulting 18 civilian deaths. Civilian deaths are always tragic, but the international humanitarian law principle of proportionality acknowledges that they can be unavoidable. In the conduct of hostilities context, proportionality requires that collateral damage to civilian objects and incidental injury to civilians caused during military operations not to be excessive in relation to the concrete and direct military advantage anticipated to result from the attack.[98] Al Zawahiri constituted a target of enormous value in the war on terrorism, and although civilian deaths are tragic, State practice has countenanced levels of incidental injury in excess of this in operations directed against lesser objectives. Proportionality in this context must not be confused with the *jus ad bellum* principle (discussed above) that is one criterion for self-defence.

Critics will assert, fairly, that the framework suggested for cross-border counterterrorist operations is subjective and, therefore, ripe for abuse. While they are correct, the alternative, elevating territorial integrity to a position of unconditioned supremacy over the right to self-defence, is inconsistent with the realities of a 21st century beset by transnational terrorism in which the prospect of the use of weapons of mass destruction by terrorists grows steadily. Lest it be rendered obsolete, law must be interpreted in light of the context in which it is to be applied, and with fidelity to its core purpose, in this case global order. The normative framework outlined above does just that without undue violence to the received understanding of the law of self-defence.

Operations against State-Sponsors: A more difficult endeavour is determining when a victim State may treat the actions of terrorist group as an armed attack not only by the group, but also by a State that has it some way provided it support. Until recently, the generally cited, albeit not universally accepted, stand-

97 Carlotta Gall & Douglas Jehl, *Strike Aimed at Qaeda Figure Stirs More Pakistan Protests,* New York Times, Jan 16, 2006, at 3.

98 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3, at arts. 51.5(b) & 57.2(a)(iii).

ard was that enunciated in the *Nicaragua* case.[99] There, the Court opined that "an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein.'"[100] It drew on the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) for the quoted text,[101] arguing that the definitional extract reflected customary internal law. However, according to the Court, the activities of the guerrilla force, to qualify as an armed attack, should be of a "scale and effects" equivalent to those that would qualify as an armed attack if conducted by regular forces, citing "acts by armed bands where such attacks occur on a significant scale," but explicitly excluding a "mere frontier incident."[102] The Court went on to determine that providing "weapons or logistical or other support" did not suffice. Such activities might amount to a threat or use of force, or wrongful intervention in the external or internal affairs of the target State, but not armed attacks.

This latter point is key. Whether an armed attack has occurred is a different matter than that of a State's responsibility (under international law) for the commission of acts to which it is in some way connected. States undoubtedly shoulder a degree of international responsibility for support to terrorists or other armed groups.[103] Recall the soft law texts cited above, as well as the General Assembly's 1996 *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, which reiterated the obligation of States to

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99 See, e.g., the dissenting opinion of Judge Schwebel in the *Nicaragua* case, esp. para. 154 ff.

100 Nicaragua, *supra* note 51, at para. 195.

101 GA Res. 3314 (XXIX), *supra* note 56.

102 Nicaragua, *supra* note 51, para. 195.

103 According to Article 8 of the International Law Commission's Articles of State Responsibility, "conduct of a person or group shall be considered an act of State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct." International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), with Commentary, at untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The Commentary to the article explains:

> More complex issues arise in determining whether conduct was carried out under the direction or control of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

Id. at 104.

refrain from "financing, encouraging, providing training for or otherwise supporting terrorist activities."[104]

The issue at hand, however, is when does a State supporter stand in the shoes of the terrorist group it backs. By the *Nicaragua* yardstick, the supporting State must send the terrorists, effectively control them, or be substantially involved in the execution of their attack before being deemed to have committed an armed attack itself.[105] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the effective control test in its 1999 *Tadic* decision. Considering whether an international armed conflict existed in Bosnia-Herzegovina by virtue of the Federal Republic of Yugoslavia's control over Bosnian Serb forces, the Chamber adopted a more relaxed standard – "overall control going beyond mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations" for acts of an "organized and hierarchically structured group."[106] Although the precise issue was not armed attack, the Appeals Chamber was commenting on the International Court of Justice's standard in that regard.

In the case of the 9/11 attacks, Taliban support of al Qaeda rose to neither the *Nicaragua* level, nor that of *Tadic*. Whilst true that the Taliban tolerated the presence of al Qaeda, and arguably offered sanctuary, they exercised no meaningful control over the organization. Nor has any evidence been produced that the Taliban were accomplices in the 9/11 attacks. Indeed, they did not even provide financing, training, or materiel to al Qaeda, standards which both the ICJ and ICTY rejected as meeting the armed attack threshold. Quite the contrary, the Taliban was in the dependency relationship to some extent, for al Qaeda supported them in their fight with the Northern Alliance, both in terms of financing and fielding the 055 Brigade.

Nevertheless, as discussed, the international community fully supported the strikes on the Taliban. Indeed, over a month after Operation Enduring Freedom began, the Security Council condemned the Taliban for "for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them" and expressed its support for

104 GA Res. 51/20 (Dec. 17, 1996).

105 On an analogous basis, the International Court of Justice in *Nicaragua* rejected assertions of US responsibility for the Contras' actions in violation of international humanitarian law. The Court stated that such activities "would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts.… For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations." Nicaragua, *supra* note 51, para. 115.

106 International Criminal Tribunal for Yugoslavia, Case IT.94.1, *Prosecutor* v. *Tadic*, 38 International Legal Materials 1518 (1999), at paras. 120 & 145.

"the efforts of the Afghan people to replace the Taliban regime."[107] This is significant, for the Coalition's participation turned the tide in the civil war between the Taliban and Northern Alliance. Thus, to the extent that the Council supported regime change, it implicitly also supported Coalition military operations against the Taliban.

What does this mean for the *jus ad bellum*? The general principle that States can technically commit an armed attack through association with non-State actions (that would constitute an armed attack if committed by a State's armed forces) remains intact. What appears to have changed is the level of support that suffices. It would seem that in the era of transnational terrorism, very little State support is necessary to amount to an armed attack; at least in this one case, merely harbouring a terrorist group was enough. This is a far cry from *Nicaragua's* "sending by or on behalf" or *Tadic's* "overall control".

Has the law changed? In a sense, no. Instead, normative interpretation appears to have shifted in the face of changed circumstances. Such shifts are entirely appropriate, for international law exists to serve global needs for security and other common goods. We should not be surprised when the normative expectations of the international community evolve in the face of new threats. This is particularly so in the absence of *lex scripta* directly on point, as is the case with regard to attributing actions of non-State actors to States.

The international community has naturally reacted very aggressively to both transnational terrorists intent on mass casualty attacks and those States that facilitate their activities. As any threat to the community evolves, so too must the operational code governing responses thereto designed to preserve common interests and values. The demise of Cold War bipolarity renders such aggressiveness less disruptive to global order. During the Cold War, many violent non-State actors enjoyed some degree of backing from one of the opposing camps. Reacting forcefully to States that supported terrorism risked superpower conflict. Thus, the international community, through State practice and judicial pronouncement, set the legality threshold for such responses very high.

That paradigm has been turned on its head. Today, failure to take strong action against either terrorists (perhaps armed with weapons of mass destruction) or their sponsors risks catastrophe. Moreover, it is in the battle against transnational terrorism that we see perhaps the greatest degree of meaningful cooperation between powerful States, thereby limiting the risk that forceful reactions will escalate into major interstate armed conflict.

The extent to which the "armed attack" bar has been lowered remains to be seen. Was the Taliban case unique? After all, the Taliban were international pariahs, condemned widely for horrendous human rights abuses and isolated in the international community. The almost audible sigh of relief upon their ouster from power was not only the product of angst over their willingness to allow al Qaeda

107 SC Res. 1378 (Nov. 14, 2001).

to operate freely within Afghanistan, but also of near universal contempt resulting from their domestic behavior towards the long-suffering Afghan people. It is irrefutable that both community order and global values were advanced by their defeat. This reality begs the question of whether States meant to relax normative understandings on the use of force against States tied to terrorism or they were simply celebrating a legitimate, albeit unlawful, regime change.

The Case of Iraq: The case of Iraq sheds a bit of light on the issue of when State sponsors may be deemed to have themselves committed an armed attack. It does so through negative inference because although discussions of Iraqi support of terrorism prominently occupied pre-attack discourse, self-defence was notably absent in the official legal justification proffered for Operation Iraqi Freedom.

In Resolution 1441 of November 2002 the Security Council stated it "deplored" the fact that Iraq had not complied with its obligations regarding terrorism. Those obligations had been set forth in Resolution 687 of April 1991, which captured the terms of the 1990-91 Gulf War cease fire.[108] In 687, the Council condemned threats made by Iraq during the conflict to "make use of terrorism against targets outside Iraq" and required Iraq to formally inform the Council that "it will not commit or support any act of international terrorism or allow any organization directed towards the commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods, and practices of terrorism."[109]

The extent and nature of Iraq's ties to terrorism prior to Operation Iraqi Freedom have proven murky at best. However, a glimpse of what the United States believed regarding Iraqi involvement came in February 2003 when Secretary of State Colin Powell briefed the Security Council in the unsuccessful effort to secure a use of force resolution.[110] The broadest accusation was that "Iraq…harbours a deadly terrorist network headed by Abu Musab al-Zarqawi, an associate and collaborator of Osama bin Laden and his Al Qaeda lieutenants." Powell asserted that al-Zarqawi had moved a training camp from Afghanistan to northeastern Iraq when the Taliban fell. Although the area was under the control of the Ansar al-Islam movement, not the Iraqi government, Saddam Hussein reportedly had an agent in the organization that was providing safe haven to some of Zarqawi's lieutenants and other members of al Qaeda. Further, al Qaeda affiliates based in Baghdad were reportedly directing operations throughout the country. Powell stated that the United States had transmitted information on Zarqawi's whereabouts to the Iraqis through a friendly intelligence service, but that Iraq did nothing to capture him. Finally, Powell asserted a detainee had admitted during interrogation that Iraq had provided training in chemical and biological weapons to two Al Qaeda operatives, an admission since discredited.

108 SC Res. 1441 (Nov. 8, 2002).

109 SC Res. 687 (Apr. 3, 1991).

110 UN Doc. S/PV.4701 (Feb. 5, 2003), at 14-17.

An intensive search throughout Iraq during the occupation turned up very little additional evidence of Iraqi support to terrorism. However, as a matter of law, the question is whether the level of support that the United States and its Coalition partners *believed* Iraq was providing at the time they launched OIF rose to the "armed attack" level. The United States was apparently uncertain it could credibly make such a case, for, having failed to convince the Security Council to mandate military action of the basis of Iraqi ties to terrorism and weapons of mass destruction, it refrained from formally asserting any claim of self-defence when it did attack. Instead, the United States and United Kingdom proffered a highly legalistic justification– material breach of the 1991 cease-fire terms.[111] Indeed, in their formal letters to the Security Council setting forth the legal basis for military action, neither country mentioned terrorism, not even in the context of a breach of the cease-fire obligations vis-à-vis terrorism.[112] That the partners chose a highly technical (albeit correct) justification certain to generate international political and legal controversy rather than self-defence – the always preferred justification for action without Security Council mandate – demonstrates they understood a claim of self-defence against State support to terrorism would likely prove unconvincing.

While the community reaction to Operation Enduring Freedom suggests a modified operational code for when support to terrorists may be treated as an "armed attack," the reticence of the United States and United Kingdom to use the principle to justify Operation Iraqi Freedom reveals its limits. The Afghanistan case suggests that knowingly and willingly allowing territory to serve as a base of terrorist operations may now represent a degree of complicity sufficient to amount to an "armed attack." Iraq, on the other hand, seems to illustrate that the scale and scope of terrorist operations occurring on the territory in question must be significant; convincing evidence of the activities, as well as of the willingness of the host State to allow them to take place, must exist; and the host State must be warned to put an end to terrorist operations on its soil and provided ample opportunity to do so before a forceful response in self-defence is permitted.

The Case of Pre-emptive Self-Defence: The issues discussed above have coalesced into formal strategy pronouncements by the United States and other nations. Most significant in this regard is the pre-emption doctrine, enunciated in the US National Security Strategy (NSS) of September 2002 in the extract

111 For a discussion of this point, see Michael N. Schmitt, *The Legality of Operation Iraqi Freedom under International Law*, 3:2 Journal of Military Ethics 82-104 (2004).

112 Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (March 21, 2003); Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (March 21, 2003).

cited earlier.[113] The 2002 NSS also reflected the US conviction that it was at war with terrorists and would, as it had a year earlier, deal harshly with States complicit in terrorist activity.

> The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists – because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.[114]

Yet despite the ominous timing of its issuance as events in Iraq cascaded towards war, and although it purported to be a new adaptation of the law of self-defence in the face of rogue states and terrorists, ultimately the United States chose not to assert pre-emption as the legal basis for the Operation Iraqi Freedom.

In March 2006, the United States issued a new National Security Strategy, one retaining all of the key elements of its predecessor. One interesting point is that the discussion of pre-emption occurs primarily in the section on weapons of mass destruction, whereas in the 2002 version it was prominent vis-à-vis both terrorism and weapons of mass destruction. In relevant part, the new strategy provides:

> Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of pre-emption…. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.[115]

Whether this placement represents a subtle change in approach or merely reflects the current strategic context, one in which the war on terrorism is well under-

113 2002 National Security Strategy, *supra* note 69, at 15 (see text accompanying footnote 69 *supra*); see also The White House, Strategy for Combating Terrorism (Feb. 2003), at 2.

114 *Id.*

115 The White House, The National Security Strategy of the United States (March 2006), at 23.

way and Iran's nuclear ambitions have moved to the forefront of global attention, is unclear. The document itself asserts that "[t]he place of preemption in our national security strategy remains the same."[116]

The new NSS comes out even more strongly than the 2002 version against State support for terrorism, making "deny terrorist groups the support and sanctuary of rogue states" one of its four short term objectives.

> The United States and its allies in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor them, because they are equally guilty of murder. Any government that chooses to be an ally of terror, such as Syria or Iran, has chosen to be an enemy of freedom, justice, and peace. The world must hold those regimes to account.[117]

Although the 2002 NSS evoked a firestorm of controversy, nothing regarding terrorism strategy in either it or its successor runs counter to any of the legal norms analyzed above. As the former Legal Adviser to the Department of State correctly noted in 2003,

> In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.[118]

So long as the State is acting in the likely last window of opportunity to defend itself effectively against a future terrorist attack in circumstances where alternatives such as law enforcement are not certain to suffice, the preemptive operation is available as a matter of law. If the State acts prior to the maturation of these conditions, it is acting preventively, not preemptively.[119] The distinction is crucial, for the *preventive* use of force is unlawful. For instance, if State A attacks WMD storage facilities in State B because it has hard intelligence that B is about to transfer WMD to a terrorist group which has previously carried out attacks against A, the action is preemptive in nature. However, if it strikes in the absence of actionable intelligence, but simply out of concern that B may effect a transfer

116 *Id.*

117 *Id.* at 12.

118 William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law* 97 American Journal of International Law 557, 557 (2003).

119 The confusion and controversy resulting from release of the 2002 NSS was in part caused by use of the word "prevent" in the title of both the terrorism and WMD chapters.

to terrorists one day, it has acted preventively. Preventive action is based solely on a potential opponent's capability to carry out an attack (or imminent acquisition of such capability). Preemption requires both capability *and* intent.[120]

In December 2004, a High Level Panel appointed by the UN Secretary-General issued *A More Secure World: Our Shared Responsibility*. In part, the report addressed self-defence and its relationship to actions under Chapter VII of the UN Charter. Although the panel avoided use of the controversial term "preemption," it embraced the notion, while rejecting that of preventive attack.

> A threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent* , no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons -making capability.
>
> Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self -defence, not just pre–emptively (against an imminent or proximate threat) but preventively (against a non -imminent
> or non -proximate one)?
> …
>
> The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option.[121]

In other words, the panel adopted the approach advanced in this article.

There is one aspect of the US preemptive doctrine, though, that has proven contentious–the commitment to act "even if uncertainty remains as to the time and place of the enemy's attack." The 2002 statement in this regard has been retained in the current version of the National Security Strategy.[122] If the statement implies that the United States might act without knowing *whether* a potential enemy will strike, then a proposed action would be preventive and, therefore, unlawful. On the other hand, if, as the plain text denotes, the United States knows the attack is coming, but does not know precisely *when and where*, then the action

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120 Of course, the preemptive action must comply with the other requirements of self-defense.

121 High Level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility, Dec. 2004, UN Doc. A/59/565, at 54-55.

122 2006 National Security Strategy, *supra* note 115, at 23.

would be judged by the criteria outlined earlier, particularly those of acting in the last window of opportunity and the absence of viable alternatives.

It cannot be otherwise in an era of weapons of mass destruction that can be unleashed by groups who often pay no heed to to their own survival. Authorities seldom know where and when a terrorist strike will occur. After all, discovery of a prospective attack usually foils it. Consequently, the terrorist *modus operandi* involves doing everything possible to foster uncertainty as to time and place. To impose a burden of certainty on a potential victim State would be ludicrous. The only bearing that knowledge as to time and place has on the lawfulness of an action in self-defense is in assessing whether alternatives to the use of military force are available and whether the proposed defensive action may be the last opportunity to thwart whatever attack is coming.

The uncertainty reference could also be interpreted as comment on the quality of the evidence upon which action is based, in other words, as an assertion that the United States will act on less than fully reliable information given the stakes involved with terrorism and WMD. This is an incorrect characterization, for the uncertainty refers to time and place of the attack, not to whether an attack will occur. However, in an abundance of analytical caution, let us assume the former is the case. Since uncertainty often shrouds international security matters, how good must the evidence be before a State may act in self-defence?

Recall criticism of the 1998 strike into Sudan. Also recall the extent to which failure to discover the "smoking gun" linking Iraq to WMD or terrorism resulted in widespread criticism of the decision to go to war and left the Bush administration scrambling for other grounds on which to denounce the Iraqi regime, such as its appalling human rights record. Both incidents evidence an operational code that requires counter terrorist operations to be based on dependable evidence.

Unfortunately, international law contains no express evidentiary standard governing the quality of the information upon which States may resort to force in self-defence. However, a useful standard is that articulated by the United States in its notification to the Security Council that it was acting in self-defense when attacking Al Qaeda and the Taliban. In the letter of notification, Ambassador John Negroponte stated that "my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks."[123] NATO Secretary General Lord Robertson used precisely the same term when announcing that the attack against the United States fell within the terms of Article V of the North Atlantic Treaty.[124] In light of the near universal characterization of

123 Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (Oct. 7, 2001).

124 Statement by NATO Secretary General, Lord Robertson, NATO Headquarters (Oct. 2, 2001), at www.nato.int/docu/speech/2001/s011002a.htm.

Operation Enduring Freedom as lawful, it appears that the international community accepts "clear and compelling" as an appropriate evidentiary standard in self-defence cases.

Clear and compelling is a term borrowed from in part from American jurisprudence, although, when assessing evidence, "clear and convincing" is more typically employed. Clear and convincing evidence is a level more probative of the issue at hand than "preponderance of the evidence," which simply means that the evidence makes the matter more likely than not. It is, on the other hand, less probative than the "beyond a reasonable doubt" standard typically required for a guilty finding in a criminal case. Used in the context of justifying a use of force, clear and convincing evidence of a forthcoming armed attack is evidence that would convince a reasonable State to act defensively in same or similar circumstances. Reasonable States do not act precipitously, nor do they remain idle as indications that an attack is forthcoming become deafening.

Since the United States proffered the phrase in a self-defence context, it is reasonable to impose such a standard upon it. Thus, if the National Security Strategy's use of the term "uncertainty" is interpreted as alluding to the quality of evidence, that uncertainty may not rise to a level that would cause the basis for the action to be less than clear and compelling.

II Conclusions

In a sense, the 2006 National Security Strategy represents the maturation of counterterrorism strategy and law. The horrendous events of 9/11 shocked the international community into reconsidering the normative framework governing terrorism. Resultantly, the premise that terrorism was more than mere criminality, that it rises to the level of armed attack, has garnered wide acceptance. This acceptance is reflected in the fact that the most powerful country in the world has chosen to make counterterrorism the centerpiece of its national security strategy.

Operation Enduring Freedom also fundamentally altered notions of the sanctions to which States that support terrorism are subject. An operational code that generally rejected the use of force against States for involvement falling below some degree of control shifted in the course of less than a month to one permitting the forcible ouster of a regime that had done little more than allow a terrorist group to freely use its territory. This shift is reflected brightly in the National Security Strategy's refusal to distinguish between terrorists and the States that support or harbor them.

The operational code has evolved other ways responsive to the new context. For instance, imminency can no longer been seen in purely temporal terms; in the 21st century the issue is opportunity, not time. And territorial sovereignty has necessarily yielded a bit to the practical needs of self-defence. As the difficulty of combating a territory-less enemy became apparent, States which cannot

or will not police their own territory must surrender a degree of their border's legal impenetrability. Again, although not completely new, these issues were highlighted by the attacks of 9/11, with transformations in the operational code revealing themselves as the United States and its global partners responded to this and subsequent acts of transnational terrorism. They are all reflected in the National Security Strategy.

But the Operation Iraqi Freedom interlude demonstrated that we were witnessing an evolution of the normative framework, not its dismantling. The United States and its allies, despite the fact that the Security Council itself had condemned Iraq for failing to comply with its obligations regarding terrorism, was incapable of making the case that the situation merited action in self-defence (or a Council use of force mandate). In the end, it resorted to a legal justification that, albeit appropriate as a matter of law, continues to mystify many. Moreover, the failure to produce the "smoking gun", and the negative impact it (wrongly) had on perceptions of the legality of the operation, demonstrate that even in cases of terrorism, States will be held to high standards. Bearing this in mind, the current normative vector of the law of counterterrorism appears sound.

Chapter 7

Is US Adherence to the Rule of Law in International Affairs Feasible?

John F. Murphy *

Yoram Dinstein is a scholar who has written widely and well on a range of international law topics.[1] He has written with particular emphasis and distinction, however, in three subject areas: the *jus ad bellum*,[2] the law of resort to the use of armed force; the *jus in bello*,[3] the law regulating the way the armed force is employed, i.e., the law of armed conflict; and international human rights.[4] Interestingly, it is these three areas where United States ability (or willingness) to adhere to the rule of law in international affairs has increasingly been called into question.[5]

A word or two about the rule of law model. The precise meaning of the term "rule of law" is unclear and the subject of debate.[6] For present purposes, I will

* I am indebted to Kristin Scaduto, a second year student at the Villanova University School of Law, Jay Hall, a third year student, and Jamie Samanns, a third year student, for their excellent research assistance. I am also grateful for a summer research grant from the Villanova University School of Law, which greatly facilitated my work on this contribution.

1 Yoram Dinstein's *curriculum vitae* lists 11 books and monographs and well over 100 articles and notes.

2 In particular, *see* Yoram Dinstein, War, Aggression and Self-Defence (4th ed. 2005).

3 *See especially,* Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004).

4 *See e.g.,* Yoram Dinstein, *Human Rights: The Quest for Concretization,* 1 Israel Yearbook of Human Rights 13 (1971); Yoram Dinstein, *Human Rights: Implementation through the UN System*, 89 Proceedings of the American Society of International Law 242, 250 (1995).

5 For a more wide ranging consideration of US adherence to the rule of law in international affairs, *see* John F. Murphy, The United States and the Rule of Law in International Affairs (2004). For shorter treatments, *see e.g.,* Robert W. Tucker and David C. Hendrickson, *The Sources of American Legitimacy,* Foreign Aff., Nov./Dec., 2004, at 18; Kenneth Jost, *International Law: Should U.S. Policy give it more weight?,* CQ Researcher, Dec. 17, 2004, at 1049; *The insidious wiles of foreign influence,* The Economist, June 11, 2005, at 25.

6 Indeed, it has been suggested that the meaning of the rule of law "may be less clear than ever before." *See* Richard C. Fallon, *"The Rule of Law" as a Concept in*

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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use the term in the sense of Chief Justice Marshall's famous dictum in *Marbury v. Madison* that American Government would cease to deserve the name of "a government of laws, and not of men," if its "laws furnish no remedy for the violation of a vested legal right."[7] The rule of law also requires that it guide its subjects in their affairs and that they understand and comply with it. Officials as well as ordinary citizens should be subject to its dictates. Impartial instrumentalities of justice, including courts, should be available to enforce the law and should employ fair procedures. It may also be useful to keep in mind the observations of Professor Richard H. Fallon:

> Perfectly realized, the Rule of Law would be rule: (i) in accordance with the originally intended and understood meaning of the directives of legitimate, democratically-accountable lawmaking authorities, (ii) cast in the form of intelligible rules binding on citizens, governmental officials, and judges alike, (iii) as identified and elucidated in any interpretive process guided by publicly accessible norms and characterized by reason-giving, and (iv) consistent with legitimate public purposes and sound, shared principles of political morality. When law, in the positivist sense, fails to satisfy any of these elements, the Rule of Law is less than completely realized, but still may (or may not) be more nearly approximated than it is scorned or abandoned.[8]

From even this brief description of the *ideal* rule of law model, one may realize that the international legal process and the nature of international law are a far cry from the ideal. Nonetheless, the United States has often proclaimed its support for the rule of law in international affairs.[9] In particular, at the close

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Constitutional Discourse, 97 Colum. L.Rev. 1 (1997). Also, some commentators have criticized the very concept. For example, Morton J. Horwitz, a leader in the critical legal studies movement, has contended that the rule of law "[b]y promoting procedural justice ... enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations." Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?,* 86 Yale L.J. 561, 566 (1977). For a recent, more positive view of the rule of law, see Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (2004).

7 Marbury v. Madison, 5 US (1 Cranch) 137, 163 (1803).

8 Fallon, *supra* note 6, at 38.

9 Remarks made by President George H.W. Bush to a joint session of Congress in September 1990 in the wake of the coalition's victory over Iraqi forces in the Gulf offer a recent and prominent example. At that time President Bush said that a new world was emerging, "a world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak... America and the world must support the rule of law. And we will." *Transcipt of President's Address to Joint Session of Congress*, New York Times, Sept. 12, 1990, at A20. See also excerpts

of World War II, when it was truly the "sole superpower," the United States engaged in strenuous efforts to create an international order based on legal principles.[10] These efforts resulted in a post-World War II international system, still very much with us, that presupposed at every stage of its development a dominant power that would be essentially non-imperial, nonaggressive and committed to the proliferation of law-based international institutions.

The United States played the leading role in the creation of the United Nations and strongly supported the attempt in the United Nations Charter to reintroduce a system of collective security against aggression, one that improved upon the arrangements set forth in the Covenant of League of Nations and that was based upon a rule of law paradigm. It also strongly supported a veritable explosion of international organizations designed to encourage cooperation among member states to address a broad range of ills plaguing the world community. The United States was also early in accepting the so-called compulsory jurisdiction of the International Court of Justice (ICJ), the successor to the League of Nations Permanent Court of International Justice, whose jurisdiction the United States never recognized because it failed to join the League. To be sure, even as early as 1946, the United States had reservations about the ICJ and hedged its acceptance of the Court's jurisdiction with the disabling "Connally Reservation," which reserved to the United States rather than the Court the authority to determine whether a matter was essentially within the domestic jurisdiction of the United States and therefore outside the jurisdiction of the Court.

The very existence of the United States as *the* superpower was an indispensable element for its strong support of the rule of law concept in international affairs. As the predominant authority in world affairs, with a so-called "automatic majority" in the United Nations and overriding influence in other international institutions, the United States was in a position to ensure that the law would develop in a way acceptable to it and, to a considerable extent, that decisions taken regarding the interpretation and application of that law would be compatible with its interests. With the passage of time, however, the United States gradually began to lose the control it had over the international legal process. With the emergence of the Soviet Union as a key adversary, and the communist takeover in China, it became clear that the Security Council would not be able to maintain international peace and security through the collective security system envisaged by the drafters of the UN Charter because there would be no unanimity of view among the permanent members of the Council. Also, as the so-called "third world" states became a majority in the United Nations, a majority strongly influenced by Soviet views, US influence in the General Assembly sharply declined

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from *President's News Conference on Gulf Crisis*, New York Times, Aug. 31, 1990, at A11.

10 This description of US efforts and struggles to support the rule of law in international affairs draws heavily on John F. Murphy, *supra* note 5, at 2-4.

during the 1960s and the 1970s to the point where that organ came to be regarded as a "dangerous place." Further, communist aggression in various parts of the world or state-sponsored acts of international terrorism sometimes resulted in unilateral action by the United States of questionable legality. In general the Cold War created numerous barriers to the rule of law in international affairs.

In the 1990s, with first the less aggressive foreign policy of Mikhail Gorbachev's Soviet Union, and then the dissolution of the Soviet Union and the rollback of communist control in eastern and central Europe, the situation changed dramatically. Now, it appeared, the rule of law international institutions, especially those created after World War II, would be able to function in the manner envisaged by their creators. The high point of this optimism, perhaps, was the performance of the Security Council in response to Iraq's invasion of Kuwait in 1990, when the Council adopted numerous resolutions demanding that Iraq withdraw from Kuwait and ultimately authorized the use of force by coalition forces to force a withdrawal and imposed an unprecedented cease-fire regime on Iraq. This optimism was soon dispelled, however, as UN efforts with respect to keeping the peace in Bosnia-Herzegovina, Somalia, and Kosovo, among others, ran into extreme difficulties.

For its part, during the 1990s and early in the new millennium, the United States has found itself in uncharted territory. While proudly proclaiming itself the "sole surviving superpower," the United States has experienced a "power shift" that has resulted in a substantial loss of autonomy and its sharing power with a variety of nongovernmental actors.[11] Moreover, as Samuel P. Huntington has noted, "[t]he settlement of key international issues [including, of course, legal issues] requires action by the single superpower but always with some combination of other major states."[12] The United States, however, has often acted more or less unilaterally, with the result being that:

> On issue after issue, the United States has found itself increasingly alone, with one or a few partners, opposing most of the world's states and peoples. These issues include UN dues; sanctions against Cuba, Iran, Iraq, and Libya; the land mines treaty; global warming; an international war crimes tribunal; the Middle East; the use of force against Iraq and Yugoslavia; and the targeting of 35 countries with new economic sanctions between 1993 and 1996.[13]

Elsewhere I have explored these and a host of other reasons the United States has found it increasingly difficult to adhere to the rule of law in international affairs.[14]

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11 *See* Jessica T. Mathews, *Power Shift,* Foreign Aff. , Jan.-Feb. 1977, at 50.

12 Samuel P. Huntington, *The Lonely Superpower,* Foreign Aff., Mar.-Apr. 1999, at 35, 36.

13 *Id*. at 41.

14 *See* John F. Murphy, *supra* note 5.

My goal in this contribution to the Festschrift is more modest: To explore some salient difficulties the United States has had in adhering to the rule of law in the areas of *jus ad bellum*, *jus in bello,* and international human rights, with reference to Yoram's insights as appropriate.

I *Jus ad Bellum*

Yoram is a self-proclaimed "strict constructionist" when it comes to the *jus ad bellum*. Recently, he has nicely summarized his position:

> The overall prohibition of the use of inter-State force is subject to only two exceptions, both explicitly recognized in the [UN] Charter: (a) self-defense in response to an armed attack, and (b) military action taken or authorized by the Security Council in a binding decision, following determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression.[15]

I fully share Yoram's view that the two exceptions explicitly mentioned in the UN Charter are the only exceptions to the Charter's prohibition of the use of armed force.[16] Other commentators, however, have argued in favor of additional exceptions.[17] Yoram will have none of it:

> Despite temptations, I completely reject the notion that the current prohibition of the use of inter-State force is subject to any additional exception not expressly incorporated in the Charter, beside self-defense and action by – or with the authority of the Security Council. I unapologetically belong to a school of thought that interprets the text of the Charter very strictly in case of a disagreement regarding its reach or meaning. I am apprehensive of any "creative interpretation" of the Charter, unless it is supported by consistent and uniform practice.[18]

Perhaps the alleged exception to the Charter's prohibition of the use of armed force that has had the most support among the commentators is the so-called

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15 Yoram Dinstein, *Comments on War*, 27 Harv. J. L. & Pub. Pol'y 877, 878 (2003-2004).

16 UN Charter art. 2(4), the keystone Charter provision prohibiting the use of armed force, 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.

17 For a discussion and analysis of some of these arguments, *see* John F. Murphy, *Force and Arms,* in 1 United Nations Legal Order 247, 253-56 (Oscar Schachter & Christopher C. Joyner, eds. 1995).

18 Yoram Dinstein, *supra* note 15, at 879.

doctrine of "humanitarian intervention,"[19] which would permit the use of armed force on the basis of humanitarian concerns, especially in the case where it is used to stop another country's government from engaging in a massive violation of the human rights of its own citizens. Again, Yoram categorically rejects the arguments in support of the doctrine.[20]

For its part, the United States government also has adopted a strict constructionist interpretation of the UN Charter's limitations on the use of armed force, although some apologists for specific uses of armed force by the United States have not felt so bound. It has, for example, so far assiduously avoided invoking the doctrine of "humanitarian intervention" as justification for the use of armed force. Nonetheless, the United States has been sharply criticized for two recent major uses of armed force: the bombing of Kosovo in 1999 and the invasion of Iraq and the subsequent "regime change" there in 2003. Let us turn first to Kosovo.

A Kosovo

The Kosovo air campaign launched by NATO against Serbia has been the subject of sharp debate on both legal and policy grounds. Time and space limitations do not permit an extensive exploration of that debate in this contribution.[21] It suffices for present purposes to note that Yoram has come down firmly on the side of those who believe that the NATO bombing did not conform to the law of the UN Charter.[22] He has done so because NATO "failed to obtain the authorization of the Security Council (and the circumstances would not sustain claims of self-defense)."[23] He also notes that "the key player, the United States, has assiduously refrained from rationalizing the Air Campaign on the ground of 'humanitar-

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19 *See e.g.,* Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives,* in Laws and Civil War in the Modern World 229 (John Norton Moore, ed. 1974); Michael Reisman, *Humanitarian Intervention to Protect the Ibos,* in Humanitarian Intervention, App. A (Richard Lillich, ed., 1973).

20 *See* Yoram Dinstein, *supra* note 2, at 66-68, 271-73.

21 For my contribution to the debate, *see* John F. Murphy, *Kosovo Agonistes,* in Trilateral Perspectives on International Legal Issues 185 (Chi Carmody, Yuji Iwasawa, and Sylvia Rhodes, eds. 2002). For a sampling of other contributions, *see* Michael Mandelbaum, *A Perfect Failure: NATO's War Against Yugoslavia,* Foreign Aff., Sept.-Oct.1999,at 2; James B. Steinberg, *A Perfect Polemic: Blind to Reality on Kosovo,* Foreign Aff., Nov.-Dec. 1999, at 128; Ruth Wedgwood, *NATO's Campaign in Kosovo,* 93 Am. J.Int'l L. 828 (1999); Thomas Franck, *Lessons of Kosovo,* 93 Am. J.Int'l L. 857 (1999); Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo,* 32 Vand. J. Transnational L. 1231 (1999); Richard Bilder, *Kosovo and the "New Interventionism": Promise or Peril?,* 9 J.transnational L. & Pol'y 153 (1999).

22 *See* Yoram Dinstein, *supra* note 2, at 271-73.

23 *See* Yoram Dinstein, *supra* note 15, at 881.

ian intervention,' and–in stressing the *sui generis* character of the Campaign–has expressed the desire 'not to overdraw the various lessons that come out of it.'"[24]

It should also be noted that the United States has generally avoided defending the Kosovo bombing on legal grounds.[25] Even in the context of Serbia and Montenegro's suit before the International Court of Justice against ten member states of NATO, including the United States, challenging the legality of the bombing, the respondent states were reluctant to offer a legal justification of the bombing. Rather, the focus of the responses was on challenging the jurisdiction of the Court , and this resulted in the early dismissal of the cases against Spain and the United States. Then, on December 15, 2004, the Court unanimously decided that it had no jurisdiction to entertain the claims against the remaining eight member states of NATO, on the ground that Serbia and Montenegro had no standing to pursue the claims before the Court.[26]

Hence, as a result of the ICJ's dismissal of Serbia and Montenegro's case against the NATO member states, there has been no determination by an "impartial instrumentality of justice" of the legality of NATO's bombing of Kosovo, a key component of the rule of law model. Assuming arguendo, however, that Yoram's (and my) view of the legality of the bombing is correct, the United States (and the other NATO member states) failed to carry out their UN Charter obligation to refrain from the use of armed force. Moreover, even if one assumes, contrary to Yoram's and my view, that there is a humanitarian intervention exception to the Charter's prohibition of the use of armed force, the doctrine of humanitarian intervention would seem to require that the military action undertaken be designed to prevent or bring to an end the humanitarian catastrophe unfolding. But arguably in Kosovo this would have required the threat and, if necessary, the use of ground troops or action by air forces below 15,000 feet. As I have noted elsewhere:

> But no such steps were taken. On the contrary, NATO's decision to avoid the risk of NATO military casualties by resorting only to very high bombing and remote missile strikes was singularly ineffective in bringing to an end the

24 *Id*. Yoram's quote is from Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law,* in Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 177, 199 (J. L. Holzgrefe and Robert O. Keohane eds., 2003).

25 According to Michael Glennon, "[i]n the United States no argument was made that the law permitted humanitarian intervention, and official legal justifications of any sort were hard to come by. Such legal defenses of NATO's actions as were presented constantly shifted from one ground to the next, with no press notice whatsoever." Michael Glennon, Limits of Law, Prerogatives of Power: Interventionism After Kosovo 25 (2001).

26 Case Concerning Legality of Use of Force (*Serbia and Montenegro* v. *Belgium*), 44 International Legal Materials 299 (2005).

> actions of the Serbian troops in Kosovo. One can understand and sympathize with the desire of NATO leaders to avoid casualties, but it appears that the effect of this decision was not only to fail to protect the Kosovars, but also to enrage and increase atrocities by the Serbs against the Kosovars. As noted by Michael Mandelbaum, before the NATO bombing began, approximatley 2,500 people had died in Kosovo as a result of the battle between Serb forces and the Kosovo Liberation Army and 230,000 persons were estimated to have left their homes. During the eleven weeks of the bombing an estimated 10,000 people died in Kosovo, most of them Albanian civilians murdered by Serbs, and 1.4 million were displaced, 860,000 becoming refugees outside of Kosovo.[27]

B Iraq

The March 2003 invasion of Iraq by the United States and coalition forces and the resultant removal of the Saddam Hussein regime have generated a firestorm of debate over the legal and policy justifications for this action. Yoram has sided categorically with those who support the legality of this use of force, and has based his position on the thesis that the Security Council had authorized it.

Yoram's analysis begins with Iraq's invasion of Kuwait in August 1990. Immediately after the invasion, the Security Council determined, in Resolution 660, that it constituted a breach of the peace.[28] Four days later, the Council adopted Resolution 661, which, among other things, affirmed " the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the Charter" and imposed economic sanctions against Iraq.[29] At the same time a coalition of states, led by the United States, formed to oppose the invasion. As noted by Yoram, "[s]ince the exercise of individual or collective self-defense in response to an armed attack can

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27 John F. Murphy, *supra* note 5, at 161. The critique of Zbigniew Brzezinski, former US National Security Adviser, is more biting:

> the painful reality is that the bombing campaign has been conducted as if the human lives at stake should be priced at three different levels: The most precious lives are those of the NATO pilots, with military tactics explicitly designed to minimize their loss; next are those of Milosevic's officials, whose headquarters have been targeted only when empty; least valuable are the lives of the Kosovars themselves, on whose behalf no risks have been taken. ... [T]o consider a war in which no effort is made – even at some risk to one's own professional warriors – to protect the most defenseless is to deprive the undertaking itself of its higher moral purpose.

Zbigniew Brzezinski, *Compromise Over Kosovo Means Defeat,* Wall St. J. Europe, May 25, 1999, at 14, quoted in Louis Henkin *et al.*, Human Rights 737 (1999).

28 S.C. Res. 660 (Aug. 2, 1990), reprinted in 29 International Legal Materials 1325 (1990).

29 S.C. Res. 661 (Aug. 6, 1990), reprinted in 29 International Legal Materials 1325 (1990).

be carried out by States unilaterally, without depending upon the prior approval of the Security Council, there was no legal need for the Council to authorize the military action against Iraq."[30] Nonetheless, for political reasons, the Security Council eventually adopted Resolution 678, which authorized the coalition to use "all necessary means" (i.e., force) against Iraq if it failed to implement a host of previous Security Council resolutions by January 15, 1991.[31] Upon the expiration of this ultimatum, the coalition forces began their attack on the evening of January 16, 1991. On February 28, President George H.W. Bush announced the suspension of hostilities. After proclaiming preliminary conditions for a cease-fire in Resolution 686,[32] the Security Council adopted Resolution 687,[33] which represents one of the most ambitious projects the Council has ever undertaken. By Resolution 687, the Council decided, among other things, that Iraq would unconditionally accept the destruction, under international supervision, of all its chemical and biological weapons and all its ballistic missiles with a range greater than 150 kilometers; unconditionally agree not to acquire or develop nuclear weapons or nuclear weapons usable material and place all such materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency; not commit or support any act of international terrorism. Upon Iraq's official acceptance of these and other demands of the Council, Resolution 687 would constitute a formal cease-fire to the Gulf conflict.

Yoram's argument suggests that a suspension of hostilities must be differentiated from their termination, and that a cease-fire does not end war. In his view, "[t]he hostilities of 2003 – like earlier rounds of hostilities between 1991 and 2003 (preeminently in 1998 and 1999) – did not signify the outbreak of a new war. They were only different phases of the same Gulf War that went on from 1990 to 2003 ...."[34] Renewal of armed conflict in the Gulf, according to Yoram, was justified by Iraq's violations of the cease-fire conditions mandated by Resolution 687. He cites Article 40 of the Regulations Respecting the Laws and Customs of War, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, for the proposition that "any serious violation of a cease-fire ... gives the other Party the right to denounce it and even, in cases of urgency, to recommence hostilities immediately."[35] Yoram also notes that Article 60 of the Vienna Convention on the Law of Treaties "sets forth that a Party to a treaty (a term

30 Yoram Dinstein, *supra* note 15, at 883.

31 S.C. Res. 678 (Nov. 29, 1990), reprinted in 29 International Legal Materials 1565.

32 S.C. Res. 686 (March 2, 1991), reprinted in 30 International Legal Materials 567 (1991).

33 S.C. Res. 687 (April 3, 1991), reprinted in 30 International Legal Materials 847 (1991).

34 Yoram Dinstein, *supra* note 15, at 889-90.

35 *Id*. at 890.

embracing a formal cease-fire agreement between States) may invoke its 'material breach' by another Party as a ground of terminating or suspending the operation of the treaty."[36]

Security Council Resolution 1441[37] is cited by Yoram as an additional basis for the legality of the invasion. He first notes that Resolution 1441 "decided categorically – in a binding manner under Chapter VII of the Charter – that 'Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687,' insofar as disarmament obligations are concerned" and that it gave Iraq "a final opportunity to comply with its disarmament obligations" "by giving UN inspectors a full account of its programs to develop weapons of mass destruction." Once several reports from UN inspectors concluded that Iraq had not met its obligations and were transmitted to the Security Council, a further "material breach" of the cease-fire agreement mandated by Resolution 687 was established, and "the decision whether and when to recommence military operations was vested in the other side to the armed conflict under the Hague Regulations and the Vienna Convention, to wit, the (restructured) coalition," and there was no need for the coalition to obtain another resolution from the Security Council.[38]

Similar arguments, with some variations, have been advanced by representatives of the United States Government,[39] as well as by other commentators supporting the legality of the invasion.[40] It is noteworthy that the US government, like Yoram, has not relied on self-defense as a ground for the invasion of Iraq.[41] By contrast, some commentators have placed substantial emphasis on self-defense as a justification for the invasion of Iraq. John Yoo, for example, has

36 *Id.*

37 S.C. Res. 1441 (Nov. 8, 2002), reprinted in 42 International Legal Materials 250 (2003).

38 *Id.* Yoram Dinstein, *supra* note 15, at 890-91.

39 *See especially,* William H. Taft, IV & Todd F. Buchwald, *Preemption, Iraq, and International Law, 97* AM. J. Int'l L. 557, 563 (2003) (article by the State Department Legal Adviser and his assistant); William H. Taft, IV, US Dept. of State Legal Adviser, Remarks Before the National Association of Attorneys General 15-16 (Mar. 20, 2003).

40 *See e.g.,* John Yoo, *International Law and the War in Iraq,* 97 Am. J. Int'l L. 563 (2003); Nicolas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq,* 32 Israel Yearbook of Human Rights 15 (2004).

41 To be sure, as noted by Sean Murphy, there have been some "brief and cryptic" references to self-defense in statements made by US representatives speaking in an official capacity, but these have not involved an invocation of Article 51 of the UN Charter or any extensive legal analysis. *See* sources cited in Sean Murphy, *Assessing the Legality of Invading Iraq,* 92 Geo. L. J. 173, 175-76, n. 12 (2004).

argued that Article 51 of the UN Charter,[42] despite its apparent requirement of an actual armed attack, has retained the pre-Charter doctrine that permitted the use of armed force in anticipation of an "imminent" armed attack in accordance with the classic formulation of the right of self-defense that arose from the 1837 Caroline incident. There, US Secretary of State Daniel Webster, in the context of a dispute with Great Britain over an attack launched from Canada against the small steamer Caroline while it was docked on the American side of the Niagara River, stated that the use of force in self-defense should be limited to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[43] At an earlier time Webster had declared a requirement of proportionality that "the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[44] As summarized by Yoo, "[t]he Caroline test has been distilled into two principal requirements. First, the use of force must be necessary because the threat is imminent and, thus, pursuing peaceful alternatives is not an option. Second, the response must be proportionate to the threat."[45]

Yoo's "reformulated" test for using force in anticipatory self-defense, however, defines the term "imminent" in a highly expansive fashion and applies it to Iraq in a highly controversial manner. According to Yoo:

> The use of force in anticipatory self-defense must be necessary and proportional to the threat. At least in the realm of WMD [weapons of mass destruction], rogue nations, and international terrorism, however, the test for determining whether a threat is sufficiently "imminent" to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth century formulation. Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity;

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42 Article 51 of the UN Charter provides:

> 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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.

43 *See* J.B. Moore, Digest of International Law 412 (1906).

44 Mr. Webster to Mr. Fox (April 24, 1841), 29 British And Foreign State Papers 1129, 1138 (1857).

45 John Yoo, *supra* note 40, at 572.

> whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat....
>
> Applying the reformulated test for using force in anticipatory self-defense to the potential use of force against Iraq reveals that the threat of a WMD attack by Iraq, either directly or through Iraq's support for terrorism, was sufficiently "imminent" to render the use of force necessary to protect the United States, its citizens, and its allies. The force used was proportionate to the threat posed by Iraq; in other words, it was limited to that which is needed to eliminate the threat, including the destruction of Iraq's WMD capability and removing the source of Iraq's hostile intentions and actions, Saddam Hussein.[46]

Yoo's reformulated test for self-defense draws heavily on *The National Security Strategy of the United States of America,* issued in September 2002, which sets forth a strategy of "preemptive" attack under certain circumstances, a strategy that others have labeled one of "preventive" attack. According to this strategy, "[t]he 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."[47]

For his part, Yoram has rejected the doctrine of anticipatory self-defense as incompatible with Article 51 of the UN Charter. In his view an actual armed attack is required for the use of force in self-defense.[48] In a provocative step, however, he has defined the scope of an armed attack broadly to cover not only the firing of firearms but also certain preliminary steps such as troop movements.[49] According to Yoram, "[t]he crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon."[50] Other commentators, including this writer, would agree with Yoo that Article 51 retains the pre-Charter right of anticipatory self-defense, but would disagree with his (arguably) overly expansive concepts of "imminence," "necessity," and "proportionality" as applied to the invasion of Iraq.

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46 *Id*. at 574.

47 The National Security Strategy of the United States of America 15 (2002).

48 *See* Yoram Dinstein, *supra* note 2, at 165-69.

49 *Id*. at 169-73. Thus, according to Yoram, once the Japanese fleet set off on its way to attack Pearl Harbor, it was engaged in an armed attack on the United States, and the United States would have been entitled to respond to this armed attack by firing the first shot. *Id*. at 171-72.

50 *Id*. at 172.

The debate over "preemptive" self-defense aside, it is clear that the key issue in the debate over the legality of the invasion of Iraq revolves around the interpretation and application of Security Council resolutions. This is a highly complex and close issue that has been explored in depth elsewhere.[51] For my part, with regret, because I strongly support the policy reasons for invading Iraq, I find the US, and Yoram's, arguments ultimately unpersuasive.[52] In my view the most serious weakness in the argument is its reliance on the proposition that the cease-fire in the Gulf created by Security Council Resolution 687 became automatically non-operative in the event of a material breach by Iraq, and, as a result, the authority to use force contained in Resolution 678 revived and justified the renewed use of force against Iraq. Unlike most cease-fire arrangements, the cease-fire in the Gulf War did not come about because of an agreement between the warring parties. Rather, the cease-fire in the Gulf was mandated by the Security Council through Resolution 687 and formally accepted by Iraq. Hence, the cease-fire "agreement" in this case is between the United Nations and Iraq, not between Iraq and the coalition forces. Moreover, as pointed out by Sean Murphy, "[n]othing in Resolution 687 suggests that the Security Council sought to leave to Member States the role of monitoring the resolution. Indeed,

51 For a series of articles expressing various points of view, *see Agora: Future Implications of the Iraq Conflict,* 97 Am. J. Int'l L. 553-642 (2003). A similar series of articles may be found in *Symposium: The Rule of Law in Conflict and Post-Conflict Situations,* 27 Harv. J. L. & Pub. Pol'y 693-892 (2004). All of these articles are worth reading. At the risk of making invidious comparisons, I would especially recommend, first, as articles supporting the legality of the US use of force: William Howard Taft IV and Todd Buchwald, *Preemption, Iraq, and International Law,* 97 Am. J. Int'l L. 557 (2003); John Yoo, *International Law and the War in Iraq,* 97 Am. J. Int'l L. 563 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense,* 97 Am. J. Int'l L. 576 (2003); Richard N. Gardner,*Neither Bush Nor the "Jurisprudes,"* 97 Am. J. Int'l L. 585 (2003); Yoram Dinstein, *Comments on War,* 27 Harv. J. L. & Pub. Pol'y 877 (2004); Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment,* 27 Harv. J. L. & Pub. Pol'y 737 (2004); Robert F. Turner, *Operation Iraqi Freedom: Legal And Policy Considerations,* 27 Harv.J. L. & Pub. Pol'y 765 (2004); Wolff Heintschel von Heinegg, *Factors in War to Peace Transitions,*27 Harv. J. L. & Pub. Pol'y 843 (2004); second,as articles challenging the legality of the US use of force: Richard A. Falk, *What Future for the UN Charter System of War Prevention?,* 97 Am. J. Int'l. L. 590 (2003); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense,* 97 Am. J. Int'l L. 599 (2003); Thomas M. Franck, *What Happens Now? The United Nations After Iraq,* 97 Am. J. Int'l L. 607 (2003); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq,* 97 Am. J. Int'l L. 621 (2003). In addition, a tour de force of arguments challenging the legality of the US use of force may be found in Sean Murphy, *Assessing the Legality of Invading Iraq,* 92 Geo.L. J. 173 (2004). For a thoughtful essay that recognizes the closeness of the question of legal authority for using force in Iraq, and then addresses possible future developments in this area of law and practice, *see* Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment,* 97 Am. J. Int'l L. 628 (2003).

52 For discussion, *see* John F. Murphy, *supra* note 5, at 147-54, 169-77.

the opposite is the case; in paragraph thirty-four of the resolution, the Security Council decided 'to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area."[53] Hence it was the Security Council that was to decide what the consequences of a material breach of the cease-fire should be, not the member states.

Nor, in my view, did the situation change with the Security Council's adoption of Resolution 1441. Although Resolution 1441 was unanimously adopted by the Security Council, it was a "masterpiece of diplomatic ambiguity that masked real differences of opinion between the United States and the United Kingdom, on the one hand, and France, Germany, and Russia, on the other, in how Iraq's failure to fulfill its obligations under Resolution 687 should be handled."[54] Nonetheless, again as pointed out by Sean Murphy, "the debate at the Security Council reflects a belief by all the members (with the exception of the United States) that they had, after intensive weeks of negotiation, reached a consensus on a 'two-stage process' whereby, if Iraq failed to disarm, the Security Council would decide at a future, second stage whether to authorize the use of force."[55] Moreover, it is doubtful whether an authorization of the use of force may ever be implicit in a Security Council resolution, and Resolution 1441 contains no explicit authorization.

Assuming arguendo that Security Council resolutions do not authorize the use of force against Iraq because of its violations of Resolution 687, this should not be the end of the analysis. There is considerable evidence that, far from helping to enforce Resolution 687, France and Russia engaged in deals with the Saddam Hussein government that undermined its enforcement.[56] Moreover, in refusing to accept the US and U.K. proposal that the Security Council adopt a resolution explicitly authorizing the use of force if Iraq failed to fulfill its obligation to disarm – for reasons that had little to do with the merits of the matter[57] – France, China, and Russia arguably failed to fulfill their obligation as permanent members of the Council to allow the Council to perform its collective security functions to maintain international peace and security.[58] As Edward Luck, a longtime observer and commentator on the United Nations, recently noted: "The United

53 Sean Murphy, *supra* note 51, at 202-03.

54 *See* John F. Murphy, *supra* note 5, at 169.

55 Sean Murphy, *supra* note 51, at 219.

56 The Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD (the "Duelfer Report") (Sept. 30, 2004) is full of examples of such actions by the Russian and French Governments.

57 *See* Michael J. Glennon, *Why the Security Council Failed,* Foreign Aff., May-June 2003, at 16.

58 I am pursuing this theme in another article, tentatively titled, "Enforcing the Peace: Privileges and Responsibilities of Permanent Members of the UN Security Council."

Nations, sadly, has drifted far from its founding vision. Its Charter neither calls for a democratic council nor relegates the collective use of force to a last resort. It was a wartime document of a military alliance, not a universal peace platform."[59]

If the United States violated the UN Charter by its military actions in Kosovo and Iraq, it has indeed drifted far from the rule of law paradigm. To be sure, as we have seen, this proposition is debatable, with Yoram in opposition with regard to Iraq. In any event, the debate will not be resolved through reference to a court, itself a deviation from the rule of law paradigm. Some commentators have suggested that the result of these actions is that the norms of the UN Charter on the use of force are "dead" and the Security Council is clearly unable to address major threats to international peace and security.[60] Elsewhere, I and others have attempted to refute the thesis that the law of the Charter on armed force is dead.[61] The validity of the proposition that the Security Council is unable to address major threats to international peace and security remains to be seen.[62] Michael Reisman has argued that, if the Security Council fails to act in response to a threat to the peace, this failure to fulfill its responsibilities releases member states from the constraints on the use of force imposed by Article 2(4) of the Charter.[63] This claim has not been accepted by most scholars or reflected in state practice.[64] In reality, however, if the Security Council fails in the future to fulfill its obligation to maintain international peace and security, powerful states, like the United States, are likely to take the law into their own hands, with the most serious adverse consequences for the *jus ad bellum* of the UN Charter.

II *Jus in Bello* and Alleged Violations of International Human Rights

The firestorm of debate generated by certain US actions taken as part of the "war on terrorism" has been at least as heated, if not more so, than the debate over the invasion of Iraq.[65] A prominent example is the charge contained in

59 Edward C. Luck, *Making the World Safe for Hypocrisy,* N.Y. Times, Mar. 22, 2003, at A11, col. 1.

60 Michael J. Glennon, *supra* 57, at 16-18, 24; Anthony Clark Arend, *International Law and the Preemptive Use of Military Force,* Wash. Q., Spring 2003, at 89, 101.

61 John F. Murphy, *supra* note 5, at 177-81. *See also, e.g.,* Jane E. Stromseth, *supra* note 51, at 629-34.

62 Jane Stromseth has suggested that steps should be taken to refute the validity of this proposition. See Jane E. Stromseth, *supra* note 51, at 634-42.

63 Michael Reisman, Nullity And Revision 848-49 (1971).

64 John F. Murphy, *Force and Arms,* in 1 United Nations Legal Order 247, 271 (Oscar Schachter & Christopher C. Joyner, eds. 1995).

65 To be sure, the Bush administration has in part defended the invasion of Iraq as a component of the war on terrorism, but for purposes of this contribution, they will be treated as separate issues.

Amnesty International's 2005 annual report on the state of human rights around the world that the Bush administration had condoned "atrocious" human rights violations, "thereby diminishing its moral authority and setting a global example encouraging abuse by other nations."[66] In her forward to the report, Irene Khan, Secretary General, Amnesty International, claimed that the detention facility at Guantanamo Bay had become "the gulag of our times, entrenching the practice of arbitrary and indefinite detention in violation of international law."[67] Ms. Khan also charged that the United States had "gone to great lengths to restrict the application of the Geneva Conventions and to 're-define' torture. It has sought to justify the use of coercive interrogation techniques, the practice of holding 'ghost detainees' (people in unacknowledged incommunicado detention) and the 'rendering' or handing over of prisoners to third countries known to practice torture ... Trials by military commissions have made a mockery of justice and due process."[68]

For his part, the executive director of Amnesty International in the United States, William F. Schultz, at a press conference, called upon the US Congress to "appoint a truly impartial and independent commission to investigate the masterminds of the atrocious human rights violations at Abu Ghraib and other detention centers."[69] In response, Scott McClellan, the White House spokesman, reportedly said: "I think the allegations are ridiculous, and unsupported by the facts. The United States is leading the way when it comes to protecting human rights and promoting human dignity. We have liberated 50 million people in Iraq and Afghanistan. We have worked to advance freedom and democracy in the world so that people are governed under a rule of law, that there are protections in place for minority rights, that women's rights are advanced so that women can fully participate in societies where now they cannot."[70]

There have been a number of other strongly worded writings that have claimed numerous alleged US violations of the law of armed conflict and international human rights arising out of the war on terrorism.[71] Space and time limitations preclude this contribution exploring most of these allegations. Rather,

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66 *See U.S. 'Thumbs Its Nose' At Rights, Amnesty Says,* N.Y. Times, June 26, 2005, at A10.

67 Irene Khan, Forward, Amnesty International Report 2005, at 1.

68 *Id.*

69 *See* Transcript of Amnesty International News Conference, May 28, 2005, available at 6, http://globalresearch.ca/articles/AMN505A.html.

70 *U.S. 'Thumbs Its Nose' At Rights, Amnesty Says, supra* note 66.

71 *See e.g.,* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law,* 43 Colum. J. Transnat'l L. 811 (2005); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,* 79 Notre Dame L. Rev. 1335 (2004). For a useful overview, *see* Martha Minow, *What is the Greatest Evil?,* 118 Harv. L. Rev. 2134 (2005) (reviewing Michael Ignatieff, The Lesser Evil: Political Ethics in an Age of Terror (2004)).

for present purposes, this contribution will briefly examine three issues concerning which Yoram's writings have particular relevance: the applicability of the law of armed conflict to the war on terrorism; the status of the detainees at Guantanamo Bay and other detention centers outside of the United States; and command responsibility for clear violations of the law of armed conflict committed by US forces.

A Applicability of the Law of Armed Conflict

In his treatise on the law of armed conflict, Yoram limits his discussion to the law of *international* armed conflict and makes no attempt to address the law of intra-state conflict or civil wars.[72] Yoram also makes it clear that the applicability of the law of international armed conflict requires the presence of an armed conflict between two or more states. Some commentators, therefore, quickly conclude that, since the September 11 attack against the United States was not committed by a state but rather by a non-State actor (Al Qaeda), the war on terrorism is a "misnomer" and international criminal law is the apposite field of law.[73] But the war on terrorism would seem to involve both the law of armed conflict and international criminal law. The US and UK attack on Afghanistan necessarily gave rise to an inter-state conflict between the United States and Afghanistan. The Taliban, the *de facto* government of Afghanistan in control of over 90% of the country's territory, had given sanctuary to Al Qaeda, allowing it to use its territory as a base of operations, and refused to surrender the leaders of Al Qaeda and close down their bases in response to the US ultimatum.[74] Although only three states (Pakistan, Saudi Arabia, and the United Arab Emirates) had recognized the Taliban as the government of Afghanistan, Yoram has pointed out that "no formal recognition of a particular regime as the Government of the enemy State is necessary. Consequently, in the 2001 hostilities, it did not matter that the Taliban regime failed to gain recognition as the Government of Afghanistan by the international community at large (and specifically by the United States). The fact that the Taliban was in control of most of the territory of Afghanistan meant that (recognized or not) it was the *de facto* Government, and the regime's actions had to 'be treated as the actions of the state of Afghanistan.'"[75]

For its part, the United States government had an internal debate on the applicability of the Geneva Conventions to the conflict in Afghanistan. The

72 Yoram Dinstein, *supra* note 3, at 14.

73 *See* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* 12 Eur. J. Int'l L. 993 (2001); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War,* 28 Yale J. Int'l L. 325 (2003).

74 *See* Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law,* in 32 Israel Yearbook on Human Rights 53, 55-63 (2002).

75 Yoram Dinstein, *supra* note 3, at 16.

Department of Justice took the position that the Geneva Conventions, especially the Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention), did not apply to the conflict in Afghanistan and therefore neither the Taliban nor Al Qaeda was entitled to prisoner of war status.[76] In contrast, the Department of State was of the view that the Geneva Conventions, including the Third Geneva Convention, applied to the conflict and the status of the Taliban and Al Qaeda should be determined in accordance with the criteria set forth in the Third Geneva Convention.[77] The then Counsel to the President, Alberto R. Gonzales, supported the position of the Department of Justice but did note the policy arguments advanced by the Department of State.[78]

On February 7, 2002, President Bush announced the US position on this issue. He determined that: (1) the Third Geneva Convention applies to the armed conflict in Afghanistan between the Taliban and the United States; (2) the Convention does not apply to the armed conflict in Afghanistan and elsewhere between Al Qaeda and the United States; (3) neither captured Taliban personnel nor captured Al Qaeda personnel are entitled to the status of prisoners of war

76 US Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Re Application of Treaties and Laws to al Qaeda and Taliban Detainees,* prepared by John Yoo and Robert J. Delahunty, Office of Legal Counsel, Jan. 9, 2002, available at http://www.msnbc.msn.com/id/5025040/site.newsweek.

77 US Department of State, Memorandum to the Counsel to the President, Assistant to the President for National Security Affairs, by Colin L. Powell, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan,* available at http://msnbc.msn.com/id/4999363/site/newsweek.

78 White House, Memorandum for the President from Alberto R. Gonzales, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban,* Jan. 25, 2002, available at http://www.msnbc.msn.com/id/4999148/site/newsweek. It should be noted that some of the arguments advanced in this memorandum in favor of not applying the Third Geneva Convention precipitated strong reactions. For example, at page 2, the memorandum suggests that the nature of the war on terrorism (the "new paradigm") "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders *quaint* some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments." (emphasis added). Similarly, also on page 2, the memorandum suggests that a determination that the Third Geneva Convention does not apply would significantly reduce "the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." It further notes that the War Crimes Act criminalizes the commission of a "war crime" by or against a US person, including US officials. War crimes include any grave breaches of the Third Geneva Convention or any violation of common article 3 thereof, such as "outrages against personal dignity." If the Third Geneva Convention applies, some of these provisions apply even if the detained individual does not qualify as a prisoner of war. Critics of the Bush administration have contended that these arguments helped to create an atmosphere which encouraged the outrages committed at Guantanamo Bay and other detention centers.

under the Convention; and (4) nonetheless, all captured Taliban and Al Qaeda personnel are to be treated humanely and consistently with the general principles of the Convention, "to the extent appropriate and consistent with military necessity," and delegates of the International Committee of the Red Cross may privately visit each detainee.[79]

The blanket decision to deny prisoner of war status to all captured Taliban and Al Qaeda detainees has come under sharp fire.

B Status of the Detainees at Guantanamo Bay and other Detention Centers

George Aldrich, a former Deputy Legal Adviser of the US Department of State and Department of Defense lawyer, has criticized President Bush's decision to deny prisoner of war status to all captured Taliban and Al Qaeda detainees as contrary to the requirements of the Third Geneva Convention.[80] Article 4 of the Third Geneva Convention provides in pertinent part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

79 Ari Fleischer, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), available in LEXIS, Legis Library, Fednew File; *see also* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), available at http://www.whitehouse.gov/news/releases/2002/02–13html.

80 George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants,* 96 Am. J. Int'l L. 891 (2002).

Although no formal legal defense of the President's decision was published, Ari Fleischer, the White House Press Secretary, offered the following explanation of that decision:

> Under Article 4 of the Geneva Convention...Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried their arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.[81]

In his commentary, Aldrich points out that Fleischer was summarizing the provisions of Article 4 (A) (2) of the Third Geneva Convention. But paragraph A (2) deals only with members of militias or other volunteer corps *that are not part of the armed forces of a party to the armed conflict* .The Taliban were, of course, members of the armed force of Afghanistan, a party to the armed conflict. As to them, paragraph A (1) would seem apposite. The four conditions specified by Fleischer as justifying the President's decision would appear to apply only to the second category of POWs, and that category relates solely to militias and volunteer corps that do not form part of the armed forces of a party to the conflict. In most cases, Al Qaeda detainees would fall into this category. Even as to the Al Qaeda detainees, however, it is arguable that some may be entitled to prisoner of war status. This would appear to be the case if an individual Al Qaeda member could prove that he was a member of a militia or volunteer corps forming part of the armed forces of Afghanistan within the meaning of Article 4 (A) (1) of the Third Geneva Convention.

Yoram supports a different interpretation of Article 4 (A) (1), although the language of that provision would appear on its face to support the Aldrich view. As explained by Yoram:

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81 Ari Fleischer, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), *available in* LEXIS, Legis Library, Fednew File; *see also* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), available at http://www.whitehouse. gov/news /releases/2002/02–13 html.

> On the face of it, the Geneva Conventions do not pose any conditions to the eligibility of regular forces to prisoners of war status. Nevertheless, regular forces are not absolved from meeting the cumulative conditions binding irregular forces. There is merely a presumption that regular forces would, by their very nature, meet those conditions. But the presumption can definitely be rebutted. The issue came to the fore in the *Mohamed Ali* case of 1968, where the Privy Council held (per Viscount Dilhorne) that it is not enough to establish that a person belongs to the regular armed forces, in order to guarantee to him the status of a prisoner of war. The Privy Council pronounced that even members of the armed forces must observe the cumulative conditions imposed on irregular forces, although this is not stated *expressis verbis* in the Geneva Conventions or in the Hague Regulations. The facts of the case related to Indonesian soldiers who – at a time of a "confrontation" between Indonesia and Malaysia – planted explosives in a building in Singapore (then a part of Malaysia) while wearing civilian clothes. The Privy Council confirmed the Appellants' death sentence for murder, on the ground that a regular soldier committing an act of sabotage while not in uniform loses his entitlement to a prisoner of war status. The earlier *Quirin* Judgment – concerning German members of the armed forces who took off their uniforms on a sabotage mission in the United States (where they had landed by submarine) – is to the same effect.[82]

Thus, under Yoram's analysis of Article 4 (A)(1) and (2) of the Third Geneva Convention, neither the Taliban nor Al Qaeda qualify for prisoner of war status and are rather unlawful combatants.[83] By contrast, under Aldrich's analysis, the Taliban and some Al Qaeda members would qualify. Yoram recognizes the difference between him and Aldrich and suggests Article 5, paragraph 2, of the Third Geneva Convention as a way to resolve this difference.[84] Article 5(2) provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Yoram suggests that the United States "might be well advised to have the status of Taliban forces determined by a competent tribunal. A competent tribunal for this purpose can be a military commission."[85]

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82 Yoram Dinstein, *supra* note 3, at 36.

83 For further discussion, *see id.* at 47-50.

84 *Id.* at 48.

85 *Id.*

A recent decision of the United States Court of Appeals for the District of Columbia Circuit has indicated, in dicta, that an alleged member of Al Qaeda might be able to assert his claim to prisoner of war status before a military commission. In *Hamdan* v. *Rumsfeld,*[86] Afghani militia forces had captured Salim Ahmed Hamdan in Afghanistan in late November 2001 and turned him over to the American military who transported him to the Guantanamo Bay Naval Base in Cuba. He was kept in detention there until July 3, 2003, when President Bush determined "that there was reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." This finding brought Hamdan within the scope of the President's November 13, 2001, Order concerning the *Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism,*[87] and he was designated for trial before a military commission.

In response to the U.S. Supreme Court's decision in *Hamdi* v.*Rumsfeld*,[88] Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, "either a member of or affiliated with Al Qaeda," for whom continued detention was required. In April 2004, Hamdan filed a petition for habeas corpus with the Federal District Court for the District of Columbia. On November 8, 2004, the district court granted in part Hamdan's petition, holding, among other things, that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a prisoner of war under the Third Geneva Convention.[89] On July 15, 2005, the Court of Appeals reversed, on a variety of grounds. With respect to Hamdan's claim based on the Geneva Conventions, the court ruled that the Third Geneva Convention did not confer upon Hamdan a right to enforce its provisions in U.S. courts. In addition, Hamdan claimed that, even if the Third Geneva Convention was not judicially enforceable, Army Regulation 190-8 provided a basis for relief. This regulation "implements international law, both customary and codified, relating to [enemy prisoners of war] ... which includes those persons held during military operations other than war."[90] Hamdan claimed that Army Regulation 190-8 entitled him to have a "competent tribunal" determine his status. The court expressed its belief that the military commission would be such a tribunal and stated: "We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the

86 Hamdan v. Rumsfeld, 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U.S. L. W. 3108, 74 U.S.L. W. 3284, 74 U.S. L.W. 3287 (U.S. Nov. 7,2005) (No. 05-184).

87 66 Fed. Reg. 57,833.

88 542 U.S. 507 (2004).

89 Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd by* Hamdan v. Rumsfeld, 415 F. 3d 33 (D.C. Cir. 2005), *cert. granted,* 74 U. S. L. W. 3108, 74 U.S. L. W. 32 84, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No-05-184).

90 AR 190-8, section 1-1(b).

time of his trial and thereby receive the judgment of a 'competent tribunal' within the meaning of Army Regulation 190-8."[91]

In *Khalid* v. *Bush*,[92] foreign nationals who were captured abroad and detained at Guantanamo Bay filed individual petitions for writs of habeas corpus challenging the legality of their detention and the conditions of their confinement. The US District Court for the District of Columbia granted the government's motion to dismiss. Although the petitioners asserted that their continued detention violated the Geneva Conventions, they later conceded at oral argument that these conventions did not apply because the petitioners were not captured in the zone of hostilities in and around Afghanistan. Alternatively, they argued that their living conditions constituted "torture" and violated the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and the International Covenant on Civil and Political Rights. The court concluded that these claims were not a viable basis in a habeas proceeding to evaluate the legality of the petitioners' detention. It held that neither the Convention nor the Covenant is a self-executing treaty, and, in such a case, they can only be enforced pursuant to legislation to carry them in effect. No legislation has been adopted to implement the Covenant, and the legislation adopted to implement the Convention does not give the petitioners a private cause of action to challenge the legality of their detention.[93]

It is possible that issues raised in these and other detainee cases will ultimately be resolved by the United States Supreme Court. If so, it will remain to be seen the extent to which the Court will resolve these issues on the basis of international law. Michael Reisman has sharply criticized the Court's decision in *Rasul v. Bush*,[94] which held that any person detained in a place controlled by the United States is able to invoke federal judicial review through the US habeas statute, on the ground "that the decision, in its majority opinion, concurring opinion and dissent, is so completely oblivious to international law. Indeed, none even discusses international law or the Geneva Convention."[95] The application and enforcement of international law in domestic courts is an important component

91 Hamdan v. Rumsfeld, *supra* note 86, at 43.

92 355 F. Supp. 2d 311 (D.D.C. 2003).

93 335 F. Supp.2d at 327. In footnote 21 to page 327, the court noted that "[t]he implementing legislation ... confers standing to sue for (1) aliens that can demonstrate it is 'more likely than not' that he or she would be tortured if removed to a particular country ... and (2) victims of torture who seek damages against individuals whom they allege subjected them, under the authority of a foreign nation, to torture."

94 124 S. Ct. 2686 (2004).

95 W. Michael Reisman, *Rasul v. Bush: A Failure to Apply International Law,* 2 J. Int'l Crim. Just. 973, 980 (2004).

of the rule of law model in international affairs. The failure of US courts to do so undermines the effectiveness of the rule of law at the international level.[96]

C Command Responsibility

Although the United States is not a party to the Rome Statute of the International Criminal Court,[97] Yoram cites and quotes from it as the most recent international legal instrument dealing with command responsibility.[98] For example, Article 25 (3) (b) of the Rome Statute provides that a person who orders the commission of any crime within the jurisdiction of the court, which includes war crimes, may be held criminally responsible and liable for punishment. As Yoram points out, however, this is the easy case. The "much more complex scenario is that of command responsibility for war crimes committed by subordinates, irrespective – and perhaps even in breach – of orders issued."[99] Here, too, in Article 28, the Rome Statute gives up-to-date guidance.[100] Yoram aptly summarizes the importance of this provision:

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96 Elsewhere I have noted that the US legal system as a whole is not conducive to the application and enforcement of international law. *See* John F. Murphy, *supra* note 5, at 74-115.

97 Rome Statute of the International Criminal Court, 1998, 37 International Legal Materials 999 (1998).

98 Yoram Dinstein, *supra* note 3, at 241-43.

99 *Id*. at 238.

100 Article 28 of the Rome Statute provides:

> 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to excercise control properly over such forces, where:
>
> (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (b) That military commander or person failed to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over subordinates, where:
>
> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

> Plainly, unlike the other instruments, the Rome Statute applies the rules of command responsibility not only to military commanders but to civilian superiors too. When the texts of Paragraphs (1) and (2) of Article 28 are carefully compared, it ensures that in a civilian context (i) a clear nexus must be traced between the crimes committed by subordinates and the effective authority and control of the civilian superior; and (ii) where knowledge is imputed to the civilian superior, there is a strict requirement of conscious disregard of the information available. The first point is due to the special need (non-existent in a military hierarchy) to prove that the civilian accused of a crime committed by another person was actually vested with effective authority and control as a superior. The second point, by raising the bar, seems to limit the liability of civilian superiors compared to military commanders.[101]

As previously noted, there have been numerous charges advanced that the United States has engaged in "atrocious" violations of the law of armed conflict and international human rights law in its conduct of the war on terrorism. For example, at the press conference introducing its 2005 annual report, Amnesty International presented a list of high ranking civilian and military officials who, Amnesty claimed, ordered, or at least tolerated, torture at various detention centers.[102] The Amnesty list of civilian officials includes, among others, Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Attorney General Alberto R. Gonzales, and even President Bush.

These charges have been strenuously denied by the Bush administration, and high level military investigations into complaints have reached varying conclusions.[103] There can be no doubt, however, that truly "atrocious" abuses of

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(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

101 Yoram Dinstein, *supra* note 3, at 242.

102 *See* Transcript of Amnesty International News Conference, *supra* note 69, at 2-3.

103 For example, a high level military investigation into complaints by F.B.I. agents about the abuse of detainees at Guantanamo Bay concluded that while their treatment was sometimes degrading, it did not qualify as inhumane or as torture. See Neil A. Lewis, *Report Discredits F.B. I. Claim of Abuse at Guantanamo Bay,* N.Y. Times, July 14, 2005, at A 21, col. 5. In contrast, the Final Report of the Independent Panel To Review DoD Detention Operations (August 2004), available online at http://www. defenselink.mil/news/Aug2004d20040824finalreport.pdf, concluded that the events of October through December 2003 on the night shift of Tier 1 at Abu Ghraib prison were acts of brutality and purposeless sadism. At the same time the report concluded that the abuses constituted a failure of military leadership and discipline. It noted that, while many of these abuses were not directed at intelligence targets, "some of the egregious abuses at Abu Ghraib which were not photographed did occur during interrogation sessions and that abuses during interrogation sessions

detainees occurred at Abu Ghraib, as graphically illustrated by the photographs taken of them. Amnesty International has charged that then White House Counsel Alberto R. Gonzales should be held criminally liable because he called the Geneva Conventions "quaint and obsolete" in a January 2002 memorandum and requested memoranda from the Office of the Legal Counsel, Department of Justice, that "fueled the atrocities at Abu Ghraib."[104] It may be worth a moment to assess the validity of this contention by the criteria of command responsibility set forth in the Rome Statute and discussed by Yoram.

Gonzales' suggestion in his January 25, 2002 memorandum that the Geneva Conventions are "quaint and obsolete," in that they place, in his view, unacceptable limitations on the interrogation of prisoners and other detainees, can hardly be called the basis for criminal liability under the law of armed conflict, and Amnesty International's charge that it may can be easily dismissed. The infamous memoranda produced by the Office of the Legal Counsel deserve a bit more attention.

In particular, the so-called "Bybee memorandum," prepared by then Assistant Attorney General Jay S. Bybee on August 1, 2002 at the request of Gonzales, set forth an extremely narrow view of what acts might constitute torture.[105] According to the memorandum, "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The memorandum also suggested that "mental torture" only included acts that resulted in "significant harm of significant duration, e.g., lasting for months or even years." The memorandum also claimed that, in any event, the domestic statute criminalizing the commission of torture outside of the United States[106] could be overridden by the President

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occurred elsewhere."(at p. 5). The panel found that "[t]here is no evidence of a policy of abuse promulgated by senior officials or military authorities," but added that "the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels." (id.). The panel concurred with the findings of the Fay/Jones report, George R. Fay and Anthony R. Jones, Investigation of Intelligence Activities at Abu Ghraib, available at http://www.defenselink.mil/news/Aug2004d20040825fay.pdf, that Lieutenant General Richard Sanchez, former commander of US forces in Iraq, and Major General Walter Wojdakowski, his deputy, "failed to ensure proper staff oversight of detention and interrogation." (*id.* at 15). There were no such findings of failure, however, with respect to civilian officials.

104 Transcript of Amnesty International News Conference, *supra* note 69, at 2.

105 Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, memorandum, Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A, Aug. 1, 2002, available at http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf. (hereinafter "Bybee memorandum").

106 18 U.S.C. Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[]or attempt[]to commit torture ...."

acting under his Commander-in-Chief power. In the words of the memorandum, "[e]ven if an interrogation arguably were to violate [the criminal statute], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign."[107]

The revelations of these memoranda, coming as they did in the wake of the Abu Ghraib scandal, precipitated a flurry of sharp reactions, from both ends of the political spectrum, rejecting the arguments set forth in the memoranda. The sharply circumscribed definition of torture set forth in the Bybee memorandum came in for especially severe criticism. As noted by Ruth Wedgwood and James Woolsey:

> This diminished definition of the crime of torture will be quoted back at the United States for the next several decades. It could be misused by al Qaeda defendants in the military commission trials and by Saddam's henchmen. It does not serve America's interest in a world in which dictators so commonly abuse their people and quash their political oponents.[108]

The Bybee memorandum also came under attack for its interpretation of and allegedly dismissive attitude toward provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[109] and of the Geneva Conventions of 1949. For example, Article 16 of the Torture Convention requires each state party to prevent "cruel, inhuman or degrading treatment or punishment" within its jurisdiction.[110] The Bybee memorandum dismisses the significance of this provision by noting that it does not require that states parties provide criminal penalties for persons who commit such acts.[111] Wedgwood and Woolsey, however, point out that Article 16 "is still a legal commitment to which we have willingly acceded... We are not legally free to choose cruel techniques just because they fall short of torture."[112]

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107 Bybee memorandum, *supra* note 105, at 31.

108 Ruth Wedgwood and R. James Woolsey, *Law and Torture,* Wall St. J., June 28, at A10.

109 Concluded at New York, Dec. 10, 1984. Entered into force June 26, 1987. 1465 U.N.T.S. 85. Signed by the United States, Apr. 18, 1988. Ratified by the United States, Oct. 2, 1994. Entered into force for the United States, Nov. 20, 1994.

110 Article 16 of the Torture Convention provides, in pertinent part:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other actions of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

111 Bybee memorandum, *supra* note 105, at 15.

112 Ruth Wedgwood and R. James Woolsey, *supra* note 108.

The January 22, 2002 memorandum[113] is similarly dismissive of common Article 3 of the Geneva Conventions of 1949, which sets forth minimum protections for persons invovled in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." According to the memorandum's analysis, common Article 3 applies only to civil wars or to "a large scale armed conflict between a State and an armed movement within its own territory," and not to a struggle for the control of Afghaistan.

A literal reading of common Article 3 supports the January 2002 memorandum's thesis because by its terms it appears to apply only to an "armed conflict not of an international character,"and Afghanistan was clearly an international armed conflict. In 1986, however, a majority of the International Court of Justice, in the *Nicaragua* case, held that "minimum rules applicable to international and non-international conflicts" are expressed in common Article 3.[114]

By contrast, in his dissenting opinion, Sir Robert Jennings suggested that the majority's view of common Article 3 as a minimum standard of treatment "is not a matter free from difficulty."[115] For his part, Yoram may have resolved this "difficulty" by his comment on Sir Jennings' suggestion:

> This is particularly true considering that the Court did not deem fit to produce any evidence for the conclusion that the provision reflects norms identically applicable to international and to non-international armed conflicts. Still, it can hardly be disputed that when common Article 3 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment", or establishes the need to afford in trial "all the judicial guarantees which are recognized as indispensable by civilized people", the text reflects an irreducible minimum that no State is allowed to rachet down even a notch in any armed conflict (whether international or non-international).[116]

In June 2004 the Department of Justice took the "unprecedented " step of rescinding the Bybee memorandum[117] and, in December 2004, replaced it with a new memorandum explicitly rejecting the controversial arguments of the Bybee

113 *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), in Karin J. Greenberg, The Torture Papers: The Road To Abu Ghraib 81 (2005).

114 Military and Paramilitary Activities (Nicar. v. U.S), 1986 I.C.J. 14, 114 (June 27).

115 *Id*. at 528, 537 (Dissenting opinion of Judge Sir Robert Jennings).

116 Yoram Dinstein, *supra* note 3, at 32.

117 *Id*.

memorandum.[118] Critics have claimed, however, that the Bybee memorandum gave potential abusers a road map for how to avoid prosecution.[119]

It is not at all clear what impact, if any, the Bybee memorandum has had on interrogation policy. The Bybee memorandum was an internal government document, and there is no evidence available that it was adopted as official governmental policy. There also is no evidence that the legal analysis set forth in the memorandum won the approval of Mr. Gonzales. Even if it did, the interpretation of the law set forth in the memorandum, no matter how wrong headed, was merely a legal opinion that would not be a sound basis for holding Gonzales criminally liable for violations of the law of armed conflict. It is clear that Gonzales gave no orders approving the use of the coercive interrogation methods employed in Iraq, Guantanamo Bay, Afghanistan or other detention centers. He had no authority to issue such orders. Nor was he "actually vested with effective authority and control as a superior"[120] over the personnel who engaged in the interrogations in question. Under these circumstances, the tests for command responsibility set forth in Article 28 of the Rome Statute and summarized by Yoram simply were not met.

At this writing, it appears highly unlikely that any of the civilian officials identified by Amnesty International will be subject to criminal investigations. It is worth noting parenthetically, however, that there is pending a civil suit in the US District Court for the Northern District of Illinois against Secretary of Defense Donald Rumsfeld, alleging that his "policies, patterns, practices, derelictions of duty and command failures caused Plaintiffs' abuse" in detention centers in Iraq and Afghanistan. According to the complaint, the eight plaintiffs were "subjected to torture or other cruel, inhuman or degrading treatment or punishment, including severe and repeated beatings, cutting with knives, sexual humiliation and assault, confinement in a wooden box, forcible sleep and sensory deprivation, mock executions, death threats, and restraint in contorted and excruciating positions."[121] There is no question that Rumsfeld had supervisory authority over most if not all persons who allegedly engaged in these violations of the law of armed conflict and international human rights law. Assuming arguendo that Rumsfeld failed to fulfill his responsibilities as supervisor to prevent atrocities, it remains to be seen whether Rumsfeld can be held civilly liable in US courts for this failure.

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118 *See* Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340-2340A (December 30, 2004), available at http://www.usdoj.gov/gov/olc/18usc2340234oa2.htm.(superseding August 1, 2002 opinion outlining applicable standards of conduct).

119 *See* Adam Liptak, *How Far Can a Government Lawyer Go?,* N.Y. Times, June 27, 2004, at 3, col.1.

120 *See* Yoram Dinstein, *supra* note 3, at 242.

121 *See* Complaint for Declaratory Relief and Damages, *Ali v. Rumsfeld*, Case No 1:05-ev-01201, Mar. 1, 2005, at 1.

III Conclusion

Yoram Dinstein has spent his distinguished career working to uphold the rule of law in international affairs and demanding adherence to it. As the brief foregoing survey indicates, the United States has had considerably more difficulty.

With respect to the *jus ad bellum*, Yoram, I, and a host of other commentators agree that the United States (and other NATO members) violated fundamental norms of the UN Charter in resorting to the use of armed force in Kosovo. Indeed, little effort has been made by the United States to defend its actions in Kosovo on legal grounds and substantial effort has been made to limit the precedential value of that action. As to the invasion of Iraq, there has been a substantial split of opinion among the commentators regarding the legality of that action, with Yoram and I on different sides of the issue (although not with respect to the policy issues surrounding the invasion). It is noteworthy, however, that, by and large, the debate has been over the interpretation and application of Security Council resolutions rather than over such controversial doctrines as humanitarian intervention or preemptive self-defense. Because the dispute over the legality of the invasion involves vital national interests, neither the United States nor other states have been willing to submit it to judicial resolution, in accordance with the rule of law model. The more important long range issue, however, is whether the Security Council will be able to fulfill its primary responsibility for the maintenance of international peace and security. The inability of the Council to take forceful action to prevent or stop the widespread atrocities in Darfur, in the Sudan, does not bode well in this regard.

It is clear that grave violations of the *jus in bello* and international human rights law have been committed by US military personnel at Abu Ghraib and other detention centers in Iraq, and there is disquieting evidence that similar violations have taken place at Guantanamo Bay, Afghanistan and elsewhere. Some disciplinary action has been taken with respect to individual perpetrators, but few military supervisors and no civilian supervisors have been held accountable under the doctrine of command responsibility.

There has been considerable controversy over the status of Taliban and Al Qaeda detainees, with Yoram supporting the US position that none of these detainees enjoy prisoner of war status, and other distinguished commentators contending that the Taliban and at least some Al Qaeda members do. Yoram would have the issue resolved by a "competent tribunal," but the United States has resisted this approach. US courts have increasingly become involved with alleged abuse of detainees issues, but, with rare exceptions, they have avoided the application of the *jus in bello* and international human rights law and have decided the cases instead on the basis of US constitutional law or other sources of domestic law.

There is even less chance that the United States would allow these *jus in bello* and international human rights issues to be determined by an international tri-

bunal than the chance that the United States would permit such a determination of the legality of the invasion of Iraq or other *jus ad bellum* issues. Here, too, the United States views such issues as involving vital national issues and therefore outside the scope of judicial proceedings.

The Bush administration is also resisting congressional involvement in these issues, either through the form of creating a commission to investigate incarceration policies at the Guantanamo Bay detention center[122] or through legislation designed to set clear and exact standards for interrogation of detainees.[123] It has made it clear that it wishes to maintain maximum flexibility in this area, free from outside interference of any kind.

In short, at the present time, it appears that the United States is likely to have increasing difficulty adhering closely to a rule of law model with respect to the *jus ad bellum,* the *jus in bello,* or international human rights law.

122 *See* Steve Goldstein, *Spector may seek probe of Guantanamo,* Philadelphia Inquirer, July 26, 2005, at A1.

123 Liz Sidoti, *Senators press bill on detainee rights,* Philadelphia Inquirer, July 26, 2005, at A8, col 1; *Sending out the wrong message,* Financial Times, July 28, 2005, at 12, col.1.

Chapter 8

The Military Action in Iraq and International Law

Ruth Wedgwood

In the rear-view-mirror of a difficult war, re-assessing legality may seem beside the point to both critics and supporters. The war for the liberation of Iraq has unfolded in unpredictable ways for all sides. In a real sense, the war is not yet over, even as the United Nations and the allied forces support the attempt by Iraqi citizens to establish a working democracy and federal structure. The ongoing terror by Ba'athist insurgents against Iraqi citizens who have worked to adopt a constitution, build a government, and restore an economy is a reminder of the nature of the former regime. Students of peacekeeping may be reminded of the parallel attempt by old regime militias in East Timor to use a scorched-earth policy to cripple that country's hard-won independence. In Iraq's nascent democracy, there is the additional challenge of an insurgency that is in part directed and financed from across the border by senior Ba'athist leaders who fled to Syria in anticipation of the allied capture of Baghdad, a reminder that some problems cannot be fully solved in isolation. Judgments about the intervention in Iraq will inevitably have a broad reach, beyond a spot-assessment of the allied decision in March 2003 to proceed to the use of military force. Alongside the important questions of legality and legitimacy, one would wish to look over time at its effect on international institutions, security doctrine, and the transformation of the Middle East. Nonetheless, there are important observations that can clarify one's judgment even now.

First, a fast-forward summary. From the viewpoint of a doctrinal international lawyer, the argument in support of the March 2003 intervention is straightforward, even though contested by some. The justification is founded on Iraq's extended and stubborn failure to account for its weapons programs under the mandatory Security Council resolutions imposed at the end of the 1991 Gulf War. Rather than attacking Baghdad, the allies had hoped to demonstrate that Iraq's threat to the region could be contained by a monitored course of compulsory disarmament. The disarmament and reporting requirements imposed by the Security Council in 1991 were not disposable, despite Iraq's 12-year-long history of defiance. In November 1990, in Resolution 678, the Council voted to authorize member states cooperating with Kuwait to use military force to expel Iraqi

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forces from Kuwait and to restore peace and security in the region, as well as to "uphold and implement … all subsequent relevant resolutions."[1] In April 1991, after the successful allied ground campaign, the Council granted a cease-fire in the war. But the end of hostilities was explicitly conditioned on two obligations – the dismantling of all programs for weapons of mass destruction, and a full and complete accounting of that disarmament. The material breach of these requirements of Resolution 687[2] served to suspend the cease-fire, leaving in place the authorizations of Resolution 678, as well as, arguably, a right of collective self-defense stemming from the 1991 war.

The claim that only a second act of authorization would suffice to permit enforcement of Resolution 687 ignores the teeth of the original resolutions. Resolution 678 authorized members states "co-operating with the Government of Kuwait, … to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." Resolution 687 was indeed a subsequent relevant resolution, and was central to the restoration of peace and security in the Gulf. There is nothing in the text of Resolution 687 that limits its duration or suggests expiry. Nor is there any conceivable claim of desuetude or abandonment. To the contrary, the enforcement of Resolution 687 was front and center in international debate for over a decade, consuming political and military resources that would have had other uses in meeting human catastrophes. The sanctions regime imposed on Iraq was testament to the seriousness with which the international community regarded Iraq's obligation. Any claim that Iraq was not given a fair chance to comply with the requirements of Resolution 687 is belied by Iraq's dangerous game of brinksmanship over the course of a decade. This was not a voluntary regime, whose force was contingent on a later ratifying act. And, as a law professor argued in the Financial Times on March 13, 2003, "Security Council resolutions are not yet so airy as to expire with the term of a particular secretary-general."[3] One may note the sober voice of Sir Adam Roberts: "How much weight attaches to the past decisions of the Security Council in authorising force? If the Council authorises certain member states to undertake a task, but is then unable to agree on follow-up action, does the original authorisation still stand? … The simple guiding principle has to be that a resolution, once passed remains in effect. In the absence of a new resolution repudiating earlier positions (which will always be hard to achieve, granted the existence of a veto) a presumption of continuity is plausible."[4]

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1 UN Security Council Res. 678, Nov. 29, 1990.

2 UN Security Council Res. 687, Apr. 3, 1991.

3 Ruth Wedgwood, Legal Authority Exists for a Strike on Iraq, Financial Times, March 13, 2003.

4 Adam Roberts, Law and the Use of Force, 45(2) Survival 31 (2003). See also Adam Roberts, International Law and the Iraq War 2003, Memorandum for the Select

There is nothing in Resolution 1441, voted by the Security Council in November 2002,[5] that suspended the force of the earlier resolutions.[6] To the contrary, Resolution 1441 recorded the Council's finding that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including resolution 687." Iraq was permitted a "final opportunity" to come into compliance, beginning with an "accurate, full, and complete declaration" of its programs. But the resolution warned that false statements and omissions would, in themselves, "constitute a further material breach of Iraq's obligations."

Iraqi's disregard of the final opportunity provided by Resolution 1441 (and continuing breach of Resolution 687) was made plain in the Iraqi declaration filed in December 2002. Once again (as so many times in the past), Saddam Hussein spurned the obligation to give a complete accounting of Iraqi weapons programs. That, without needing more, sufficed as *casus belli,* alongside the regime's persistent refusal to permit any interviews of Iraqi weapons scientists outside the country, the inspectors' discovery that Iraq was still deliberately violating the 150 kilometer limit on ballistic missiles, and the discovery that Iraq had retained growth stocks of anthrax and other prohibited biological reagents.[7]

The invasion of Kuwait in August 1990 was the culmination of a long record of aggressive conduct by the Ba'athist Iraqi leadership. The regime had previously invaded Iran and gassed Iraqi Kurds in the Anfal campaign,[8] and when faced with this dismaying record, the United Nations Security Council reacted with admirable dispatch against Iraq's invasion of Kuwait, not least because of the additional threat to Saudi Arabia. To point out a factor of self-interest in the world's swift reaction to Iraq's attempted domination of an oil-rich Gulf is no insult to the shared principle that other countries should not be swallowed up. The economic facts of life, however, serve as a reminder that collective security mechanisms lack any automatic supply of police power. Even where the Security Council votes to authorize the use of force, the employment of that authority

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Committee on Foreign Affairs, Written Evidence for the Tenth Report: Foreign Policy Aspects of the War against Terrorism, July 31, 2003.

5 UN Security Council Res. 1441, Nov. 8, 2002.

6 See Ruth Wedgwood, The Fall of Saddam Hussein, Security Council Mandates and Preemptive Self-Defense, 97 American Journal of International 25, 29 (2003).

7 The suggestion has been made that a "material breach" of a Council resolution is different from the material breach of a treaty, and may lack the same suspensive effect. But the Council itself has used the idea of material breach in just this way throughout the 12-year history of Resolution 687. See, e.g., statement by the President of the Security Council concerning United Nations flights into Iraqi territory, UN Doc. S/25081 (1993), quoted in Ruth Wedgwood, The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction, 92 American Journal of International Law 724, 727 & accompanying notes (1998).

8 See, e.g., Human Rights Watch, Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds (Yale University Press 1995).

depends upon coalitions of the willing – countries willing to raise and contribute military forces. Council authorization may be stymied as well by the particular ambitions and conflicting agendas of Council members. One may note, for example, the potential effect of Chinese energy relationships on the Security Council's delayed response to Iranian violations of the Nuclear Non-Proliferation Treaty and to Sudan's genocidal acts in Darfur.

In August 1990, the Security Council demanded Iraq's withdrawal from Kuwait, and imposed economic sanctions against the regime. Sanctions and diplomacy were given several months to work. In November 1990, the use of armed force was authorized by Security Council Resolution 678, under Chapter VII, with a 90-day time delay to permit Russian Foreign Minister Primakov and others to undertake one final round of diplomacy. The potential costs of "last chance" diplomacy were later shown in a dramatic discovery made by United Nations weapons inspectors. As it turned out, Saddam had used the 90-day diplomatic interval in 1990-91 to get ready for battle, producing and loading biological reagents into aerial bombs and warheads.[9] It was also revealed, after the fact, that following the invasion of Kuwait, Saddam attempted to accelerate the production of a nuclear weapon, hoping for a weapon within a year's time.[10] Iraq did not employ chemical or biological weapons during the March 1991 ground war, but this may have been the result of the deterrence provided by US Secretary of State James Baker's warning that "devastating consequences" would follow if such weapons were employed. (Whether this should be considered a threat of belligerent reprisal is a different legal debate.[11])

In February 1991, after a month-long air campaign, coalition forces swept into Kuwait and Iraq, with a famed Hail-Mary pass of the armored and infantry divisions. The coalition's pursuit of Iraqi Republican Guard Divisions stopped short of Baghdad, allowing Saddam to preserve substantial military forces. A cease-fire was offered to the Iraqis, and was formalized in Security Council Resolution 687.

This constitutive resolution required that Iraq abide by unique limitations on its military capacity for the indefinite future. Iraq would have to give up any missiles with a range exceeding 150 kilometers, together with any chemical, biological, or nuclear weapons, and any components and precursors. In addition, Saddam would have to provide a full and accurate accounting of these weap

9 Report of the Secretary-General on the status of the implementation of the Special Commission's plan for the ongoing monitoring and verification of Iraq's compliance with relevant parts of section C of Security Council resolution 687 (1991), U.N Doc. S/1995/864, at 29, para. 75(w).

10 See Mahdi Obeidi, A Bomb in My Garden (John Wiley & Sons 2003). See also Report of the Iraq Survey Group (2003), available at <www.cia.gov>.

11 See generally Frits Kalshoven, Belligerent Reprisals (Brill 1971, reprinted 2005).

ons programs, subject to verification by United Nations weapons inspectors, and agree to ongoing monitoring to prevent any reconstitution of these programs.

The expected compliance by Iraq was not forthcoming. The UN special commission on Iraq, formed under the leadership of Swedish diplomat Rolf Ekeus, originally expected to complete verification of Iraq's weapons disposal within 6 to 12 months. But Iraq refused to grant international inspectors open access to the records, scientists, and sites that would have permitted a rapid assay of the state of the regime's weapons programs. Records were removed from sites scheduled for inspection, travel by the inspectors was delayed and impeded, and air inspections were subjected to landing restrictions and, on at least one occasion, a physical struggle over a helicopter's controls. It was not until four years later, in 1995, that Iraq finally acknowledged it had established a research program on biological reagents such as anthrax, botulinum and aflatoxin. This admission was not forthcoming until the UN Special Commission (UNSCOM) succeeded in piecing together supplier records that showed unaccountably large purchases of biological growth media, ultimately totaling 39 tons (grossly excessive for medical laboratory cultures but useful in biological weapons research and production.) Admission that the program had proceeded to the stage of weaponizing reagents came only after Saddam Hussein's son-in-law defected to Jordan, with knowledge of the programs. Skillful concealment of weapons production capability within dual use research and manufacturing facilities also thwarted verification.

Iraq produced a parade of last and final accountings throughout the 1990's, each sworn to be the true and complete version. Iraq's ambassador to the United Nations in New York showed evident chagrin, when he was reduced each time to the argument that Iraq's admissions of prior lies now proved its incontestable good faith.

Iraq regularly threatened to withhold future cooperation with the UNSCOM inspectors unless economic sanctions against the regime were lifted. France and Russia began to regularly challenge the regime of sanctions designed to coerce Iraqi compliance, and criticized the inspection methods of UNSCOM, suggesting that the burden of persuasion lay upon UNSCOM rather than Iraq. Even after the "Oil for Food" program was introduced in late 1996, the ambivalent stance of these two members of the Permanent Five continued. Saddam Hussein's political skill was evident, as well, since any fracture in the Council alliance was translated into resistance on the ground. The Iraqi regime refused access to various sites of interest to the inspectors, including so-called presidential palaces, and persistently argued that it was up to UNSCOM to prove that Iraq still had weapons, rather than Iraq's burden to show the opposite. The doe-faced claim that Iraqi personnel had poured out chemical weapons and biological reagents into the desert sand, without keeping records of the disposal or recording the place, was met with understandable incredulity. Attempts to study Iraq's methods of denial and concealment, in order to avoid evasion of the inspection methods, had limited success. The same closed Iraqi security apparatus was

charged with supervision of weapons research and with Saddam's personal security. The situation continued to deteriorate despite the 1997 appointment of a new director of UNSCOM, Australian diplomat Richard Butler, a conciliatory trip to Baghdad by UN Secretary-General Kofi Annan obtaining a short-lived memorandum of understanding with the regime, a review of UNSCOM inspection results by Brazilian diplomat Cesare Amorim, and the further reorganization of UN inspection efforts (and nearly wholesale change of inspection personnel) in a new UN group headed by Hans Blix (the United Nations Monitoring, Verification and Inspection Commission, or UNMOVIC). When Iraq refused to admit American inspectors as part of the UNMOVIC teams, on-site inspections were terminated in late 1998. This was followed by a brief air campaign against Iraqi military sites, dubbed Desert Fox.[12] Perhaps one should have expected at the outset that Saddam was unlikely to comply with any program of monitored disarmament, even after a defeat. As Rolf Ekeus has observed, when a leader comes to power through stealth and violence, the same pattern of behavior is likely to manifest itself internationally.

There is no need to summon a controversial theory of preventive war or preemptive self-defense as a basis for obtaining Iraq's compliance with a Council-mandated disarmament regime. The legal argument against Iraq can be modest and confined. As a recidivist aggressor against its neighbors, Iraq was assigned and accepted singular duties under Council Resolution 687, to shed its development of weapons of mass destruction, to abstain from any renewal of those programs, in perpetuity, and to show the international community that it had done so. To be sure, the attacks of September 11, 2001, have challenged classic strategic doctrine, by exposing the potential failure of deterrence against non-state-actors. Any future attacks with weapons of mass destruction may lack a "return address." A state could hand-off weapons materiel to a non-state-actor, in order to target a shared enemy, and yet avoid the matter coming to light. Deterrence of such conduct would not be available, unless one was prepared to announce an unprecedented strategic doctrine that would threaten a response against any possible source of the anonymous attack. Thus, in a brave new world of non-state-actors, even where there is no established relationship or hierarchical integration between a state and a private network, deterrence may fail to prevent deadly hand-offs. As with September 11, there may be no warning of an "imminent" attack. It may be a bolt from the blue, or a bolt from a smuggled cargo container on an ocean barge.

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12 There was no additional Security Council resolution preceding Desert Fox. So, too, in 1993, American, British and French aircraft took part in limited air attacks against Iraqi radar sites as a means of coercing Iraqi compliance with inspection requirements. See Ruth Wedgwood, The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction, 92 American Journal of International Law 724, 727-728 (1998).

Unlawful production of weapons of mass destruction and deliberate evasion of reporting requirements thus seemed an aggravated danger after the occurrence of al Qaeda's terrorist attacks of September 11. Earlier in the 1990's, Iraq may (or may not) have exported chemical weapons production to Sudan, where Osama bin Laden maintained important links.[13] Iraqi agents may (or may not have) met in Prague with a leader of the September 11 attacks. Regardless of the interpretation of intelligence sources on these matters, the deliberate evasion of inspection requirements by an irresponsible regime could not be ignored or indulged, even in 2003.

This helps to explain the willingness of the United States and its allies to flow significant numbers of troops into the Gulf region, in mid-2002, in order to persuade Iraq that it needed to readmit the UN weapons inspectors and comply with the verification requirements of Resolution 687. Under Resolution 1441, Iraq was given what the Security Council deemed a "final chance" to give an adequate accounting, and failed to do so. UNMOVIC inspectors directed by Hans Blix did reenter Iraq, and conducted some on-site inspections. But even then, they could not interview weapons scientists in private nor offer to take the scientists and their families out of the country, where they would enjoy some safeguards against retaliation. Blix was reduced to playing needle-in-a-haystack. He could not follow records or materiel that may have been removed to Syria, a Ba'athist neighbor. He could not dig up the Iraqi desert, though the intriguing discovery of a Soviet MIG buried in the desert sand suggests that unusual storage methods were not beyond Saddam's imagination. Indeed, Saddam's scientific expert on nuclear centrifuges admitted after the war in 2003 that he had become expert in cleansing inspection sites to thwart UNSCOM inspectors, and had ended up burying crucial design blueprints in his own garden under a tree.[14]

Shortly before the allied military intervention, there was a reported meeting in Saint Petersburg between French president Jacques Chirac, German chancellor Gerhard Schroeder, and Russian president Vladimir Putin, to discuss their positions. Several public international lawyers from each country were reportedly invited to this affair of state, in order to attempt to frame arguments in opposition. But the fat was thrown in the fire by President Chirac's statement to the press on March 10, 2003, that under no circumstances would France vote in favor of renewed authorization of the use of force.[15]

The Security Council was thus blocked from further action. The United States, United Kingdom, and Australia, acting in cooperation with the Emirate

13 See Ruth Wedgwood, Responding to Terrorism: The Strikes Against Bin Laden, 24 Yale Journal of International Law 559 (1999).

14 Mahdi Obeidi, A Bomb in My Garden (John Wiley & Sons 2003).

15 See Interview Televisée sur l'Iraq du President de la Republique, M. Jacques Chirac, 10 mars 2003, par Patrick Poivre d'Arvor (TF1) et David Pujadas (France 2), Palais de Elysee.

of Kuwait, decided to proceed with a military intervention, without extending the UNMOVIC inspections for any further period. Factors that may have argued in favor of an earlier start were the challenges in maintaining battle-readiness in a desert bivouac, and the difficulties of fighting in summer temperatures (especially in chemical protective suits, since Iraq was believed to have chemical arms). In addition, there was an advantage in achieving tactical surprise once the Turkish parliament refused to allow the US Fourth Infantry Division to deploy on Iraq's northern border, and post-war analysts have credited that surprise as a factor in the coalition's success in getting to Baghdad with unexpected speed. Saddam's calculated exploitation of the 1991 diplomatic pause also showed the hazards of granting an adversary extra time to prepare, once an operation was widely seen to be inevitable.

The race to Baghdad went better than anyone expected. The occupation has been difficult and costly to human life, both civilian and military. The war planners saw the possible difficulties of house-to-house fighting in the initial assault on urban areas. But the melting away of Iraqi forces and the organization of a funded, well-supplied, and sustained urban insurgency in Sunni areas turned the occupation into a continuation of combat by another name. Even the capture of Saddam Hussein in a spider hole near Tikrit has not sufficed to quell the insurgency.

Still, several things have happened that may cast a warmer light on events. First, there is the remarkable and uplifting celebration of Iraqi democracy. Iraqi women and men courageously went to the polls in January 2005, and again in December 2005, defying the danger of car bombs and suicide attacks, in order to cast their ballots. Their forefingers were painted with indelible purple ink to show that they had voted. This safeguard against double voting also provided the remarkable sight of women and men, proud of their purple fingers, pointed up, in defiance of the repression of the old regime. Iraq's example was reinforced by the events of Ukraine's "orange revolution," showing the power of civil disobedience and public demonstration in rebuffing outside interference in national elections.

Since that time, there has been a "domino effect" of democracy – as if other regimes newly understood their citizens would claim the same voice. The results of a democratic ballot are not always easy in the short run, especially in the wake of a fundamentalist Islamist movement that has radicalized some actors. But the long-term trend toward democracy may be the best chance to bring prosperity and stability to the region. With the death of Yasir Arafat, the Palestinian people voted for Mahmoud Abbas as the new president of the Palestinian Authority, upon his pledge to rid the Authority of its debilitating financial corruption. A year later, in 2006, the parliamentary showing of Hamas has been startling to some observers, but its role as a governing coalition may mitigate its radicalism towards co-existence with Israel. Saudi Arabia held municipal elections in February 2005, and has indicated that women may be permitted to vote in 2009. President Mubarak of Egypt held presidential elections in September 2005,

though his first impulse was to arrest the most prominent opposition candidate. The people of Lebanon reacted to the brazen assassination of former prime minister Rafik Hariri by demanding an end to the thirty-year occupation of Lebanon by Syrian troops. The Security Council followed suit by demanding the immediate withdrawal of Syrian troops in Resolution 1559[16] and the UN authorized an astonishing investigation of Hariri's murder that pointed to the complicity of Syria's leadership. It is too early to speak of a "Basra" or "Baghdad" spring, but the demonstration effect of the Iraqi vote has been extraordinary.

Second, there is the impact of the United Nations "High-Level Panel," a study commissioned by the Secretary-General to assay future dangers facing the international community. The panel members include a remarkable array of former international and national leaders, including former UN High Commissioner for Refugees Sadako Ogata, former Egyptian foreign minister Amr Moussa, former head of the French conseil constitutionnel Robert Badinter, and former Australian foreign minister Gareth Evans. One of the prime threats identified by the panel is the problem of weapons of mass destruction in the hands of bellicose regimes.

Customary international law has never purported to limit the acquisition of weapons capability by independent states. The limits on acquisition of biological weapons, chemical weapons, and nuclear weapons have developed as a matter of treaty law, and countries can leave those treaties. But the panel faced a new and more dangerous world with the examples of North Korea and Iran, as well as the evident dangers of the attempted acquisition of WMD by private terror networks. The panel observed that there is a new type of collective threat facing the international community, namely, "nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible States." For the first time, the United Nations community – which reacted with great skepticism to the United States National Security Strategy in 2002 – has acknowledged that capacity can itself be dangerous and potentially actionable. The acquisition of WMD by an "irresponsible State" might "conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent."[17]

To be sure, the High-Level Panel concludes that threats should be countered collectively, rather than unilaterally. But the panel also acknowledges that this preference for multilateral response depends upon the temper and sense of responsibility of Council members. The Security Council must rise to the occasion. In considering the tension between unilateralism and multilateralism, one may remember the Secretary-General's own conundrum about who could authorize humanitarian intervention. In 1999, in a speech to the General Assembly,

16 UN Security Council Res. 1559, Feb. 8, 2004.

17 A More Security World: Our Shared Responsibility, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, December 2, 2004, at p. 64, paragraph 194.

Kofi Annan posed a more-than-rhetorical question about genocide in Rwanda and ethnic cleansing in Kosovo. He asked what states should do if the Security Council refused to act.[18] Was humanitarian intervention permissible without Council approval? The Secretary-General's suggestion was that the successful maintenance of a collective system for decision-making would depend upon the Council's willingness to respond to threats. Quite apart from the effect of Resolutions 678 and 687, the same point might be drawn in relation to an irresponsible regime such as the Ba'athist dictatorship of Saddam Hussein. As the Secretary-General noted in his visit to Washington in December 2004, "where there is a convincing and persuasive case, the council must face up to its responsibilities and act, rather than create a situation where a member state feels it has to go outside the council to take – to get redress or to take action."[19]

As a third factor, one should note the sobering effect of post-war assessments of Saddam Hussein's weapons programs. To be sure, the post-war Iraq Survey Group discovered no stockpiles of chemical weapons or biological weapons. But the reticent voice of former UNSCOM director Rolf Ekeus has reminded post-war observers of the central role of Saddam's intention and his interest in break-out capability. In an essay called "Don't be fooled, they found more than you think," Ekeus notes that the work of the post-war weapons inspectors "convincingly demonstrates that Iraq's biological weapons experts developed and maintained a clandestine network of laboratories and facilities within the security apparatus." This infrastructure for experimentation was not reported in Iraq's declaration, and this was "an obvious violation of Iraq's reporting obligations under UN Security Council resolution 1441." So, too, recorded Ekeus, "Iraqi scientists have also admitted to investigating how to improve and simplify fermentation and spray-drying capabilities of BW-simulants for application to anthrax." Ekeus also stated that he was "struck … by information on Iraq's production of liquid rocket fuel and oxidiser. This does seem to support the argument that Iraq had maintained its interest in longer-range missiles (over the 95-mile range allowed)."[20]

The ultimate challenge, notes Ekeus, is how to handle a regime leader who seeks to engineer the lifting of multilateral sanctions in order to go back to his interests in prohibited weapons systems. Ekeus reaches the unvarnished conclusion that "It is difficult to believe that, had there not been a war, it would have

18 Kofi Annan, On Sovereignty and Intervention, reprinted in Secretary-General Presents His Annual Report to General Assembly, UN Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999). See also Kofi Annan, Two Concepts of Sovereignty, The Economist, Sept. 18, 1999.

19 Remarks of Secretary-General Kofi Annan, A More Secure World: Who Needs to Do What?, Council on Foreign Relations, Washington, D.C., Dec. 16, 2004.

20 Rolf Ekeus, Don't be fooled, they found more than you think, Sunday Times (London), News Review 7, Oct. 19, 2003. See also Rolf Ekeus, Iraq's Real Weapons Threat, Washington Post, June 29, 2003.

been possible to control and monitor Iraq's dual-use capacities for any length of time." The problem was something that no inspector could extirpate – namely, Saddam's commitment to weapons of mass destruction as a central stanchion of his regime's power and prestige. In a challenge that is unusually blunt for UN diplomacy, Ekeus states: "I put it to those who criticised the decision to go to war against Iraq to outline an alternative route and explain what should have been done with Saddam's weapons programmes."[21]

So, too, the results of the Iraq Survey Group corroborate that Saddam had not abandoned his ambitions. Charles Duelfer, who had served as deputy executive chairman of UNSCOM under both Ekeus and Butler, concluded that the Iraqi Intelligence Service "maintained throughout 1991 to 2003 a set of undeclared covert laboratories to research and test chemicals and poisons, primarily for intelligence operations." In addition, the Survey Group "uncovered Iraqi plans or designs for three long-range ballistic missiles with ranges from 400 to 1,000 km and for a 1,000 km-range cruise missile."[22] Although these were still in the design phase, this was a forbidden enterprise, and was accompanied by the importation of engines from Poland, and possibly Russia or Belarus, which would have supported longer range missiles, and by the importation of missile guidance and control systems. The Duelfer report concluded that Saddam Hussein "wanted to end sanctions while preserving the capability to reconstitute his weapons of mass destruction (WMD) when sanctions were lifted."[23] Yet, of course, the regime created by Resolution 687 would not be satisfied by a momentarily empty larder. Rather, it required the dismantling of WMD programs in perpetuity. It is hard, then, to know how inspections would have quelled this commitment. Inspectors, supported by 225,000 troops in the desert, would have had to continue their work until Saddam and his heirs had finished their natural span of years.

The final post-war development that has put the assessments of Resolutions 678, 687 and 1441 into a different light is the so-called Oil for Food scandal. Starting in 1997, the UN sanctions program permitted Iraq to sell significant amounts of oil, for the purpose of raising money for humanitarian supplies, as well as to pay reparations demanded by the Iraqi Claims Commission, a body sitting under UN auspices in Geneva. The investigative report by former Federal Reserve chairman Paul Volcker, appointed by the Secretary-General, concludes that a UN director of the Oil for Food program was steering valuable oil purchase vouchers to a favored company, and obtained cash in return.[24] Oil allotments were allegedly given to prominent politicians of Security Council member

21 Rolf Ekeus, Don't be fooled, they found more than you think, Sunday Times (London), News Review 7, Oct. 19, 2003.

22 See Report of the Iraq Survey Group, available at www.cia.org.

23 Id.

24 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Third Interim Report, August 8, 2005, available at www.iic-offp.org.

states, to outspoken opponents of the Iraqi sanctions, and to two family members of a former UN Secretary General, acting for an Egyptian oil company. The steady flow of illicit cash to Iraq as kickbacks on oil purchases and surcharges on contracts for the supply of humanitarian goods, meant that the regime had a steady supply of hard currency to use as it might wish, including for purchase of weapons components. The Oil for Food scandal showed that economic sanctions had, in a sense, already been lifted against Iraq, at least as to high-priority regime purchases. Thus, there could be no guarantee that forbidden fruit was really out of reach, even while UN weapons inspectors might be traveling around the countryside in pursuit of a site inspection. This resupply chain – sustained by cash, and shaped by intention – could overcome any inspector's ability to separate Saddam from WMD. The breach of Resolutions 687 and 1441, as shown in the false declaration of December 2002, was more than a technical failure. It was yet another sign of Saddam's totemic attachment to weapons of mass destruction, as symbols of power and as a club with which to overawe his neighbors and his own population. That is what Resolution 687 was designed to prevent.

Chapter 9

Ius ad Bellum and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?

*Marco Sassòli**

One of the qualities that make Yoram Dinstein such a unique scholar is that he is one of the very few who are genuine experts in both *ius ad bellum* (the rules on the legality of the use of force) and *ius in bello* (the rules on how force may be used, which comprise International Humanitarian Law (IHL)). He has never tried to mix the two branches or even to nuance the absolute separation between them. On the contrary, he has insisted on strict separation in many of his writings.[1] As far as I know, none of his numerous publications is even dedicated to both branches: they always either deal with *ius ad bellum* or *ius in bello*. It may therefore be appropriate in this contribution in his honour to explore this separation – in my view crucial for the survival of IHL and for the effective protection of war victims – its reasons and consequences, the threats it is subject to, and the possible tendencies which would make it pointless.[2]

* I would like to thank my research assistants, Ms Lindsey Cameron, Ms Marie-Hélène Proulx and Mr Éric Corthay, for their help in finding references for and revising this text.

1 Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., (Cambridge: Cambridge Univ. Press, 2001) at 140-147; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge Univ. Press, 2004) at 4-5; Yoram Dinstein, "Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War" (2004) 27 *Harv. J.L. & Pub. Pol'cy* 877 at 881-882; Yoram Dinstein, "Jus in Bello Issues Arising in the Hostilities in Iraq in 2003" 34 *Israel Yearbook on Human Rights* (2004) at 2.

2 See generally on this distinction, François Bugnion, "Guerre juste, guerre d'agression et droit international humanitaire" (2002) 847 *Int'l Rev. Red Cross* 523-546 (also available online in English: http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/review?OpenDocument); Terry Gill, "The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Ius ad Bellum* and the *Ius in Bello*" (1999) 12 *Leiden J. Int'l Law* 613-624; Christopher Greenwood, "Self-Defence and the Conduct of International Armed Conflict" in Yoram Dinstein, ed., *International Law at a Time of Perplexity* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 273-288; Christopher Greenwood, "The Relationship Between *Ius ad Bellum* and *Ius in Bello*" (1983) 9 *Review of International Studies* at 221-234. Peter Kooijmans, "Is there a Change in the *Ius ad Bellum* and, if so, What Does

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I Definitions

The *ius ad bellum* defines when it is lawful to use force in international relations, *i.e.*, to resort to armed conflict. At least since the prohibition of the use of force was enshrined in Article 2 (4) of the UN Charter, it could be more appropriately referred to as *ius contra bellum*. As Yoram Dinstein has so brilliantly explained in every detail, the use of force between States is prohibited by a peremptory rule of international law. There are exceptions, in particular individual and collective self-defence, enforcement measures decided or approved by the UN Security Council, probably national liberation wars and arguably other cases. However, those exceptions in which a *ius ad bellum* (*i.e.,* a right to wage war) exists may only justify the use of force by one party. The enemy has necessarily violated the *ius contra bellum*. States are never equal before the *ius ad bellum* and if the *ius contra bellum* were respected, international armed conflicts would no longer exist.

In this article, I will use a broad concept of *ius ad bellum*, one which includes not only the rules of the UN Charter on the use of force, but also all rules of international law which directly or indirectly justify the use of force in international relations.

The *ius in bello* defines what is legal in an armed conflict. International Humanitarian Law is its most important branch, equally commented upon in all its aspects by Yoram Dinstein. It limits the use of violence in armed conflicts by protecting those who do not or no longer directly participate in hostilities and limiting the violence to the amount necessary to achieve the aim of the conflict, which under *ius in bello* can, whether that aim is lawful or unlawful under *ius ad bellum*, only be to weaken the military potential of the enemy. Today, this branch of international law is largely codified in the 1949 Geneva Conventions and the

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it Mean for the *Ius in Bello*?" in Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie, eds., *Making the Voice of Humanity Heard* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) at 225-237; Hersch Lauterpacht, "Rules of Warfare in An Unlawful War" in George A. Lipsky, ed., *Law and Politics in the World Community* (Berkeley: Univ. Calif. Press, 1953) at 89-113; Melanie Macdonagh, "Can there be such a Thing as a Just War?" (2000) 4 *International Journal of Human Rights* at 289-294; Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris: Pedone, 1970); Rein Müllerson, "On the Relationship Between *Ius ad Bellum* and *Ius in Bello* in the General Assembly Advisory Opinion" in Laurence Boisson de Chazournes, ed., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: CUP, 1999) at 267-274; Georges Scelle, "Quelques réflexions sur l'abolition de la compétence de la guerre" (1954) *RGDIP* at 5-22. Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 3rd ed., (New York: Basic Books, 2000); Quincy Wright, "The Outlawry of War and the Law of War" (1953) 47 *AJIL* at 365-376.

1977 Additional Protocols.[3] In a recent study, the ICRC further identified a large body of customary rules of IHL applicable to both international and non-international armed conflicts.[4]

II Terminology and History

While the Latin terms feign ancient origins, and while war is one of the earliest subjects dealt with by international law, the two terms discussed in this article were born in the early twentieth century and used regularly only since the Second World War[5] – interestingly enough precisely when *ius* (in the sense of a right) *ad bellum* no longer existed. The literal German equivalent of the two terms "Recht zum Kriege" and "Recht im Kriege" had however already been employed by Immanuel Kant, who also stressed the necessity of distinguishing the two branches.[6]

Earlier, at the time of Grotius and the classical just war theory, a *bellum iustum* (but only such a war) was subject to *temperamenta belli* (restraints on the waging of war, which were considered by Grotius not to be legal obligations). To be just, a war had to comply with both, in today's terminology, *ius ad bellum* and *ius in bello*.[7] The enemy, waging war for an unjust cause, was not subject to such *temperamenta belli*. Yet, as Vattel noted, both sides, even in a civil war, often claimed in good faith to be right; therefore, international law had to apply pending determination of who is actually right.[8]

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3 *Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention [III] relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; *Geneva Convention [IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977*, 1125 U.N.T.S. 3; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977*, 1125 U.N.T.S. 609.

4 Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humantiarian Law* (Cambridge: Cambridge Univ. Press, 2005).

5 Robert Kolb, "Origin of the Twin Terms *Ius ad Bellum – Ius in Bello*" (1997) 320 *Int'l Rev. Red Cross* at 553-562.

6 Immanuel Kant, *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, trans. W. Hastie (Edinburgh, 1887) at paras. 53 and 57.

7 See Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: PUF, 1983) at 597-604.

8 See Bugnion, "Guerre juste", *supra* note 2 at 525-526.

When natural law concepts were largely abandoned, war became a simple fact in international relations. It was only logical that international law, the *ius durante bello*, governed this aspect of international relations. Interestingly enough, only when the prohibition of the use of force appeared did the terms *ius ad bellum* and *ius in bello* appear.[9] The latter had to necessarily be distinguished from the former, for it applied to a situation which should not exist under the former body of law. As will be discussed, one day, when the international community is regularly able and willing to live up to (or with) the rule of international law and to regularly and impartially enforce *ius ad bellum*, we may return to concepts of *temperamenta belli*.

III Reasons for the Separation

Although international armed conflicts are prohibited, they still occur. It is today recognized that international law must not only counter this reality, but also regulate it through IHL, which has to apply equally to both sides: the one resorting lawfully to the use of force and the one violating the *ius contra bellum*. In its Preamble, Protocol I clarifies both aspects. First, while IHL applies to violations of the *ius ad bellum*, it does not justify them: "The High Contracting Parties [….] [e]xpressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations". Second, IHL must be respected by all sides, independent of who is right or wrong under *ius ad bellum*: "[r]eaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict." Post World-War II trials recognized that Germans accused of war crimes could rely on all the rights IHL provides to a lawful belligerent and could expect that the inhabitants of territories they occupied in violation of the *ius ad bellum* would comply with their own obligations under *ius in bello*.[10]

Several reasons underlie this separation, each of which illustrates the controversies surrounding it. First, one may consider it a mere question of logic. Once the primary rules prohibiting the use of force (*i.e.* the *ius ad bellum*) have been violated, the subsidiary rules of *ius in bello* must apply, as they are foreseen

9 See Kolb, *supra* note 5 at 561-562.

10 See the US Military Tribunal at Nuremberg in the cases of *Wilhelm List et al.* (section 3 (v)) 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals*, vol. VIII (The United Nations War Crimes Commission) at 34-76, and *In re* Altstötter and Others (The Justice Trial), *AD* 1947 at 278. See for the contrary view B. D. Meltzer, "A Note on Some Aspects of the Nuremberg Debate" (1946-7) 14 *U.C.L.R.* 455 at 461 and F. De Menthon, "Opening Address", 5 *I.M.T.* 98 at 387.

precisely for situations in which the primary rules have been violated. They must perforce apply independently. This premise was not always uncontroversial. Some have objected to it, on the level of legal logic, based on the general principle *ex iniuria ius non oritur*, whereby he who acts contrary to the law cannot acquire rights as a result of his transgression.[11] In the main, however, IHL cannot be seen as providing rights to States, but rather as setting forth objective rules of behaviour binding them for the benefit of individuals affected by war. In addition, it is impossible to separate rights from obligations in IHL.[12]

From a more teleological point of view, in 1949 the International Law Commission refused to engage in codification of the laws of war because "public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace."[13] Indeed, a national legislator adopting rules on how drivers should behave when driving in the prohibited direction on a one-way road would be criticized for undermining the main rule. One may reply that if the direction to be travelled on a one-way road was often controversial, subsidiary rules might help the avoidance of many accidents. This is precisely the approach of IHL. In many parts of the public, certain scepticism persists towards IHL on the ground that it arguably diverts attention from the main aim: to avoid wars. Even such an eminent IHL expert as Theodor Meron writes, after explaining the separation between *ius ad bellum* and *ius in bello,* that "it also offers an easy way out to those satisfied with the present situation. Ironically, making the war more humane enhances its acceptability and might even prolong it."[14] If this were true, one should seriously rethink the justification for IHL. I would simply respond that the premise is false. I am convinced that no politician, military leader or soldier has ever waged war because he or she trusted that IHL will be respected, thereby limiting the risks of battle. First, even a war in which IHL is perfectly respected causes unpredictable human suffering. Second, reality unfortunately shows that no belligerent can confidently count on the respect of IHL.

Humanitarian reasons for the separation are even more compelling. War victims need as much protection against the belligerent fighting in conformity with the *ius ad bellum* as against a belligerent who violated *ius contra bellum*. They are not responsible for "their" State's violation of international law (*i.e.*, *ius ad bellum*) and they require the same protection regardless of whether they are on

11 See Hersch Lauterpacht, "The Limits of the Operation of the Law of War" (1953) 30 *B.Y.B.I.L.* 206 at 212 (who rebuts himself this thesis). For a detailed rebuttal, see Bugnion, "Guerre juste", *supra* note 2 at 529-533.

12 Bugnion, *ibid.* at 536-537.

13 See (1949) *Yearbook of the International Law Commission* at 281 (A/CN.4/SER. A/1949).

14 Theodor Meron, "The Humanization of Humanitarian Law" (2000) 94 *AJIL* 239 at 241.

the "right" or on the "wrong" side". Conceptually, this assertion may be justified by the fact that *ius in bello* confers rights (and imposes duties) not only on the belligerent States but also on human beings.[15] A right afforded by international law to an individual, such as the right of a combatant to be treated in a humane way when captured by the enemy, is not rescinded just because his State has acted in contravention of international law.[16]

The humanitarian consideration is coupled with a very practical one. Most belligerents and those who fight for them are convinced their cause is just. Seldom does any binding third-party decision on which side violated *ius ad bellum* exist during the conflict. Even if it does, the belligerent designated as the aggressor will disagree. During a conflict, belligerents never agree on which party violated *ius ad bellum*, *e.g.* on which side is the aggressor, but IHL nevertheless has to apply during the conflict. It therefore only has a chance of being respected if it applies independently of the violation of *ius ad bellum* and if both sides apply the same rules.[17] Otherwise, "[e]ach of the belligerents would consider its adversary to be the aggressor and take advantage of this determination to disregard the rules imposed by the law of war. Here too, the floodgates would be left open for a surge of unchecked violence."[18]

IV Consequences of the Distinction

A The Equality of Belligerents before International Humanitarian Law

Under *ius ad bellum*, the parties to an international armed conflict are never equal because one side has necessarily violated that law, although it is often controversial which side has done so. Conversely, under *ius in bello*, both sides have to always comply with exactly the same rules. Many scholars rightly see this as "absolute dogma".[19] It means that while aggression is unlawful, the first shot fired by a member of the aggressor's armed forces upon a soldier of the attacked State is as lawful under *ius in bello* – and governed by the identical restraints – as the latter's shooting back in order to defend his country. In other words, "[t]he individual military action undertaken within the framework of the conflict can only

15 See Yoram Dinstein, "The International Law of Inter-State Wars and Human Rights" (1977) 7 *Israel Yearbook on Human Rights* 139 at 147-52.

16 See Wright, "The Outlawry of War" *supra* note 2 at 373; Yoram Dinstein, *War, Aggression and Self-Defence, supra* note 1 at 142.

17 Yoram Dinstein, *War, Aggression and Self-Defence, supra* note 1 at 141.

18 Bugnion, "Guerre juste", *supra* note 2 at 536.

19 Louise Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (1997) 37 *Int'l Rev.Red Cross* 35 at 53; Yoram Dinstein, *War, Aggression and Self-Defence, supra* note 1 at 144; and most importantly the fundamental book by Meyrowitz, *supra* note 2.

be judged in the light of the *ius in bello*, but not by the yardstick of the *ius ad bellum* independently from the question which party violated the *ius ad bellum* by starting the conflict."[20] Any requirement treating the parties to an armed conflict differently can therefore only be based upon *ius ad bellum*. Thus, when, in 1993, the UN Security Council required the Bosnian Serbs to refrain from attacking protected areas, while Bosnian government forces were allowed to remain in those areas[21] and not prohibited to fire upon Bosnian Serb forces (*e.g.*, to defend the areas), such requirement did not derive from the IHL regime on protected areas, but was perforce a *ius ad bellum* regime.[22]

It is not surprising that this equality comes under attack by those who consider themselves as serving a particularly noble cause. That IHL did not bind the victim of aggression was apparently official doctrine in the Soviet Union (and under Marxist-Leninist doctrine aggression was by definition an attribute of capitalist States).[23] At the diplomatic conference which adopted the 1977 Additional Protocols, the Democratic Republic of Vietnam explained in detail why an aggressor should be subject to IHL, while the victim of an aggression should be relieved of any of its obligations.[24] The Vietnamese proposal was fortunately not accepted; the above-mentioned preambular paragraph 5 of Protocol I was instead adopted by consensus.[25] In actual practice, Vietnam also abandoned its position.[26] Similar theories reappear, however, in the "war on terror". One author writes: "[T]he fundamental principle of the equality of belligerents in the eyes of *ius in bello* means that the combatants' privilege would be granted not only to arguably worthy forces such as armed pro-democracy militants, but also to those on the other side as well, such as armed anti-democracy forces. These potential extensions of the category of international armed conflicts are precisely the sorts of slippery slopes that advocates of a strict separation of *ius ad bellum*

20 Michael Bothe, "Terrorism and the Legality of Pre-emptive Force" (2003) 14 *EJIL* 227 at 234.

21 See UN Security Council Resolutions 819 (1993), 824 (1993), and in particular para. 5 of SC Res. 836 (1993) referring to the "withdrawal of military and paramilitary units other than those of the government of the Republic of Bosnia and Herzegovina".

22 See Jean-Philippe Lavoyer, "International Humanitarian Law, Protected Zones and the Use of Force" in Wolfgang Biermann and Martin Vadset, eds., *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia* (Aldershot: Ashgate, 1998) at 262-279.

23 See references in Jiri Toman, *L'Union soviétique et le droit des conflits armés* (Geneva : Graduate Institute of International Studies, 1997) at 19.

24 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974-1977)* (Bern: Federal Political Department, 1978) [hereinafter: Official Records], vol. IV at 177-188.

25 *Ibid.*, vol. VII at 167-172.

26 On the actual practice of Vietnam, see Bugnion, "Guerre juste", *supra* note 2 at 542-543.

and *ius in bello* have long feared, but that their arguments have always been normatively and logically insufficient to prevent."[27] This criticism misses the point. In that the worthiness of one's cause is often in the eyes of the beholder, is certainly not shared by the enemy, and may change over time, the preservation of the distinction between *ius ad bellum* and *ius in bello* remains very relevant and appropriate even in today's conflicts. In my view, criticism should instead be directed against "extensions […] of the category of […] armed conflicts.[28]

B International Humanitarian Law Applies Independently of the Qualification of the Conflict under Ius ad Bellum

The applicability of IHL or of certain of its sub-regimes (such as the law of military occupation) depends on the actual situation on the ground, *i.e.*, upon whether there is armed violence between armed forces of two States or a degree of violence by armed groups within a State sufficient for a non-international armed conflict. The justification for the violence or the presence of the parties is irrelevant. This may be illustrated by the Israeli-Palestinian conflict.

Israel denies the *de iure* applicability of parts of the Fourth Geneva Convention on occupied territories to the territories it has occupied since 1967, arguing that those territories did not lawfully belong to another High Contracting Party (in the case of the West Bank: Jordan) before 1967.[29] However, whatever the Bible or the Balfour Declaration may have promised to the Jewish people, even if the 1967 war was fought in self-defence, and even if Israel had a stronger right to the West Bank than Jordan and the annexation of the West Bank by Jordan in 1950 was resultantly illegal, in 1967 there was an armed conflict between Israel and Jordan and during that conflict Israel gained control of territories over which it previously had no control. These facts are decisive for the applicability of IHL of military occupation.[30] Other arguments pertain to *ius ad bellum* and may, if correct, have an impact upon the final status of those territories, but they do not bar the applicability of IHL pending such a final peace agreement. Palestinian groups also regularly invoke *ius ad bellum* to justify non-respect of *ius in bello* in their fighting. When they fight Israeli forces without distinguishing themselves from the civilian population, or when they deliberately attack civilians (for exam-

27 Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War" (2004) 43 *Colum. J. Transnat'l L.* at 28.

28 *Id.* See for my criticism Marco Sassòli, "Use and Abuse of the Laws of War in the 'War on Terrorism'" (2004) 22 *Law and Inequality: A Journal of Theory and Practice* 195 at 198-203.

29 See for the Israeli position Meïr Shamgar, "The Observance of International Law in the Administered Terriories" (1971) 1 *Israel Yearbook on Human Rights* at 262-277.

30 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion* (9 July 2004) [2004] I.C..J. Rep. 136, online: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm at paras. 92-95.

ple by suicide attacks), they assert their right to resist foreign occupation. Such a right could justify their acts only under *ius ad bellum*; they would nevertheless have to comply with IHL when resisting.

The question whether a legitimate presence bars the applicability of IHL during a military occupation arose in the Eritrea-Ethiopia Claims Commission. During the conflict between Ethiopia and Eritrea from 1998 – 2000, Eritrean armed forces moved into and administered territory that had previously been administered by Ethiopia. Eritrea argued before the Claims Commission that the Geneva Conventions, and especially the IHL of occupation, did not apply to its activities there because it claimed it was the rightful sovereign of the territory such that the alleged offences were in fact "interactions between Eritrean forces and Eritrean nationals".[31] The Eritrean argument was reinforced by the fact that the Boundary Commission had determined the territory in question to be part of Eritrea. Eritrea therefore argued that "it could not be subject to occupation by Eritrea's own forces".[32] The Commission rejected this position, stating

> The Commission does not agree that persons should be denied the protections of international humanitarian law because of disputes between the Parties to an international conflict regarding sovereignty over the territory concerned.[33]

In other words, the Commission correctly held that any *ius ad bellum* issues could not affect the applicability of IHL to the conflict.

C Arguments under Ius ad Bellum *May Not Be Used to Interpret International Humanitarian Law*

Ius ad bellum not only has no impact upon the applicability of IHL, but it also may not be used to interpret a provision of IHL. Thus when balancing the anticipated military advantage of an attack upon a military objective with the expected incidental civilian losses – in order to evaluate whether the latter are excessive, thereby making the attack unlawful[34] – the military commander may only take *ius in bello* advantages into account and not, *e.g.*, the liberation of civilians under enemy occupation. The proportionality analysis by the military commander trying to occupy a town on the territory of the adverse party and the analysis by the commander trying to liberate a town on his own territory that is occupied by the enemy is exactly the same. I could therefore accept the suggestion that in

31 *Partial Award, Central Front, Ethiopia's Claim 2*, Eritrea Ethiopia Claims Commission, (Federal Democratic Republic of Ethiopia v. State of Eritrea) The Hague, 28 April 2004 at para. 77.

32 *Ibid.*

33 *Ibid.* at para. 78. See also paras. 27 – 31.

34 See Art. 51 (5) (b) of Protocol I.

an armed conflict labelled a "humanitarian intervention", a stricter proportionality analysis applies[35] only in the overall *ius ad bellum* proportionality analysis, not for the proportionality which must be respected under *ius in bello* for every single attack. For the very same reason, the concept of military objective cannot be more restricted during a humanitarian intervention than in any other armed conflict.[36]

Similarly, while it may be possible to classify "the sole policeman or local defence guard [who defends a village against enemy forces engaged in ethnic cleansing], even if they joined hands to try to prevent the cataclysm,"[37] as members of the civilian population for the purposes of classifying them as possible victims of a crime against humanity, they are lawful targets under IHL.

Unfortunately, the highest judicial organ of the United Nations, the International Court of Justice, could not reach a definitive conclusion as to whether the most typical *ius ad bellum* argument, self-defence, could be used to interpret IHL. By seven votes to seven, with the President's casting the necessary tie-breaking vote, the Court came to the correct conclusion (in my view) that the "use of nuclear weapons would generally be contrary to […] the principles and rules of humanitarian law."[38] The Court could obviously have come to another conclusion. Equally, it could have found that a general prohibition exists, but that there are also exceptions. Under the separation between *ius ad bellum* and *ius in*

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35 See Christopher Greenwood, "Self-Defense", *supra* note 2 at 273-88, asserting that the use of force for humanitarian purposes must be limited to what is necessary and proportionate to achieving the humanitarian purposes of the operation. This principle, Greenwood argues, necessarily restricts the range of what may be lawfully attacked. See Christopher Greenwood, "International Law and the NATO Intervention in Kosovo" (2000) 49 *Int'l & Comp. L. Q.* 926 at 933. Critical, Andreas Laursen, "Nato, the War over Kosovo, and the ICTY Investigation" (2002) 17 *Am. U. Int'l L. Rev.* 765 at 788.

36 Ove Bring, "International Humanitarian Law after Kosovo: Is *Lex Lata* Sufficient?" (2002) 71 *Nordic J. Int'l Law* 39 at 50-54; Michael Bothe, "The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on Report to the Prosecutor of the ICTY" (2001) 12 *E.J.I.L.* 531 at 535; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, online: http://www.un.org/icty/pressreal/nato061300.htm at para. 37 [ICTY Report]. Richard B. Bilder, "Kosovo and the 'New Interventionism': Promise or Peril?" (1999) 9 *J. Transnat'l L. & Pol'y* 153 at 171-172, thinks that NATO practice in the Kosovo campaign reveals rather the opposite, *i.e.* that in a humanitarian intervention it may be legitimate to attack additional targets to put pressure on the leadership.

37 *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, S/1994/674, para. 78; *Prosecutor v. Blaskic* (2000) Case No. IT-95-14 (ICTY, Trial Chamber) at para. 213 and *Prosecutor v. Tadic* (1997) Case No. IT-94-1 (ICTY, Trial Chamber, Merits) at para. 640.

38 *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion* (July 8, 1996) [1996] ICJ Rep. 226 at para. 105 E.

bello, such exceptions could not be based upon *ius ad bellum* arguments. Yet this is precisely what the Court considered possible when it wrote: "However […] the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake."[39] This conclusion has been widely criticized, including by Yoram Dinstein.[40] If it would be lawful for that reason, that would mean the end of IHL as we know it. In nearly all international armed conflicts, at least one side believes itself to be fighting in self-defence. In most armed conflicts, at least one side's very survival is at stake. If such a situation could justify the (otherwise prohibited) use of nuclear weapons, it could perforce also justify the killing of wounded or sick or the torture of prisoners of war. I prefer the finding of a post-World War II tribunal (in relation with the admittedly slightly different plea of national emergency): "[T]he contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected […]. War is by definition a risky and hazardous business. […]. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. […] To claim that they can be […] disregarded when [one belligerent] considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."[41]

The ICJ unfortunately repeated the offence in its advisory opinion on the Wall in the Occupied Palestinian Territory. After mentioning several rules of IHL that it considered to be violated by the wall (without actually providing reasons for its conclusion), the ICJ enquired whether those violations could be justified by circumstances excluding their unlawfulness. Among them, it dealt with self-defence. In a very controversial paragraph, it found that the conditions for self-defence were not satisfied because the attacks were not attributable to another State and originated from territory under Israeli control.[42] According to the separation between *ius ad bellum* and *ius in bello*, it should simply have

39 *Id.*

40 Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 146. Yoram Dinstein, "The Law of Air, Missile and Nuclear Warfare" (1997) 27 *Israel Yearbook on Human Rights* at 12-13; Eric David, "The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons" (1997) 37 *Int'l Rev. Red Cross* 21 at 31; Louise Doswald-Beck, "IHL and the Advisory Opinion", *supra* note 19 at 53.

41 US Military Tribunal at Nuremberg, *US v. Alfried Krupp et al.*, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X, 1949, 100, at Section 4 (iii).

42 *Legal Consequences of the Construction of a Wall, supra* note 30 at para. 139. See criticism in AJIL 2005: Ruth Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense" (2005) 99 *AJIL* 52 – 61 and Sean D. Murphy, "Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?" (2005) 99 *AJIL* 62 – 76.

explained that as far as violations of IHL are concerned, self-defence, belonging to *ius ad bellum*, could not justify violations of *ius in bello*.

D International Humanitarian Law May Not Render the Application of Ius ad Bellum*, e.g. Self-defence, Impossible*

The most noble and legitimate cause under *ius ad bellum* does not permit one to disregard IHL or even to interpret it differently; conversely, the separation between *ius ad bellum* and *ius in bello* also implies that *ius ad bellum* is an absolute limit on possible developments (or interpretations) of IHL. As long as it is lawful under *ius ad bellum* to use force for certain reasons and purposes, IHL may not make it impossible to achieve those purposes. After all, parties and those who fight for them would hardly renounce their lawful purposes just to comply with IHL. This body of law inevitably seeks compromise between military necessity and the demands of humanity, precisely because military necessities are for certain belligerents based upon, and implement, *ius ad bellum*.

In contemporary wars directed against modern societies, which are evermore integrated and survive only by relying on sophisticated infrastructure networks, many attacks against genuinely military objectives will have increasingly distant and indirect reverberating effects throughout country and on the civilian population. It is suggested with growing frequency that such reverberating effects must be taken into account when evaluating whether incidental civilian losses or damages are excessive.[43] This may, however unfortunately, not go as far as to make it impossible to efficiently win a conflict waged, for example, in self-defence against such a country. Similarly, the tendency to outlaw weapons not because they are technically inherently indiscriminate, but because they are most often used in an indiscriminate way, may not go so far as to outlaw the weapons necessary to win a war complying with *ius ad bellum* (*e.g.,* authorized by the UN Security Council to restore international peace and security). Indeed, contemporary reality in many conflicts shows that many weapons are used indiscriminately. However, this cannot lead to the outlawing of guns, artillery or machetes.

Similarly, if national liberation wars and armed resistance against a technologically overwhelming aggressor or foreign occupier are lawful under *ius ad bellum*, IHL cannot outlaw *every* efficient method to win such a war. Certainly, it

43 See for the US "International Law and Legal Considerations in Targeting" (Appendix A), in *Joint Doctrine for Targeting,* Joint Publication 3-60, (17 January 2002), at A-5, online http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf, at I-6, and Michael N. Schmitt, "The Principle of Discrimination in 21st Century Warfare" (1999) 2 *Yale Human Rights & Dev Law Journal* 143 at 168; Michael N. Schmitt, "Future War and the Principle of Distinction" 28 *Israel Yearbook on Human Rights* (1999) 51 at 79-80. *Contra* Lt. Col. Kenneth A. Rizer, "Bombing Dual Use Targets: Legal, Ethical and Doctrinal Perspectives" (2001), online: http://www.airpower.maxwell.af.mil/airchronicles/cc/Rizer.html.

would, for instance, be preferable for the protection of the civilian population if combatants always clearly distinguished themselves from the civilian population and if military objectives were kept far from concentrations of civilians. However, under such rules, certain belligerents would not have the slightest chance of overcoming the enemy, even though they might be fighting for a cause which is lawful under *ius ad bellum*. Inevitably, therefore, IHL had to be adapted to make such fighting, and victory, possible. Thus, Protocol I had to lower the distinction requirement to what is both possible to comply with in a guerrilla war and the minimum necessary to ensure respect for the civilian population.[44] Those who criticize this as "law in the service of terror" want to have *ius in bello* bar the realization of *ius ad bellum*.[45]

Similar objections must be raised against the claim made by the United States and some writers that both sides, the defender and the attacker, have an equal responsibility to protect the civilian population from the effects of hostilities.[46] It is true that the civilian population is best protected if both sides take precautionary measures. In law, however, State practice and the text, legislative history, and context of Protocol I indicate that both under Protocol I and in customary international law the main responsibility is conferred upon the "attacker". Beyond the absolute prohibition to use civilians as shields,[47] Protocol I, which lists several passive precautions to be taken by the defender, clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only "to the maximum extent possible," and the defender has only to "endeavour to remove" the civilian population and "avoid" locating military objectives nearby.[48]

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44 See Art. 44 (3) of Protocol I.

45 *A Message from the President of the United States Regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, Message from the President of the United States*, US Government Printing Office, 100th Congress, 1st session, Treaty Doc. 100-2, Washington D.C., 1987; Douglas J. Feith, "Law in the Service of Terror" (1985) *The National Interest* No. 1 at 47.

46 See the Vietnam war Letter by J. Fred Buzhardt, General Counsel of the Department of Defense to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, reproduced in (1973) 67 AJIL 122 at 123; *U.S. Air Force Pamphlet 110-34* at 3-1; *U.S. Naval Handbook NWP 9* at 11-1; forcefully, W. Hays Parks, "Air War and the Law of War" (1990) 32 *The Air Force Law Review* 1 at 149-168 with further references; A.P.V. Rogers, *Law on the Battlefield*, (Manchester: Manchester Univ. Press, 1996) at 77-79; lately, Kenneth Anderson, "Who Owns the Rules of War?", *The New York Times Magazine*, 13 April 2003, online: http://www.nytimes.com/2003/04/13/magazine/13RULES.html. According to Danielle L. Infeld, "Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage ?" (1992-93) 26 *George Washington J. Int'l and Comp. Law* 109 at 141, the defender even has the primary obligation.

47 See Art. 51 (7) of Protocol I.

48 See Art. 58 of Protocol I.

Even with those qualifications, several delegations at the Diplomatic Conference stressed that the provision, in particular the obligation in respect to the location of military objectives, may not prevent a State from organizing its national defence as it considers necessary.[49] Other delegations enumerated the many factors to be taken into account when evaluating whether a given measure prescribed by Article 58 is at all "possible".[50] Participants report that in the competent working group of the conference,

> many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas. This was deemed by representatives of densely populated countries to restrict their right to self defence, and by others to impose too heavy an economic burden to disperse their industrial, communications and transportation facilities from existing locations in densely populated areas.[51]

When becoming a party to Protocol I, Belgium, Italy, the Netherlands, and Algeria declared that the term "feasible" must be understood to mean taking the available means or military considerations into account. Switzerland and Austria even made formal reservations subjecting Article 58 to the "exigencies dictated by the defence of the national territory."[52] Requiring extreme precautionary measures, *i.e.,* either the removal of possible military objectives from their population centres or the evacuation of that population from these centres, would make efficient self-defence of densely populated or poorer countries, that is to say, *ius ad bellum*, impossible.

V The Distinction in Non-international Armed Conflicts

A International Law Does Not Prohibit Non-international Armed Conflicts; Internal Law Does

Technically, no international *ius ad bellum* exists concerning non-international armed conflicts, since such conflicts are neither justified nor prohibited by international law. In fact, the only category of conflicts within an existing State that

49 *Official Records, supra* note 24, vol. VI, 213/214 (France, Switzerland, Austria), 232 (Italy), 234/235 (South Korea), 239 (Cameroon).

50 *Ibid.*, vol. VI, 214 (U.K., The Netherlands), 224 (Canada), 226 (Germany), 241 (U.S.).

51 Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Boston: Martinus Nijhoff, 1982) at 372.

52 See for the text of declarations and reservations Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, 4th ed. (Leiden/Boston: Martinus Nijhoff, 2004) at 792, 794, 796, 807, 810, and 814. Switzerland withdrew its reservation on 17 June 2005.

has been considered as having a justification in international law – national liberation wars in which a people exercises its right to self-determination – has been moved into the category of international armed conflicts.[53] This shift in classification, based as it is on the justification for such conflicts, has been criticized by many as mixing up *ius ad bellum* and *ius in bello*.[54] Yet, although the shift may be contrary to the idea that *ius ad bellum* should not influence the applicability of IHL, the crucial equality of both belligerents before IHL has been preserved. The national liberation movement and the "colonial dominator", "alien occupier" or "racist regime" against which it is fighting are equally bound by this body of law.[55]

Nevertheless, *ius ad bellum* for non-international armed conflicts does exist, in national legislation. As the monopoly on the use of force for State organs is inherent in the very concept of the Westphalian State, we may assume that the national legislation of all States prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except State organs acting in said capacity, anyone else.

B International Humanitarian Law Treats Parties to a Non-international Armed Conflict Equally; However, It Cannot Require Internal Laws to Do So

IHL of non-international armed conflicts treats all parties to such conflicts equally.[56] Article 3 common to the four Geneva Conventions of 1949 explicitly prescribes that "each Party" to such a conflict has to apply its provisions. Here too, *ius in bello*, in the form of either the application of this Article or the conclusion of agreements between the parties which bring into force all or part of IHL of

53 Art. 1 (4) of Protocol I.

54 See Message from the President, *supra* note 45.

55 Thus explicitly Art. 96 (3) (c) of Protocol I.

56 States rejected at the 1974-1977 diplomatic conference which elaborated Protocol II an explicit provision prescribing such equality (cf. Art. 5 of draft Protocol II, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva: ICRC, June 1973), but the applicability of the principle is uncontroversial (see François Bugnion, "Jus ad Bellum, Jus in Bello and Non-International Armed Conflict" (2003) 6 *Yearbook of International Humanitarian Law* [forthcoming]; Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva/Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987) at paras. 4442-4444 [ICRC Commentary]; Rosemary Abi-Saab, *Droit humanitaire et conflits internes* (Genève/Paris, 1986) at 157-159; Michael Bothe, "Conflits armés internes et droit international humanitaire" (1978) *RGDIP* 82 at 92 and 93).

international armed conflicts,[57] has no impact on the legitimacy or legality of the cause of the parties under *ius ad bellum*.[58]

When drafting Protocol II, States made a desperate attempt to ignore the obvious, based upon the illusion that social phenomena disappear when they are not mentioned in legal rules, by deleting any reference to "parties" to non-international armed conflicts.[59] But it is clear that the higher threshold of Protocol II can only be satisfied when highly organized non-State parties exist. It is uncontroversial that such parties have to respect all the rules of Protocol II. Those rules are now formulated in the passive tense, as prohibitions of various acts against certain categories of persons.

Obviously, IHL cannot oblige States to adopt internal laws that treat members of rebel forces and members of governmental forces equally. While domestic law authorizes the latter to use force, the use of force by the former is generally criminalized, even if it complies with IHL; States may punish members of rebel forces for the mere fact of having directly participated in hostilities. This consequence results from the absence of any combatant status in non-international armed conflicts. *De lege ferenda*, a minimum status rewarding rebels who fought while respecting IHL should be determined.[60] *De lege lata*, the only provision offering a (very limited) reward to rebel forces who comply with IHL is Article 6 (5) of Protocol II, which encourages the authorities in power at the end of the conflict to grant such persons the broadest possible amnesty. Equally, one cannot imagine in non-international armed conflicts a status of protected persons, benefiting from a more complete set of protections, for civilians of "enemy nationality."[61] In a non-international armed conflict, civilians cannot be linked to one party by nationality; indeed, they generally all possess the same citizenship. Nor can "protected" civilians be identified by allegiance with the enemy[62] because allegiance to rebel forces is precisely what national laws repress.

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57 The conclusion of such agreements is encouraged by Article 3 (3) common to the Conventions.

58 Article 3 (4) common to the Conventions stipulates that its application "shall not affect the legal status of the Parties to the conflict."

59 See Rosemary Abi-Saab, *supra* note 56, pp. 156-159; Georges Abi-Saab, "Non-International Armed Conflicts" in *International Dimensions of Humanitarian Law* (Geneva/Paris/Dordrecht: Henry Dunant Institute/UNESCO/Nijhoff, 1988) 217 at 231.

60 See in detail Bugnion, "Jus ad Bellum, Jus in Bello and Non-International Armed Conflict", *supra* note 56.

61 As foreseen in Art. 4 of Convention IV for international armed conflicts.

62 The ICTY replaces, for international armed conflicts, the nationality standard laid down in Article 4 of Convention IV, by an allegiance standard (See *The Prosecutor v. Tadic* (1999) Case No. IT-94-1 (ICTY, Appeals Chamber, Merits) at paras. 163-69, and our criticism, Marco Sassòli and Laura Olson, "Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case n° IT-94-A, ICTY Appeals Chamber (15 July 1999)" (2000) 94 *AJIL* 571 at 576-77.

Apart from these differences, however, IHL implies that even beyond the letter of treaty law, both parties must have the equal opportunity to respect IHL. This means, for example, that rebel forces must be able to establish a regularly constituted court, although such court must be established by law,[63] and it is difficult to imagine non-State armed groups passing the requisite legislation. If they are unable to do so, the rebels are at serious disadvantage in applying IHL because it prescribes that only such a court may pass sentences.[64] Not only could they then not punish their enemies, while the government authorities could, but their ability to enforce the respect of IHL through criminal prosecution of their own members would be seriously hampered.

Thus, as with international armed conflicts, it is crucial to separate the illegality of a non-international armed conflict under domestic law from the applicability and application of IHL rules.[65] Similarly, rules of IHL must apply equally to both sides, however morally justified a conflict may be, as in rebellions against a dictatorial government, the battle between a democratic government and a terrorist group, or efforts to combat an armed group seeking to loot natural resources or engaged in drug trafficking. Here again, however, the separation encounters practical limits when the underlying aim of one party is incompatible with IHL, as in the case of the elimination or forcible transfer of a civilian population.[66]

VI Contemporary Threats to the Distinction

A New Concepts of "Just" (or even "Humanitarian") War

Neither existing nor suggested new justifications for the use of force in international relations (such as "humanitarian intervention") necessarily lead to a blurring of the distinction between *ius ad bellum* and *ius in bello*. The separation precisely implies that whatever the justification for a conflict, the same rules of IHL apply. In reality, however, the more either a party to a conflict or an individual fighter is convinced that the cause is just, the more difficulties they will have in accepting the legal fact that they have the same obligations and (only) the same rights as their unjust enemies.[67] They will invoke many brilliant legal theories to obtain more rights or fewer obligations than their opponents. Carefully

63 See, *e.g.*, Art. 14 (1) of the International Covenant on Civil and Political Rights.

64 See Art. 3 (1) (1) (d) common to the Geneva Conventions and Art. 6 (2) of Protocol II.

65 See Bugnion, "Jus ad Bellum, Jus in Bello and Non-International Armed Conflict", *supra* note 56.

66 Kirsti Samuels, "*Jus ad bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone" (2003) 8 *Journal of Conflict & Security Law* 315 at 337.

67 Yoram Dinstein, "Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War" (2004) 27 *Harv. J.L. & Pub. Pol'y* 877 at 881, and, for

considered, such theories invariably blur the distinction between *ius ad bellum* and *ius in bello*.

It is thus unsurprising that during its 1989 invasion of Panama, labelled "Operation Just Cause", the US administration sought to deny prisoner-of-war status to the captured commander-in-chief of the armed forces of Panama, arguing that the legitimate (but ousted) president of Panama had requested US intervention. Correctly, US courts rejected this blurring between *ius ad bellum* and *ius in bello* by recognizing General Noriega's status as a prisoner of war, even after he had been convicted for drug trafficking.[68]

When the US briefly called its 2001 invasion of Afghanistan "Operation Infinite Justice,"[69] it might reasonably have been feared the US would deny the applicability of IHL based upon *ius ad bellum* arguments. Fortunately this was not to be, although innovative US interpretation of *ius in bello* led to a similar result.[70] While the Geneva Conventions were recognized as applicable, captured enemy forces were characterized as having neither combatant nor civilian status. Therefore, they were denied the protection of both the Third and the Fourth Geneva Conventions. Whether the denial was motivated by the purported justification of the operation on the basis of the 11 September 2001 attacks is a matter of pure speculation. That *ius ad bellum* and *ius in bello* are blurred in those parts of the "war on terror" which are armed conflicts is, however, confirmed by at least one expert, who writes, "[i]n short, contemporary IHL absolutists, by eliding distinctions between lawful and unlawful combatants and adopting an interpretive approach absolute with respect to observance of […] the *ius in bello* […] but agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the *ius ad bellum*), privilege terrorists at the expense of their fettered targets."[71] It is not surprising that he comes to the following conclusion: "In effect, a rationalized IHL is an admixture of *ius in bello* and *ius ad bellum* that treats not merely the conduct of soldiers but also the cause for which they fight as practically significant in establishing differential legal standards, canons of interpretation and guidelines for adjudication."[72]

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humanitarian interventions, Adam Roberts, "The So-Called 'Right' of Humanitarian Intervention" (2000) 3 *Yearbook on International Humanitarian Law* 3 at 3-4 .

68 *U.S. v. Manuel Antonio Noriega*, United States District Court for the Southern District of Florida, 808 F. Supp. 791 (1992).

69 See "Bush to explain sustained nature of future war", 20 September 2001, CNN.com, online: http://archives.cnn.com/2001/US/09/19/gen.america.under.attack/.

70 See Marco Sassòli, "Use and Abuse", *supra* note 28 at 195-221.

71 William Bradford, "Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War" (2004) 73 *Mississippi Law J.* 639 at 860.

72 *Ibid*. at 897. See also, for a call to deny "Nazis", whether organized in regular armed forces or otherwise, combatant status, Berman, "Privileging Combat?", *supra* note 27 at 56.

In my view, the controversy over whether the United Nations is bound by IHL is partly related to the tendency of those who argue against full applicability to invoke *ius ad bellum* for the purpose of denying the full applicability of *ius in bello*.[73] Certainly, there are technical reasons for doubts. The UN is not a party to the Geneva Conventions. The UN has insisted that it is bound by the "principles and spirit" of humanitarian law, but denies that it is bound by the detailed rules of IHL. I also have some doubt whether customary IHL, which developed in conflicts between States, binds the organization. At the very least, soldiers involved in a UN operation are bound by virtue of their own States' engagement to "respect and ensure respect for" international humanitarian law "in all circumstances".[74] In addition, a UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL includes and summarizes many, but not all, rules of IHL and instructs UN forces to comply with them when engaged as combatants in armed conflicts.[75] Interestingly enough, in debates leading to its adoption, UN representatives argued that UN forces, even when involved in actual fighting with the armed forces of a State, could not possibly be labelled a party to a conflict, an occupying power or as "the enemy." Rather, they represent both international legality and the entire international community, including even a State against whom they fight. Similarly, in debates about when IHL fully applies to UN forces, some argue that it depends on their mandate. But that is clearly a *ius ad bellum* argument, while IHL should and does apply according to the actual situation.

In my view, the notion that UN forces, which represent international legality and the international community, and which enforce international law, cannot be bound by the same rules as their enemies underlies the UN's reluctance to be bound by the full corpus of IHL rules. Yet, as mentioned, the fact that the UN has authorized military intervention has no impact on the applicability of IHL to the conflict. The UN may authorize the use of force and lead an operation, or it may authorize a regional organization or a State to lead a military intervention.

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73 See, on the whole debate whether IHL applies to UN operations, Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations" (1998) 1 *Y.B Int'l Humanitarian L.* 3; Claude Emanuelli, *Les actions militaries de l'ONU et le droit international humanitaire* (Montréal: Wilson & Lafleur Ltée, 1997); Daphna Shraga, "The United Nations as an Actor Bound by International Humanitarian Law" in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l'occasion du cinquantième anniversaire des Nations Unies, Genève 19, 20, 21 octobre 1995* (Paris: Pedone, 1996) 317; Dietrich Schindler, "United Nations Forces and International Humanitarian Law" in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of J. Pictet* (1984) 521 at 523.

74 Article 1 common to the four Geneva Conventions.

75 UN Doc. ST/SGB/1999/13 of 6 August 1999.

Is there any reason to distinguish between a campaign that is UN-led as opposed to a campaign that is UN-authorized with regard to the applicability of IHL?

On a more technical level, States contributing to UN peace forces correctly perceive that if IHL applied to hostilities between their forces and those opposed to them, both would be combatants and therefore lawful targets of attacks. Contributing States obviously hope that their forces will not be attacked. However, do they really think that such attacks are less likely if the applicability of IHL is denied, which incidentally also strips their own forces of any protection by that law?

For an extreme example of an illusionary stand along these lines, consider the arguments of some European NATO member States during the UN authorized NATO air attacks against Bosnian Serb artillery positions threatening protected areas in Bosnia and Herzegovina during 1994 – 95. They seriously asserted that their pilots were not combatants, that the Bosnian Serbs had no right to fire upon them and that if captured the pilots had to be released immediately. The States claimed their pilots were UN "experts on mission," protected by the 1946 Convention on the Privileges and Immunities of the United Nations. Some actually issued identity cards designating them as such. In *ius in bello*, the idea that someone may attack but not be attacked by those bombed, and must be released upon capture, only to bomb again, is absurd. It will never withstand the test of reality. It was not surprising that as soon as two French pilots were shot down, France changed its legal position and asked for prisoner of war status and treatment.[76] Indeed, if I were such a pilot, I would clearly prefer to invoke prisoner of war status, rather than claim that the legitimacy of my mission under the UN Charter meant my enemies should not have shot me down and they must now immediately release me to allow me to fulfil my mission, *i.e.,* to bomb them.

IHL of international armed conflicts, including the rules on military occupation, does not apply, however, when UN forces are present with the consent of the sovereign of the territory in question. Nonetheless, in such cases, it may be wise to apply IHL by analogy, since it provides a framework to address many of the situations with which peacekeepers will be confronted.[77]

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76 See "Peace Operations" in Jeanne Meyer and Brian Bill, eds., *Operational Law Handbook (2002)* (Virginia, 2002) for the expert on mission status of NATO pilots in the enforcement of the no-fly zone and during the bombardment of Bosnian Serb positions. See also Agence France Presse, "Paris admet que ses deux pilotes disparus en Bosnie sont prisonniers", Dépêche, 20 September 1995; AFP, "M. Millon: les démarches pour libérer les pilotes français vont "s'intégrer dans le plan de paix", Dépêche, 20 September 1995 and AFP, "La Croix-Rouge ignore toujours ou sont les pilotes francais abattus en Bosnie", 21 September 1995, for France's reaction to its pilots being held prisoner and recourse to the ICRC, which emphasized that it was not involved in negotiations for release of the pilots.

77 Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" (2005) 16 *EJIL* 661 at 689 and 691-693.

B Law Enforcement Directed at Terrorists Classified as International Armed Conflict

Two of the many disadvantages of the US administration's current approach towards the "war on terror", *i.e.,* classifying that war as a single world-wide international armed conflict, are that the characterization creates a category of international armed conflicts in which IHL cannot be applied independently of the conflict's justification and in which IHL cannot apply equally to both sides. The author cited above, in criticizing the strict separation between *ius ad bellum* and *ius in bello* in the context of a "war on terror,"[78] may be correct in his premises, but is wrong in the conclusion he draws. It is not the "war on terror" that demonstrates that the separation between *ius ad bellum* and *ius in bello* is erroneous. It is rather the equality of the belligerents before IHL, resulting from that separation, which constitutes an additional argument that the entire "war on terror" should not be labeled as "war".

In the "war on terror," the US and its allies are by definition on the right side and the terrorists are on the wrong one, if only because the latter are defined by a methodology prohibited in IHL, terrorism.[79] To label that fight against terrorism as "war" may conform to a political analysis and have psychological advantages, but from an IHL perspective it inevitably implies conferring upon the terrorists an equal status, which criminals do not enjoy and should not have. This is precisely how the terrorists see what they do – not as crime, but as war against the West. In the US approach to the applicable IHL, the "terrorists" are labelled "unlawful combatants" who may be targeted at any time until they surrender. They may be detained without an individual status determination until the end of that "war." However, they are (correctly) denied the benefits of combatant status, *i.e.,* the right to commit acts of violence, combatant immunity against prosecution and prisoner of war treatment.[80]

While such inequality is contrary to the basic notions of IHL, it conforms to the typical law enforcement situation, which is indeed the appropriate legal framework for all parts of the "war on terror" not taking place within an international armed conflict (such as the conflict between the US and Afghanistan in 2001/2002) or amounting to a non-international armed conflict. Where a genuine armed conflict exists, however, the same IHL must apply to both sides, even if the goal of one is to fight global terrorism. I therefore agree with Ruth Wedgwood when she writes that

78 Berman, "Privileging Combat?", *supra* note 27 at 28.

79 See Art. 33 (3) of Convention IV, Art. 51 (2) of Protocol I and Arts. 4 (2) (d) and 13 (2) of Protocol II.

80 See Sassòli, "Use and Abuse", *supra* note 28 at 196, 206 and 211-213.

> [o]ne potential problem with the war paradigm is that in an ordinary war between states, military objects are legitimate targets. Humanitarian lawyers, military lawyers, have chosen to separate *ius in bello* from *ius ad bellum*, i.e., how you fight a war from when you can fight a war. Once you're at war, in any ordinary interstate setting, it's conceded that either side can strike at military targets. But we would not concede that bin Laden has a privileged right to strike at the U.S.S. Cole or the Pentagon or Khobar Towers. So the traditional war paradigm of war between Westphalian states doesn't quite fit properly either.

I cannot, however, agree with her solution: "We're going to have to pick elements from each, and then craft the reconstructed model to fit the facts of the case."[81] This approach forfeits IHL's normativity and predictability, both of which are essential for victims of future conflicts, including US victims, confronting opponents who believe the law does not to fit the facts of their case as they see it.

C Genuine Armed Conflicts Perceived as "International Police Action"

While the "war on terror" is one in which the law enforcement paradigm should prevail, in other situations genuine armed conflicts are sometimes perceived as international police actions. Such labels imply an unwillingness to apply IHL. Thus, for instance, the Russian Federation consistently denies the obvious – the existence of an armed conflict in Chechnya.

Even in international armed conflicts, those fighting for the enemy are sometimes claimed by the opposing side to be not combatants, but "criminals", generally based upon the cause for which they fight. This non-application of IHL is as problematic as its application to terrorist acts, but for different reasons. First, as a practical matter, combatants have much less choice than criminals to elect the cause for which they fight. Second, unlike combatants, all acts of violence criminals commit are crimes, whether directed against enemy armed forces or uninvolved civilians, or simply conducted indiscriminately. While combatants have an incentive to comply with IHL because they benefit from combatant immunity for acts which conform to IHL, criminals are liable for punishment for any violent act they commit, whether complying with IHL or not. An important incentive for respect of IHL is therefore lost. Third, if an armed conflict is labelled as law enforcement, while the "law enforcers" remain bound by human rights law and domestic law, their enemies are bound only by the *ius ad bellum* barring them from fighting, not any *ius in bello* on how to fight. Killing women and children indiscriminately and targeting members of enemy armed forces become legal equivalents.

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81 Ruth Wedgwood, "Comment" in "Symposium: America Fights Back: The Legal Issues" (2004) 11 *Cardozo J. Int'l & Comp. L.* 831 at 847-848.

For the same reasons, the claim that "defensive armed reprisals" or other "measures short of war" do not constitute armed conflicts, if correct, may only have consequences under *ius ad bellum*, while *ius in bello* must fully apply.[82]

D *International Armed Conflicts Change into Law Enforcement Actions Directed by the International Community against "Outlaw States"*

From the perspective of the UN Charter, the contemporary world can be perceived as ruled by a collective security system. Others may see it as developing towards a hegemonic system in which the sole superpower will ensure international law and order with coalitions of the willing.[83] From both perspectives, international armed conflicts between States can no longer be perceived as conflicts between equals. Both from the point of view of the means at the disposal of the two sides and from a moral point of view, they are asymmetric. On the one side there is the international community and those who represent it, or at least who claim to represent it; on the other side there is generally one single "outlaw" State (in recent years, for instance, Yugoslavia or Iraq).

In such an environment, the separation between *ius ad bellum* and *ius in bello,* and the application of the same IHL rules to both sides, becomes less and less acceptable for those who perceive themselves as enforcing the common interest. At the same time, equal application corresponds less and less to reality because the militarily weaker "outlaw" does not respect IHL, but rather sees the resort to acts prohibited by IHL, such as terrorist attacks or perfidy, as his only chance of avoiding total defeat.

The major disadvantage of such a development is that it leads to a self-fulfilling prophecy and an *ex-post* justification for IHL violations. Similarly, to criminals in domestic law enforcement, there will be no rules on how the outlaws may fight against law enforcers. As a result, the "outlaws" will not even be bound by IHL (rather than simply acting in violation of IHL). As for the "law enforcers", they can no longer be bound by the full set of IHL rules, including, *e.g.*, combatant status and combatant immunity for the members of the "outlaw" armed forces. Nor can the "law enforcers" tolerate the resistance that IHL puts up in situations of military occupation to changes of laws and institutions by an occupying power.[84] At most, they will accept being bound by a new set of *temperamenta belli*, human rights-like restraints addressed to those who are engaged

82 As recognized by Yoram Dinstein, *War, Aggression and Self-Defence*, *supra* note 1 at 194-196, and Yoram Dinstein, "Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Comments on War" *supra* note 67 at 887.

83 Detlev Vagts, "Hegemonic International Law" 95 AJIL (2001) 843 ff. and José E. Alvarez, "Hegemonic International Law Revisited" (2003) 97 *AJIL* 873 – 888.

84 See Sassòli, "Legislation" *supra* note 77 at 668-682.

in international law enforcement – but not to their enemies.[85] Thus, the historical cycle, which started with *temperamenta belli* for those engaging in a *bellum iustum,* would be closed and we would return to the starting point.

It may be that this development is inevitable. I would hope it would take place in the form of strengthened international institutions able and willing to enforce the rule of international law. In such an environment, there could indeed be inequality before the law as between those who enforce international law and the subjects of that enforcement. Yet, I contend that contemporary reality remains very far from the utopia just described – and from a genuine hegemonic world order. First, the world is still made up of sovereign States. Even when they violate international law, States cannot yet be perceived as simple criminal gangs, comprised of criminal individuals. In particular, the freedom of combatants, and even more so of civilians, to "join" an "outlaw" State is incomparably less than the freedom an individual has to join a criminal gang in the domestic legal order. Second, despite all the progress made by international criminal law and international criminal justice in recent years, the possibility of holding responsible individuals who decide upon a course of action resulting in their State's violation of international law is still underdeveloped. It depends to a great extent on the willingness of States to co-operate. This implies that behaviour contrary to the international community's common interest (including law and order) cannot yet be dealt with exclusively as individual behaviour. It must still in addition be attributed to States to generate the necessarily collective reaction. Third, in the absence of an efficient international system of adjudication, there may, in a given armed conflict, still be *bona fide* divergences of view over which side is the outlaw and which is fighting for the common interest.

As long as these realities remain unchanged, armed conflicts will continue to have more in common with traditional wars than with domestic law enforcement. Law that attempts to protect those involved in, and affected by, a social phenomenon should not disappear before the phenomenon to which it applies. This truism applies to IHL, including the separation which must be drawn between it and the legitimacy of the cause of the parties involved.

85 See David Scheffer, "Beyond Occupation Law" (2003) 97 *AJIL* 842; Nehal Bhuta, "The Antinomies of Transformative Occupation" (2005) 16 *EJIL* 721; and Steven Ratner, "Foreign Occupation and International Territorial Administration" (2005) 16 *EJIL* 695.

Chapter 10

21st Century Conflict and International Humanitarian Law: Status Quo or Change?

*Kenneth Watkin**

> In the Law of Armed Conflicts the hand of the past is heavy upon us.
> *Colonel G.I.A.D. Draper*[1]

I Introduction

It is an honour to contribute this article to the *Festschrift* for Professor Yoram Dinstein. Professor Dinstein's record of scholarship and leadership in the field of international law provides ample proof of his mastery of this difficult and at times fluid discipline. While his list of accomplishments speaks to a broad mastery of international law, it is Professor Dinstein's influential works on "war" and "aggression"[2] and the "conduct of hostilities"[3] that bring him particular renown among those who serve in the "profession of arms". Professor Dinstein has achieved what few would attempt to master as he combines matchless intellectual rigour with eminently practical analysis of some of the most difficult legal problems facing both military commanders and humanitarian activists in the complex security situations of the 21st century. His impressive work *The Conduct of Hostilities Under*

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1 Colonel G.I.A.D. Draper, *Combatant Status: An Historical Perspective*, 11 The Mil. L. and L. of War Rev. 135, 143 (1972).

2 Yoram Dinstein, War, Aggression and Self-Defence (4th ed. 2005).

3 Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge University Press 2004). (Hereinafter "The Conduct of Hostilities").

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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the Law of International Armed Conflict[4] is a necessary reference book for anyone practicing international humanitarian law today.

Professor Dinstein's approach to international law is unique in the sense that he combines respect for tradition with the realist's view that law must change to be relevant to the society it regulates. It is Yoram's way to encourage critical analysis while embracing change and advancement in the law. As he himself noted in *The Conduct of Hostilities,*[5] the limitation of the semi-traditional quarter century reviews of the Geneva Conventions to "weaponry" over the last decades has produced tangible results in that field but "only serve to spotlight the lethargy in others."[6] As a result "[o]ne can only express hope that the twenty-first century will revive the tradition of periodic reviews of the main body of LOIAC [law of international armed conflict]. The need for such a review is compelling."[7]

The goal of this article is to look at some of the contemporary challenges facing international humanitarian law. In doing so this analysis will touch on three of the "principal problems confronting LOIAC today" highlighted by Professor Dinstein: perceptions that international humanitarian law will have trouble dealing with the development of new methods and means of warfare; the intermingling of civilians and combatants and the employment of civilians as combatants; and the meaningful implementation of international humanitarian law.[8]

The analysis is divided into two parts. First, there is consideration of the degree to which conflict in the 21st century presents new problems. This is done by looking at the types of conflicts, including the "war on terror" and considering the impact of technology on methods and means of warfare. The second part of the article addresses the adequacy of existing law to meet contemporary challenges; looks at the present reluctance to change that law; and outlines a number of the major "cracks" in the humanitarian law normative framework. Ultimately, the article seeks to identify a way ahead in order to ensure the law keeps pace with societal change.

II Modern Conflicts?

The first issue to be considered is whether the nature of conflict has changed in the 21st century. Such an assessment will help identify the degree to which challenges to international humanitarian law are new or simply old problems for which increased scrutiny has served to highlight controversies in the existing

4 *Ibid.*

5 *Ibid.*

6 *Ibid.* at 257.

7 *Ibid.*

8 *Ibid.* The other problems identified by Professor Dinstein are: intransigent theoretical disagreements between the supporters of AP I and some key players led by the United States; and the legality of nuclear weapons.

law. In that regard contemporary conflicts are assessed in two often inter-related ways: the type of conflicts and the methods and means of warfare used to prosecute those conflicts.

A Types of Conflicts

Warfare is often considered within a bifurcated legal framework of international and non-international armed conflict. In its traditional form, international armed conflict is viewed as a conflict between states,[9] while non-international armed conflict most often relates to non-state insurgent groups attempting to overthrow or break away from the recognized government.[10] This traditional view of "international armed conflict" being identified with inter-state conflict was reinforced in the International Court of Justice decision, *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*,[11] where the justification of the construction of a security fence was rejected because Israel "does not claim that the attacks against it are imputable to a foreign state".[12]

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9 The Prosecutor v. Tadic, IT-94-1-A para. 84 (15 July 1999) at http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf. ("It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.").

10 See common article 3 to the four 1949 Geneva Conventions. It does not define "armed conflicts not of an international character". [The four 1949 Geneva Conventions are: 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter Geneva Convention I-GC I), 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Geneva Convention II-GC II), 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (Hereinafter Geneva Convention III-GC III) and 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereinafter Geneva Convention IV-GC IV)]. See also the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1). (Hereinafter "Additional Protocol II-AP II").

11 I.C.J. (July 2004) available at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm. (hereinafter the "*Wall Opinion*"). This decision has been the subject of considerable criticism. For example, see Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ*, 99 Am. J. Int'l. L. 62 (2005), Geoffry Watson, *The "Wall" Decision in Legal and Political Context*, 99 Am. J. Int'l L. 6 (2005) and Ruth Wedgwood, *The Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence*, 99 Am. J. Int'l. L. 52 (2005).

12 *The Wall Opinion*, *supra* note 11, at 56, para. 139.

Attempts to strictly categorize armed conflict have been open to challenge for some time as such simple theoretical models are often challenging to apply in the contemporary complex security environment. Some of the complexity of inter-state conflict is reflected in Professor Dinstein's use of the terms "peacetime status mixus" and "wartime status mixus" to describe "the simultaneous operation of the laws of war (for some purposes) and the laws of peace (for others)" in time of war and peace.[13] Similarly, in respect of state on state conflict "occupation" can create situations similar to an internal armed conflict with "insurgent" forces battling against the occupying power.[14] Restricting international armed conflict to a contest between states also has an element of artificiality considering the recognition in Geneva Convention III of "regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power."[15]

Further, Additional Protocol I extends the rules of international humanitarian law applicable to inter-state conflict to non-state actors engaged in national liberation.[16] There are a number of significant states which have not ratified Additional Protocol I.[17] Concerns expressed by the United States have included the potential legitimization of non-state participants in armed con-

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13 See Dinstein, *supra* note 2, at 15-19.

14 For example at the time of negotiating the Third Geneva Convention dealing with Prisoners of War it was concluded that having organized resistance movements belong to a Party to the Conflict in article 4 A.(2) "refutes the contention…that this provision amounts to a '*jus insurrectionis*' for the inhabitants of occupied territory." See ICRC Commentary, GC III, art. 4 A.(2) at http://www.cicr.org/ihl.nsf/COM/375-590007?OpenDocument. However, the nature of the combat between occupying forces and resistance groups often resembles internal armed conflict. The idea of "insurgency" in occupied territory can also be linked to the fact that prior to the 19th century, occupation meant the ceding of territory including pledging allegiance to the newly occupying power. See L. Oppenheim, International Law 432 (H. Lauterpacht ed., 7th ed. 1952). For another reference to "insurrection" see Doris Appel Graber, The Development of the Law of Belligerent Occupation 1863-1914 45 (Columbia University Press 1949). ("If the impression is created that occupation exists only where it is visible, insurrection might be provoked and people would suffer by the repressive measures which follow insurrection.").

15 GC III, art. 4(3).

16 See 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4). (Hereinafter "Additional Protocol I-AP I"). See also Leslie C. Green, The Contemporary Law of Armed Conflict 55-56 (2nd ed. 1990) (1993). ("To some extent certain non-international conflicts have come under the aegis of international humanitarian law since the adoption of Article 1(4) of Protocol I and Protocol II Additional to the Geneva Conventions….").

17 Countries which have not ratified AP I include the United States, India, Pakistan, Iraq, Israel and Iran. For a list of ratifying states see http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Dec. 23 2005).

flict,[18] although there is a considerable body of opinion that the expansion of AP I to include "national liberation movements" will not have a significant effect.[19] The reluctance of a number of states to sign the Protocol can be balanced with the reality that 85 percent of states are now parties to the document.[20] In addition, many of the provisions of Additional Protocol I are often applied as a matter of policy by the most prominent non-ratifying state: the United States.[21]

Perhaps the greatest challenge facing those seeking to enforce the normative provisions of international humanitarian law in the contemporary international security situation is that most of the armed conflicts in the world are not "international" in the sense of inter-state hostilities. The changing nature of conflict is such that theorists now sometimes treat inter-state conflict as a disappearing if not extinct concept,[22] even though recent events such as the 1999 Kosovo air campaign, the 2001 conflict in Afghanistan and the 2003 Iraq invasion suggest that

18 See *Letter of Transmittal, Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 Am. J. Int'l. L. 911 (1987). (This concern over legitimization is reflected in the letter of transmittal sent by President Reagan to the United States Senate where it is stated "this would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves." Therefore the United States "must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.") See also Abraham D. Sofaer, *Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)* 82 Am. J. Int'l. L. 784 (1988). ("Treating these terrorists as soldiers also enhances their stature, to the detriment of the civilized community.").

19 George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 Am. J. Int'l. L 1, 4–6 (1991); Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 Am. J. Int'l. L. 912, 916–17 (1987); see also Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 Am. J. Int'l. L 678, 683 (1994).

20 There are 163 states parties to Additional Protocol I and 191 member states of the United Nations. (For the number of state parties to AP I see *supra* note 17 and for member states of the United Nations see http://www.un.org/Overview/unmember.html) (last visited Dec. 23, 2005).

21 Major Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 Air Force L. Rev. 1, 23-24 (2005). ("[AP I] is thoroughly represented in U.S. military doctrine, practice and rules of engagement".) See also Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 Am. J. Int'l. L. 481, 482-483 (2003).

22 See William S. Lind et al., *The Changing Face of War: Into the Fourth Generation*, Marine Corps Gazette 22-26 (1989) available at http://www.d-n-i.net/fcs/4th_gen_war_gazette.htm (last visited Dec. 31, 2005) and Lieutenant-Colonel Thomas X. Hammes, *The Evolution of War: The Fourth Generation*, Marine Corps Gazette (September 1994) available at http://www.d-n-i.net/fcs/hammes.htm (last visited Dec. 31, 2005), for a discussion of a theory of "generational" change in warfare evolving from massed manpower, to massed firepower, then manoeuvre and finally information warfare. See also Colonel Thomas X. Hammes, The Sling and the Stone 207-208 (Zenith, Press 2004).

any predictions of its demise are both premature and unrealistic.[23] However, the effort in the post World War II era to restrict the recourse to war by states (*jus ad bellum*) means the rich body of conventional and customary law (*jus in bello*) technically applies to its fullest extent to a significantly decreasing type of conflict.

While overall the numbers of conflicts in the world are dropping,[24] there remains considerable destruction and humanitarian tragedy resulting from the estimated 95% of armed conflicts that are conflicts within states.[25] In many cases, the resolution of these non-international conflicts cannot simply be left to the state as an internal matter, for they often occur in failed or failing states. As a result, the international community can become involved militarily, as well as politically and diplomatically. Military participation can range from complex peacekeeping missions under United Nations control to significant participation in the armed conflict. Perhaps the most graphic example of the complexity of the legal basis for such operations is found in Afghanistan, where a United Nations sanctioned, North Atlantic Treaty Organization-led International Security Assistance Force (ISAF) mission co-exists with a United States-led Coalition operation directly engaged in armed conflict.[26]

The military intervention by the United States Coalition in Afghanistan following the attacks of 9/11 also raises the issue of whether contemporary conflict resulting from transnational terrorism is an international armed conflict. There is no consensus. Views about the post 9/11 conflict in Afghanistan, for instance,

23 Colin S. Gray, Another Bloody Century: Future War 36 (Weidenfeld & Nicolson, 2005).

24 See Human Security Report 2005: War and Peace in the 21st Century, 17 (Oxford University Press, 2005) available at http://www.humansecurityreport.info/HSR2005/Part1.pdf (last visited Dec. 24, 2005). ("In terms of battle-deaths, the 1990s was the least violent decade since the end of World War II. By the beginning of the 21st century, the probability of any country being embroiled in an armed conflict was lower than at any time since the early 1950s.").

25 *Ibid.*, at 23.

26 See *NATO in Afghanistan Press Fact Sheet* available at http://www.nato.int/issues/afghanistan/050816-factsheet.htm#troop_contributions, where it is indicated the ISAF is not a UN force although it operates under United Nations Security Council mandates – UNSCRs – 1386, 1413, 1444 and 1510. Further, ISAF was initially led by individual volunteer nations before transferring over to NATO in 2003. As of December 2005 the "Alliance now commands nine PRTs and provides security assistance in about 50% of Afghanistan's territory". See also United States Central Command Website available at http://www.centcom.mil/Operations/Coalition/joint.htm (last visited Dec. 27, 2005). ("In Afghanistan alone, our coalition partners are contributing nearly 8,000 troops to Operation Enduring Freedom and to the International Security Assistance Force in Kabul – making up over half of the 15,000 non-Afghan forces in Afghanistan.").

include characterization as an international armed conflict, internal armed conflict and the internalization of a civil war.[27]

The controversy over the categorization of the 21st century threat posed by transnational terrorists has focused attention on how well traditional interpretations describe contemporary conflict. The treaty framework developed to regulate internal conflicts is limited in its application in a number of ways. State concern over legitimizing internal conflict has restricted the application of Additional Protocol II to major conflicts such as civil wars.[28] Previous efforts to provide expanded humanitarian protection to non-international armed conflict during negotiations over the 1949 Geneva Conventions resulted in the important, but significantly watered down, protection found in common article 3.[29] The "armed conflict not of an international character" wording in the 1949 Geneva Conventions has presented challenges in ascertaining the limits of its applicability.[30] The provisions of humanitarian law treaties governing internal conflict are further marked by their limited reference to the regulation of the conduct of hostilities.[31]

Suggestions to use "conflict not of an international character"[32] or "transnational", rather than "international", to describe cross-border terrorism and vio-

27 See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l. L. 1, 3-4 (2004).

28 See Keith Suter, An International Law of Guerrilla Warfare: The Global Politics of Law-Making 170-171 (St. Martin's Press, 1984).

29 See commentary GC III, art. 3, available at http://www.cicr.org/ihl.nsf/COM/375-590006?OpenDocument, which outlines the reaction by a number of states regarding a wholesale application of the Conventions to internal conflict as: "It was said that it would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State. To compel the Government of a State in the throes of internal conflict to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition."

30 See Watkin, *supra* note 27, at 5-6.

31 For example, the 1949 Geneva Convention, common article 3 provision refers to the protection of persons no longer taking an active part in hostilities "including members of armed forces who have laid down their arms and those placed *hors de combat*". Those persons are to be treated humanely with special protection relating to violence to life and person, the taking of hostages, outrages on personal dignity and judicial guarantees. This article does not address the conduct of hostilities. However, see also The Amended Protocol II to the Convention on Certain Conventional Weapons, art. 3, para. 7-10. These provisions appear somewhat unique in that they deal with distinction, reprisals, indiscriminate attacks and the taking of feasible precautions in respect of internal armed conflicts.

32 See Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003).

lence delivered across continents highlight the degree to which contemporary conflict is challenging traditional international law concepts.[33] To a certain extent, the existing controversy may simply reflect a longstanding weakness in the categorization of armed conflict. The strongly positivist basis of international law, certainly since the 19th century, has focused attention on the state as the source of legal obligation.[34] Yet this state-centric view of law at times appears to have masked the fact that *de facto* hostilities have always been broader in scope than the traditional *de jure* concepts of inter-state and non-international armed conflict (i.e., occurring within the jurisdiction of a state). Conflicts between state armed forces and non-state actors were in a colonial context called "small wars".[35] Such *de facto* "wars" have now given way to the "Three Block Wars" confronting modern armed forces in failed and failing states.[36]

International law's struggle to deal with low level "international" or "transnational" armed conflict is additionally reflected in the controversy surrounding non-combatant evacuation operations, hostage rescue and intervention in defence of nationals in foreign territory.[37] There is the further question of cross-

33 For example, see Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 International Review of the Red Cross 149, 154-156 (2005) and Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 The Fletcher Forum of World Affairs 55, 58 (2003) available at http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/5PWELF/$File/Rona_terror.pdf (last visited Jan. 2, 2006).

34 See Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism,* 12 Eur. J. Int'l. L. 269, 270-271 (2001), for a discussion of the struggle between "natural law" and the doctrine of "legal positivism".

35 Colonel C.E. Caldwell, Small Wars: Their Principles and Practice 21 (3rd ed. 1996) (1906). ("Expeditions against savages and semi-civilized races by disciplined soldiers.") See also the Small Wars Manual, United States Marine Corps 1, at paras. 1-1 (c) to 1-1 (d), United States Government Printing Office 1940. See also Bing West, No True Glory: A Frontline Account of the Battle of Fallujah 1-3 (Bantam Books, 2005) (where reference is made to the Marine Corps Small Wars Manual being required reading for United States Marines preparing to combat the Iraqi insurgency in 2004.

36 See General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, Marines: Official Magazine of the Marine Corps 32 (January 1999) available at http://www.usmc.mil/marinesmagazine/pdf.nsf/8e8afdade19e000c852565e700807312/ba6c7b077948be1b852566e80538752/$FILE/jan99.pdf (last visited Dec. 24, 2005) for a description of contemporary operations. See also *A Role of Pride and Influence in the World*, 11 (April 2005) available at http://www.dfait-maeci.gc.ca/cip-pic/IPS/IPS-Overview.pdf for a reference to "Three block wars". Such operations are described as "[o]ur military could be engaged in combat against well-armed militia in one city block, stabilization operations in the next block, and humanitarian relief and reconstruction two blocks over."

37 For example, see also *Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations*, Joint Pub 3-07.5 I-3, at para. 4c. (30 September 1997) available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_07_5.pdf. (Hereinafter the

border terrorist threats. Professor Dinstein has categorized operations taken against armed bands or terrorists within the territory of another state as "extra-territorial law enforcement", with law enforcement in this context referring to "international law".[38]

The blurring and overlap of the traditional categories of conflict is reflected in the trend under humanitarian law to apply the established rules for governing international armed conflict to its non-international counterpart. This trend is reflected in judicial decisions[39] and the ICRC's "Customary International Humanitarian Law" study, where such rules, which are based to a large extent on Additional Protocol I, are proffered for application in non-international armed conflict.[40] Further, the accountability framework associated with international armed conflict is increasingly being applied to civil wars and other similar conflicts through both the ad hoc international tribunals[41] and the International Criminal Court.[42]

In summary, modern conflict often does not appear to fit nicely into the strict traditional legal concepts of what constitutes international or non-international "armed conflict". A particular challenge for the international community and their international law advisors will be focusing on those 95% of conflicts that are not "international" conflicts in the technical legal sense of the term. Here the effort to expand the application of international humanitarian law has been, and will continue to be, confronted by state reluctance to apply international norms to what has been seen as uniquely falling within their sovereign jurisdiction. However, as the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber noted in *Prosecutor v. Tadic*[43] in 1995, "it cannot be denied that customary rules have developed to govern internal strife".[44]

"*Noncombatant Evacuation Manual*".) ("Personnel may be evacuated under conditions ranging from civil disorder or terrorist action to full-scale combat.") (Last visited Jan. 1, 2006).

38 See Dinstein, *supra* note 2, at 244.

39 For example see Prosecutor v. Tadic, (Appeal Chamber) paras. 65-142 (2 October 1995), available at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

40 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law xxix (Cambridge University Press, 2005). (Hereinafter the "Customary Law Study".).

41 For example, see the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, SC Res. 955, Art. 4.

42 Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(2)(e).

43 See Prosecutor v. Tadic, (Appeal Chamber) (2 October 1995), *supra* note 39.

44 *Ibid.* at para. 127. (These rules were identified as covering "such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of

What remains to be done is to articulate those rules in a manner which will lead to a consensus regarding their scope. If history is a good indicator, achieving such a consensus may prove to be one of the greatest challenges in international humanitarian law. In that regard, potential obstacles will not be limited to gaining acceptance by states. As will be discussed, the regulation of both internal conflicts and violence by non-state actors transcending national borders will require consideration of the interface between international humanitarian law and human rights norms. Reaching consensus may necessitate resolution of the significantly different views of humanitarian law and human rights law advocates on how to control armed force and its effects. Further, the fundamental distinctions between the two normative regimes in controlling the use of force will have to be reconciled, as a human rights law regime seeks to review every use of force, while humanitarian law is based on the premise there will be killing and likely collateral damage.[45]

B Methods and Means

The second way to assess contemporary conflict is in respect of the means and methods of warfare. In many conflicts, the "tools" of war have not changed. Warfare continues to be conducted to a large extent by the use of small arms, artillery and even landmines, although a significant portion of the world community has now banned land mine use.[46] Even the idea of asymmetric warfare,[47] which has a predominate place in the contemporary lexicon, has long been a part of a means of warfare practiced by both non-state[48] and state actors.[49] The asym-

civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.").

45 See Watkin, *supra* note 28, at 32.

46 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

47 See S. Metz & D.V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts, Strategic Studies Institute Report,* US Army War College, 5-6 (2001). ("Acting, organizing and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action".).

48 Asymmetric attacks are inherently part of what John Keegan has termed the "oriental" way of war which describes a different way of waging war with traits of evasion, delay and indirectness. See John Keegan, *A History of Warfare*, 389 (Vintage Books, 1993).

49 Asymmetric warfare can also be conducted by states. For example, the Allies made extensive use of special operations forces during World War II to support organized resistance movements in occupied territories. Such specialized forces included the Special Operations Executive-SOE, the Office of Strategic Services-OSS and the

metric use of military and para-military special forces to counter the threat of international terrorism has been one of the hallmarks of the "War on Terror".[50]

Despite considerable debate about the status of detainees captured during operations following the 9/11 attacks, "unlawful combatants" or "unprivileged belligerents"[51] have existed throughout history.[52] Similarly, "terrorism" is neither modern nor exceptional. Terrorist acts pre-date the 21st century use of the term.[53] The state initiated "modern" concept of the "Reign of Terror" was introduced during the French Revolution.[54] Further, the two traditional principles of the law governing the conduct of hostilities: the requirement to distinguish between combatants and civilians and limitations on the methods and means of warfare, continue to provide the fundamental principles upon which international humanitarian law is based.[55]

Russian Central Staff of the Partisan Movement. See Robert B. Asprey, War in the Shadows, chap. 31 to 51 (Doubleday and Co. Inc., 1975) No. I. The post World War II use of special forces is outlined in books such as Stephen Dorril, MI6: Inside the Covert World of Her Majesty's Secret Intelligence Service 729 (Touchstone, 2002), John Prados, Lost Crusader: The Secret Wars of CIA Director William Colby 207-238 (Oxford University Press, 2003) and Steve Coll, Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden, From the Soviet Invasion to September 10, 2001 (Penguin Books, 2004).

50 For an outline of 21st century special forces involvement see Max Boot, *The Struggle to Transform the Military*, 84 For. Aff. 103 (March/April 2005), Linda Robinson, Masters of Chaos: The Secret History of the Special Forces 153-190 (Public Affairs, 2004) (outlining United States Special Forces operations in Afghanistan), Gary C. Schroen, First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan (Ballentine, 2005) and Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 Brit. J. Crim. L. 504, 509-510 (2005).

51 See Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 Brit.Y.B. Int'l L. 323, 328 (1951), where unprivileged belligerents are defined as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949".

52 See Draper, *supra* note 1. See also Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, And The Struggle Over Legitimacy* 2 Occasional Paper Series 45-72 (Program on Humanitarian Policy and Conflict Research Harvard University, Winter 2005) available at http://www.hpcr.org/pdfs/OccasionalPaper2.pdf.

53 See Bernard Lewis, The Assassins: A Radical Sect in Islam 129-130 (Phoenix, 1967) (2004), where he indicates the Assassin sect of the medieval period may well have been the first terrorists.

54 Charles Townsend, Terrorism: A Very Short Introduction 36-37 (Oxford University Press, 2002).

55 See J.M. Spaight, War Rights on Land 37 (photo. reprint 1975) (1911). ("[T]he separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law".).

There has been considerable stress placed on longstanding international humanitarian law principles. Notwithstanding the continuing importance of the principle of distinction, which has been termed a "fundamental and 'intransgressible' principle of customary international law", this foundational concept has been significantly impacted by technology.[56] It was the devastating effect on civilians by technologically empowered warfare which led to the comment at the end of World War II that "whatever may have been the original merits of that distinction, the phenomenon of total war has reduced it, in most respects, to a hollow phrase."[57] This erosion of the principle of distinction to the "vanishing point"[58] ultimately led to a post war effort to reinforce its effect. One result was a clear reference to the principle as a "basic rule" in Additional Protocol I, article 48.

While the use of airpower and long range artillery continue to challenge the principle of distinction, their employment is prescribed by both the targeting precautions of that Protocol[59] and customary international law,[60] as well as public perceptions of acceptable proportional damage.[61] In 21st century conflict, it is technologically driven information based operations that present a new and potentially greater threat to the principle of distinction.

As a theoretical construct, information operations allow you to protect yourself better, react faster than an opponent, and then strike precisely and effectively at that adversary.[62] The technological revolution, and with it the globalization of the capacity to inflict violence, has impacted directly on what has been the basic building block of international security: the monopolization of violence in the hands of the state.[63] It has empowered non-state actors to strike not just across

56 See Dinstein, *supra* note 3, at 82 and Nuclear Weapons Opinion, 110 Int'l Law Rep. 163 (1996).

57 H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 Brit. Y.B. Int'l. L. 360, 364 (1952).

58 See Oppenheim, *supra* note 14, at 529.

59 AP I, art 57 and 58.

60 Henckaerts & Doswald-Beck, *supra* note 40, at 51-76.

61 Martin Van Creveld, *Technology and War II*, in The Oxford History of Modern War 341, 362 (Charles Townsend ed., 2005), where it is suggested that notwithstanding the precision weapons systems and gathering of excellent intelligence which enables Israeli Defence Forces to target individual terrorists the resulting casualties still invoke reactions that "on the whole the results may well be counterproductive."

62 Information operations have been defined as "actions taken to affect adversary information and information systems while defending one's own information and information systems." See Michael Schmitt et al., Computers and War: The Legal Battlespace 2 (2004) quoting Joint Chiefs of Staff, Department of Defense, Dictionary of Military and Associated Terms, Joint Publication 1-02, April 12, 2001, at 203, available at http://www.ihlresearch.org/ihl/pdfs/schmittetal.pdf (last visited Jan. 1, 2006).

63 See Michael Ignatieff, The Warrior's Honor 159 (1997), where it is noted that a major contemporary problem is that some states are losing their monopoly on violence.

borders, but across continents. Their tools of destruction include conventional weapons. Increasingly non-state actors are demonstrating an ability to acquire and employ the modern weapons of the state, as represented by Hezbollah's reported use of unmanned aerial vehicles.[64] They also employ 21st century "weapons" such as the ubiquitous computer.[65] Most worrying is the fact that terrorist groups threaten to use weapons of mass destruction. The expansion of the ability to kill citizens on a massive scale beyond the control of the state has marked the 21st century. Effectively, the "relentless advance of technology is 'democratizing' or 'denationalizing' killing capabilities."[66] In many respects, contemporary conflict has seen the reintroduction of the concept of "private" war, an idea that appeared to have receded into a historical footnote.[67]

States have similarly harnessed technology to enable them, through the use of intelligence gathered by satellites, to strike at individuals from unmanned aerial vehicles from significant distances.[68] The ability of states to strike at enemy

64 *Hezbollah drone flies over Israel*, BBC News, World Edition (November 7, 2004) available at http://news.bbc.co.uk/2/hi/middle_east/3990773.stm. (last visited Dec. 28, 2005).

65 See Watkin, *supra* note 27, at 1. See also National Strategy for Homeland Security 9 (July 2002) available at http://www.whitehouse.gov/homeland/book/sect2-1.pdf, where it is indicated that terrorist groups are already exploiting new information technology and the Internet for the purposes of planning attacks.

66 See Graham Allison, Nuclear Terrorism: The Ultimate Preventable Catastrophe 128-129 (First Owl Books, 2005). See also Michael L. Wald, *Widespread Radioactivity Monitoring is Acknowledged*, N.Y. Times.com (24 December 2005) available at http://www.nytimes.com/2005/12/24/national/24radioactive.html?hp&ex=1135486800&en=16f37cc8b03e5948&ei=5094&partner=homepage (last visited Dec. 24, 2005). ("The concrete nature of the threat is evidenced by the reaction of United States to invoke internal monitoring of possible radioactive markers for the existence of 'dirty bombs' and nuclear weapons.").

67 See Hugo Grotius, De Jure Belli Ac Pacis Libri Tres 33 (Francis W. Kelsey trans., Carnegie ed., 1925) (1646) ("[Private war] is more ancient than public war and has incontestably, the same nature as public war; wherefore both should be designated by one and the same term".).

68 See David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set out by Bush*, N.Y. Times, Nov. 6, 2002, at A16 (for an outline of the November 2002 missile strike on Al Qaeda suspects in Yemen.). See also Dana Priest, *Covert CIA Program Withstands New Furor*, Washington Post, December 30, 2005 at A01 available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901585.html ("This month, Pakistani intelligence sources said, Hamza Rabia, a top operational planner for al Qaeda, was killed along with four others by a missile fired by U.S. operatives using an unmanned Predator drone, although there were conflicting reports on whether a missile was used.") See also Dana Priest, *Surveillance Operation in Pakistan Located and Killed Al Qaeda Official*, Washington Post, May 15, 2005 at A25 available at http://www.washingtonpost.com/wp-dyn/content/article/2005/05/14/AR2005051401121.html. ("The sources said the Predator drone, operated from a secret base hundreds of miles from the target, located and

leaders and personnel belonging to insurgent or terrorist groups raises new and complex issues regarding the application of the principle of distinction. Further, it erodes the concept that the conduct of hostilities might be easily limited to one geographic area.[69] The notion that North Americans are protected from the effects of contemporary armed conflict by geography, distance and physical borders has all but disappeared. The often surreal threat of nuclear mutual assured destruction during the Cold War has been replaced by threats of suicide bombers, "dirty" radioactive bombs and bacteriological "events". It also means that non-traditional military operations such as shooting down civilian airliners have become a very real possibility.[70]

Continuing technological advancement means that future operations by nation states may involve hypersonic unmanned aircraft capable of flying 9,000 miles to deliver precision munitions.[71] In addition, the 21st century battle may include computer network attack on a scale that dwarfs the almost quaint current notion of computer hacking threats posed by misguided teenagers and computer "geeks" carrying out criminal acts. It is also difficult to know whether a computer network attack is initiated by a lone hacker or a nation state.[72] As a result, applying the principle of distinction will become significantly more challenging.

Further, the expanding geographic area of operations also impacts on the principle of distinction, which may be increasingly difficult to apply when both the threats and responses to "armed attack" involve a growing number of civilians. The digitalization of the battlefield has continued the 20th century aerial warfare-induced trend of extending the "front-line" to encompass an increasing number of uninvolved civilians. As Professor Dinstein has noted "it must be categorically stated that the cutting edge of novel technology cannot affect the irrevocable commitment to basic principles: this is why even nuclear weapons are not beyond the reach of the law."[73] The challenge will be in applying the legal theory, often based on 19th and 20th century concepts of conventional conflict, to the reality of the modern battlespace.

The advent of precision weaponry raises new and challenging questions regarding the conduct of hostilities. For instance, when and how must such highly accurate weapons be used? Some groups express a preference for their

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fired on al-Yemeni late Saturday night in Toorikhel, Pakistan, a suburb of Mirali in the province of North Waziristan.").

69 See Dinstein, *supra* note 2, at 19-23 (for an outline of the "regions of war" – the territories to the parties to the conflict, the high seas and the exclusive economic zone and potentially through space.).

70 See Watkin, *supra* note 27, at 22.

71 *U.S. Eyes Global Strike Capability Within Two Hours*, N.Y. Times/Reuters, 1 July 2003.

72 See James F. Dunnigan, The Next War Zone: Confronting the Global Threat of Cyberterrorism 276 (Citadel Press, 2003).

73 See Dinstein, *supra* note 3, at 256.

use in every instance to minimize civilian casualties. This could place pressure on commanders who had planned to "husband" their "high-tech" resources for other attacks or unknown contingencies. Technological advancement in terms of media and communication capability also increases the chance that higher level commanders, the media and ultimately the public on both sides of the conflict will be closely analyzing operational decisions long before the rationale for taking a particular action can be explained by those at the tactical level who actually made the decision.[74] Professor Michael Schmitt has noted two resulting effects in respect of accountability: a tendency of higher level commanders to insert themselves into the decision making process of subordinate commanders and, conversely, the reliance of subordinates on such oversight in lieu of taking action on their own.[75]

In order for the principle of distinction to remain relevant to the modern "battlespace", fundamental questions need to be asked about how military objectives are distinguished from civilians and civilian objects. To this point, the application of the principle of distinction in separating combatants from uninvolved civilians has largely been "uniform" or "symbol" based. Other than the marking of "implements of war" such as tanks, trucks, ships, aircraft, etc., the same symbol-based identification has not be required for military objects such as bridges, factories and oil production facilities.[76]As was noted by Professor Richard Baxter over 50 years ago, "the emphasis on the properly uniformed belligerent may be only a survival from the type of war fought by closely grouped ranks of soldiers, in which firing upon even individual detached soldiers was regarded as violative of international law."[77] These words have even greater relevance to contemporary conflict.

The time may have arrived once again to critically analyze the historically-based criteria for distinction with a view to addressing the involvement of "civilians" and combatants who dress like them on the battlefield. Earlier attempts leading up to the 1907 Hague Land Warfare Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols did not fully resolve what has been one of the most significant challenges of international humanitarian law.[78]

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74 See West, *supra* note 36, at 1-3, for an account of how the media and higher headquarters were aware of the deaths of four murdered United States "Blackwater" security contractor employees in Fallujah in 2004 before the tactical level commander responsible attempting to secure the city.

75 See Michael Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University (November 2002) at 11, at http://www.ihlresearch.org/ihl/pdfs/briefing3296.pdf (last visited Jan. 1, 2006).

76 See Dinstein, *supra* note 3, at 38.

77 See Baxter, *supra* note 51, at 343.

78 See Spaight, *supra* note 55, at 55. (As James Spaight noted in 1911 the delegates to the 1907 conference had "almost shirked their task – a task of great difficulty, it must be

The pressure to do so is increasing, not only because contemporary conflict involves "insurgents" and "terrorists", but also because of the widespread use by states of civilians to support the operation of their armed forces and in other security operations.[79] This issue has a significant impact on targeting. It is becoming increasingly relevant to assess the "function" people perform rather than the type of clothes or symbols they wear when deciding whether they are valid "military objectives".[80] This is what makes initiatives, such as those sponsored by the ICRC and the Asser Institute, to determine what is meant by the term "taking a direct part in hostilities" so important at the dawn of the 21st century.[81]

III Is Existing Law Up to the Challenge?

With the nature of 21st century conflict placing humanitarian law under unique stress the question arises as to whether that normative framework is up to the task of regulating modern armed conflict. The following analysis will explore three areas of this issue: the adequacy of existing law, resistance to change, and weaknesses in the humanitarian law framework.

A The Adequacy of Existing Law

There appear to be two main challenges to international humanitarian law. First is the question of whether existing law adequately reflects the complexity and scope of contemporary armed conflict even though many of the challenges are

admitted" in failing to reach a comprehensive definition of "belligerents".) There is also widespread recognition that the post-World War II requirement for "organized resistance movements" to wear a fixed distinctive sign set out in GC III, art. 4 A.(2) was an amendment to the law which provides POW status only under the most exceptional circumstances. For example, see example Howard Levie in *Prisoners of War in International Armed Conflict*, 59 International Law Studies 1, 42 where he indicates this amendment changed little of existing law.

79 For example, see Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chic. J. Int'l. L. 511 (2004), P.W. Singer, *Outsourcing War*, 48 For. Aff. 119 (March/April 2005), and Avril McDonald, *The Legal Status of Military and Security Contractors*, in International Humanitarian Law and the 21st Century Conflicts 215 (Roberta Arnold & Pierre-Antoine Hildebrand eds., 2005).

80 See Kenneth Watkin, *Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict, in* New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts 153-154 (David Wippman & Matthew Evangelista eds., 2005).

81 *Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law,* The Hague, 25 – 26 October 2004, Co-organized by the ICRC and the TMC Asser Institute available at http://www.icrc.org/Web/eng/siteengo.nsf/htmlall/5TALL8/$File/Direct_participation_in_hostilities_2004_eng.pdf (last visited Dec. 28, 2005).

not "new". Secondly, in respect of the significant new challenges, is the law properly positioned to deal with the effects of the changing nature of warfare? As the following analysis suggests, it is unclear whether existing law is up to the task on either account.

As law serves two main functions in society – regulating the affairs of all persons and acting as a standard of conduct and morality – it appears self evident that the effectiveness of the law will be dependent upon the degree to which that law reflects the needs and challenges facing that society.[82] Pursuant to the contemporary highly positivist interpretations of international law, the governing legal framework is a mix of treaty law and customary international law. Both forms of law have their inherent limitations.

The process for negotiating international treaties can be cumbersome, often resulting in a product that reflects political compromises. One of the best examples of compromise that produced a result which is difficult to apply is the limitation found in the Third Geneva Convention restricting prisoner of war status to members of organized resistance movements who meet the traditional "visible" signs of belligerency (i.e., distinctive signs visible at a distance).[83] Customary international law has its own limitations, to the extent it has traditionally been dependent upon state practice to prescribe its scope.[84] In terms of international humanitarian law, the treaties themselves often provide evidence of customary practice. However, if those treaties do not keep pace with the changing needs of society then their relevance may be increasingly called into question.

B Resistance to Change

As Professor Dinstein has noted, there has been a trend of a significant review of international humanitarian law every quarter century.[85] However, at the turn

82 Gerald Gall, The Canadian Legal System 1 (Carswell, 1990). Ultimately, consideration of the function performed by the law must be tempered with consideration of its more complex interaction with politics and morality. See Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 Eur. J. Int'l. L. 105, 106 (2003). ("Law is a tool of politics, but at the same time politics is expected to be conducted within the framework of law. Thus it is meaningful and useful to compare functions of law with those of morality and of politics.").

83 For example, see Howard Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l L. Studies 1, 42. ("This attempted enlargement of the provisions of prior conventions accomplished little or nothing.").

84 See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation,* 95 Am. J. Int'l. L. 757 (2001), for a discussion of the challenges of assessing customary international law in respect of the traditional (state practice) and modern (*opinion juris*) approaches.

85 See Dinstein, *supra* note 2, at 257. The 20 to 30 year periodic return to codification is reflected in the following major initiatives since the mid-1800s: 1863-1864 (The

of the 21st century there appears to be a fundamental resistance to considering changes to existing international humanitarian law. One rationale for this reluctance is provided by Anthony Dworkin when he states "reopening the debate will allow groups to push for other changes to the law … that could set back humanitarian values."[86] The International Committee of the Red Cross (the ICRC) has also expressed similar concerns.[87]

At the same time, resistance to change is not unique to groups or individuals with a humanitarian focus. The United States has not ratified Additional Protocol I.[88] As that Protocol was drafted specifically to deal with the changing nature of conflict associated with guerrilla warfare and national liberation movements in the post World War II era, the unwillingness to adjust the law to meet the realities of those conflicts demonstrates a preference for the mid-century legal status quo.[89] Such resistance to change, particularly by dominant nation states, has been a regular feature in the development of international humanitarian law.[90]

Lieber Code of 1863 and the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field), 1874-1907 (The Hague process: The 1974 Brussels Declaration, 1899 Hague Conference and the 1907 Hague Convention and its Regulations), 1929 (The two Geneva Conventions for the Sick and Wounded as well as Prisoners of War), 1949 (The four Geneva Conventions for the Sick and Wounded on Land and at Sea, Prisoners of War and Civilians) and 1977 (the Additional Protocols).

86 See Anthony Dworkin, *Revising the Law of War to Account for Terrorism: the Case Against Updating the Geneva Conventions, On the Ground That Changes Are Likely Only to Damage Human Rights,* available at http://writ.news.findlaw.com/commentary/20030204_dworkin.html (last visited Jan. 1, 2006).

87 See Dr. Jakob Kellenberger, *International Humanitarian Law at the Beginning of the 21st Century*, Statement at the 26th Round Table in San Remo on the Current Problems of International Humanitarian Law: The Two Additional Protocols to the Geneva Conventions: 25 Years Later-Challenges and Prospects (Sep. 5, 2002), available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5E2C8V?OpenDocument. ("[D]o they want to lower existing standards of protection? As far as this last point is concerned, you will understand that the ICRC will never be associated with initiatives aimed at weakening existing standards of protection.").

88 See Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 Akron Law Rev. 531 (1986).

89 See Richard Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 Harv. Int'l L. J. 1, 3 (1975).

90 See Spaight, *supra* note 55, at 48-53, for a discussion of the disagreement at the turn of the 20th century between the dominant military powers (e.g. Prussia) and what were termed the "secondary" powers (e.g. France, United Kingdom) concerning the classification of lawful belligerents. The dominant powers demonstrated a preference for regular uniformed armed forces, while the opposing powers championed recognition for less structured nationalistic forces such as the *levee en masse*. Similar discussions marked the negotiations of the 1949 Geneva Conventions and the 1977 Additional Protocols. See Watkin, *supra* note 52, at 42-44 and 59.

The potential for a conflict between some states and groups seeking to maintain, if not expand, humanitarian protection, appears to have increased in the post 9/11 period. Controversies such as the scope of the "war on terror", the status of unprivileged belligerents and the standards of treatment for detained persons have served to further solidify the underlying tension that has always existed in international humanitarian law: ensuring a basic level of protection for humanity while conducting warfare.

For practitioners confronted with applying international humanitarian law on the "frontlines", the task of ensuring compliance with the existing rules may be seen as the primary challenge. It is a sad truth that if the world simply applied the rules that we now have in place, significantly more death, destruction and human suffering would be avoided. It is not enough to sign a treaty. States also have to take positive steps to enact domestic law or otherwise ensure that the provisions of the international treaties are put into effect. The ICRC President enunciated the organization's position in 2002:

> … the greatest challenge today towards which the ICRC, but also the international community as whole, should direct its energies is ensuring greater respect of existing rules. Without greater respect of existing rules the credibility and protective value of new rules would also be very limited.[91]

There is both wisdom and practical reality reflected in these words. As Professor Dinstein has noted, "[l]aw must not be confused with liturgy. It is not enough to prescribe and reiterate the law: to be meaningful, norms must be adhered to in reality."[92] All too often the application of the humanitarian rules, both in principle and in their detail, would significantly lessen the suffering that exists in armed conflict. However, the question remains whether the existing rules, even if fully implemented, will meet the needs of modern armed conflict.

In effect, a decision to concentrate on enforcing the existing treaty law is a commitment to implement one quarter-century, one half-century and, in some instances, century old laws. In addition, the existing law has always relied on general principles to fill what would otherwise be gaps in the existing positive law regime. While general principles, such as the Martens clause,[93] are essential elements of the humanitarian normative framework, it is the rich detail of treaty documents such as the Third Geneva Convention which provides the most cer-

91 See Kellenberger, *supra* note 87.

92 See Dinstein, *supra* note 3, at 257.

93 See Ministry of Foreign Affairs, The International Peace Conference 548 (Martinus Nijhoff, 1907), "the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience". See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 Eur. J. Int'l. L. 187 (2000).

tain protection. For that reason, the Third Convention is held out as the standard even for those who do not qualify for combatant status.[94]

Given both the change in the nature of combat and the predominance of internal conflict, it appears increasingly difficult to maintain an argument that the "status quo" provides either sufficient protection to victims or adequate guidance for commanders and their political leaders. The resulting need to identify and clarify the customary legal rules governing contemporary conflict underpinned the ICRC's Customary International Humanitarian Law Study.[95]

C Cracks in the Armour of Humanitarian Law

It is possible to suggest there are no "gaps" in protection when taking the existing treaty law and general principles of humanitarian law into consideration. However, even in such an approach, a significant number of unresolved issues and areas remain in which protection could be enhanced by a more detailed articulation of the law. They include: the status and treatment of persons who are not lawful combatants; the interface between human rights law and international humanitarian law; clarifying the interface between *jus ad bellum* and *jus in bello*; and addressing the degree to which the present positive law regime fully addresses the nature of contemporary armed conflict.

i Unprivileged Belligerents

The confusion that has swirled around the detention of Taliban and Al Qaeda personnel in the post 9/11 period highlights the lack of clarity in existing international humanitarian law regarding the status of "unprivileged belligerents". The debate has been emotionally charged, with allegations that detainees have been kept in a legal "black hole".[96]

In much of contemporary analysis, the status of participants in conflict is commonly addressed by relying on a bright line interpretation of the principle of distinction, one that sets out two privileged classes: combatants and civilians. This approach is reflected in the wording of article 50(1) of Additional Protocol I, where civilians are identified as those who do not qualify for "lawful" combatant

94 See AP I, art. 44(4).

95 See Henckaerts & Doswald-Beck, *supra* note 41, at xxviii, where it is noted the "wealth of treaty law does not regulate a large proportion of today's armed conflicts in sufficient detail."

96 See the UK Court judgement of Abassi and Anor. v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department (2002) available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/1598.html, and Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 27th F.A. Mann Lecture, (November 25, 2003), available at http://www.biicl.org/admin/files/F%20A%20MANN.doc (both last visited Jan. 1, 2006).

status.[97] While such an approach is conceptually simple, it does not fully account for either the historical involvement in international armed conflict of non-state armed groups who lack "lawful" status,[98] or the loss of lawful status by combatants themselves who conduct espionage, sabotage or otherwise participate in hostilities without meeting the criteria of lawful combatancy.

Notwithstanding the wording of Additional Protocol I, there is no universal agreement among international scholars that persons who take a direct part in hostilities have civilian status. One approach has been to categorize such participants as "unlawful combatants" separate from civilians. This is a position that Professor Dinstein has taken, sometimes in the face of significant opposition from those who rely on a narrow literal interpretation of the text of Additional Protocol I.[99] The narrow interpretation only recognizes the specific textual references to lawful "combatants" and "civilians".[100] If a person does not qualify as a lawful combatant then they have civilian status. Such an interpretation has the potential to expand the protection available to civilians, since they cannot be targeted "unless and for such time as they take a direct part in hostilities." However, it also could erode the sanctity of "civilian" status if insurgent and other armed groups, who have no chance of attaining combatant status, are permitted to hide behind its protective cover.[101]

In reality, the text of Additional Protocol I suggests a much more nuanced treatment of "combatant" status than would a narrow interpretation relying primarily on article 50(1). This is evident in article 44(4), where a "combatant" who fails to meet the relaxed standards applicable in unique circumstances ("due to the nature of hostilities", i.e., occupations and wars of national liberation) forfeits the right to be a prisoner of war. It is not evident that such combatants would become "civilians" and, therefore, it could be argued they represent a class of "unlawful combatant". Similarly, notwithstanding the specific categories "combatant" and "civilian", the Protocol refers generically to "[a]ny person who has taken part in hostilities" when outlining the protection available to those who

97 See also Prosecutor v. Blaskic, IT-95-14-A (Appeal Chamber) paras. 111-114 (29 July 2004), available at http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf.

98 Of course the Allies made considerable use of "organized resistance movements" during World War II. See Asprey, *supra* note 49. It would be very difficult to argue that most of these "proxy" warriors qualified for lawful combatant and therefore POW status under the 1907 Hague Land Warfare Regulations.

99 See Dinstein, *supra* note 3, at 29. ("A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combantancy. Nor does he enjoy the benefits of civilian status….").

100 AP I, art. 50(1).

101 AP I, art. 50(3).

do not qualify for prisoner of war status.[102] This phrase could quite comfortably encompass traditional "unlawful combatants."

It could be argued there are five different classes of "people": "lawful combatants" who fall within article 43 of Additional Protocol I; otherwise lawful combatants who fall within article 44(4); members of organized armed groups who do not qualify as combatants under article 43;[103] civilians who take a direct part in hostilities;[104] and uninvolved civilians. Along this continuum, the second, third and fourth categories could be viewed as "unlawful combatants" rather than simply "civilians".

The approach taken in the ICRC Customary Law Study – referring generically to "combatant" for both international and non-international armed conflict – fails to resolve the existing confusion.[105] It implies that the generic term does not raise issues of "status". However, concern over "combatant" status being associated with non-state actors has been a continuing impediment to both the adoption of Additional Protocol I and the extension of international humanitarian law standards to non-international armed conflict. Some confusion has also been created by the United States use of an even more generic term: "enemy combatants".[106] In addition, the decision by the United States government to deny POW status to Taliban fighters as a group has generated considerable critical comment (although group denial is legally possible under existing international humanitarian law).[107]

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102 AP I, art. 45(3).

103 These groups could be organized armed forces not belonging to a state or a "national liberation movement" or transnational terrorist organizations such as Al Qaeda.

104 For an outline of the broad range of contemporary "insurgent" fighters, albeit not in the context of an international armed conflict where AP I would apply, see West, *supra* note 35, at 132. ("The Iraqis who fought in the five-day battle for Ramadi were a mixture of committed insurgents, semi-believers, or "Minutemen", and the emotional tagalongs who grabbled a weapon, ran alongside the Marines from a safe distance of a block, then exuberantly trotted home. Not all fired a weapon; most rushed around, yelling to one another, brandishing weapons, returning to their homes sweaty and excited, later in coffeehouses and on street corners feverishly exchanging stories of near-misses with death.").

105 Henckaerts & Doswald-Beck, *supra* note 40, at 3. See also Chap. 33 (where combatant and prisoner of war status is only dealt with in the context of international armed conflict).

106 See Hamdi v. Donald H. Rumsfeld, 542 U.S. 1, 2, 8-12 (2004). The terms "enemy combatants", "lawful combatants" and "unlawful combatants" are used.

107 The ICRC Commentaries to Art. 44, para. 1688, state that notwithstanding considerable discussion on this issue at the time of the development of AP I "this in no way detracts from the fact that armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such force, within the meaning of Article 43."

It is clear that Additional Protocol I treatment of combatant status is not, on close analysis, as clear cut as article 50(1) might suggest. Similarly, while the 1949 Geneva Conventions have been recognized as reflecting customary international law, they neither resolved the issue of combatancy, nor entirely replaced customary law regarding combatant status, or the lack thereof.[108] There remains the rich history and customary legal basis of "unlawful combatancy".[109] In this regard, the suggestion in 1951 that "the problem of the guerrilla fighter is still one of customary international law" remains valid in the complex security situation of 21st century warfare.[110]

Until steps are taken to concretely address the existence of "unprivileged belligerency", and provide more detailed standards of treatment to persons who do not have lawful combatant status, it is difficult to see how many of the existing controversies will be resolved. The problem that has plagued international humanitarian law since the earliest efforts at codification continue to present significant problems for courts, practitioners, academics and humanitarian law advocates.

ii The Interface between International Human Rights and Humanitarian Law

Another challenging demand is the need to more clearly articulate the interface between international human rights law and humanitarian law. Such challenges are particularly evident in situations of low level conflict involving insurgents and terrorists, in which law enforcement operations may be conducted alongside armed conflict.

The *Nuclear Weapons Case,*[111] with its acknowledgement that international humanitarian law is a *lex specialis,* provided an important reference point regarding the interaction between international human rights norms and international humanitarian law in international armed conflict. However, much remains unre-

108 For example, see Baxter, *supra* note 51. This foundational work written in 1951, just following the creation of the 1949 Geneva Conventions, clearly established the continuing relevance of what the author called "unprivileged belligerents". See also The Nuremburg Tribunal Case, The Hostages Case, Trials of War Criminals (Washington: Government Printing Office 1950), where members of resistance movements not having lawful combatant status are termed "unlawful belligerents".

109 For an outline of that history see Lester Nurick and Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 Am. J. of Int'l L. 563 (1946), *Ex Parte Quirin*, 317 U.S. 1 (1942), Baxter, *supra* note 51, G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 Brit. Y. B. Int'l. L. 173 (1971), and Watkin, *supra* note 52, at 45-68.

110 See Baxter, *supra* note 51, at 337.

111 Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion, 110 Int'l Law Rep. 163 (1996).

solved. For example, the "war on terror", with its overlap between law enforcement and armed conflict paradigms, has intensified the debate about the impact that human rights norms have in controlling the use of force during armed conflict. The dynamic of the interplay between the normative frameworks appears, for instance, in two Human Rights Watch reports: *"Violent Response: The U.S. Army in Al-Falluja"*[112] and *"Enduring Freedom: Abuses by U.S. Forces in Afghanistan"*.[113] Although human rights organizations often lean towards human rights law solutions when analyzing the human rights/humanitarian law interface, there is a general reluctance on the part of states to embrace that position.[114] The problem of overlap occurs not only when dealing with cross-border "terrorism", but also with regard to both occupation and internal armed conflict.

Recently, the International Court of Justice provided some clarification of the matter. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[115] the court determined generally that some rights may be exclusively covered by each area of the law, while others may be matters addressed by both these branches of international law. However, at this stage the ultimate solution to this pressing problem is not readily ascertainable in the customary or treaty based humanitarian law.[116] It is also not always clear whether international human rights law principles are meant to provide a governing framework of humanitarian protection during armed conflict, or if they operate merely as a form of "fall back" protection in situations where international humanitarian law is silent.

There is increasing interest by judicial bodies and human rights advocates in using human rights norms to control the use of force in complex security situations involving armed conflict.[117] Perhaps the most interesting contemporary examples arise out of the European Court of Human Rights decisions relating to operations conducted by Russian security forces in Chechnya: *Isayeva, Usupova and Bazayeva v. Russia*[118] and *Isayeva v. Russia*.[119] In these cases, the court applied human-rights based "law enforcement" principles to assess the use of aerial delivered munitions in what might ordinarily be considered, in a *de facto*

112 15 Human Rights Watch, Iraq, No. 7 (E), June 2003, available at http://www.hrw.org/reports/2003/iraqfalluja/iraqfalluja.pdf.

113 16 Human Rights Watch Report, No. 3(C), March 2004, available at http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf.

114 See Watkin, *supra* note 27, at 23-24.

115 ICJ para. 106 (2004), available at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited 31 October 2004).

116 See Watkin, *supra* note 27.

117 See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 Eur. J. Int'l. L. 171 (2005).

118 Eur. Ct. Hum. Rt., App. Nos. 57947-49/00 (24 Feb. 2005).

119 Eur. Ct. Hum. Rt., App. Nos. 57950/00 (24 Feb. 2005).

sense, as operations at the armed conflict end of the hostilities spectrum.[120] This prompted a suggestion that in respect of internal armed conflicts, "the ECtHR will apply doctrines it has developed on the use of force in law enforcement operations even to large battles involving thousands of insurgents, artillery attacks, and aerial bombardment."[121]

However, the European Court of Human Rights did not address whether an "armed conflict" was occuring or why customary international humanitarian law, as was recognized in the *Tadic* decision, was inapplicable.[122] The court seems to a have relied on the state's position that the matter was one of internal "law enforcement" since no state of emergency or martial law had been declared and no derogation had been made pursuant to article 15 of the European Convention on Human Rights.[123] In this respect, the determination of when violence reaches the level of an armed conflict is both factually and legally difficult, although it has been suggested that the decision should not to be left to the state.[124] These decisions will undoubtedly be the subject of critical debate, particularly since the interface between customary international humanitarian law and the convention-based European human rights regime is left unresolved.[125] Such a debate may

120 See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 Eur. J. Int'l. L. 741, 754 (2005). ("The facts amply support a Protocol II characterization.").

121 *Ibid.*, at 742.

122 See *Isayeva v. Russia*, *supra* note 119, at 44, para. 191. ("The Court considers that using this kind of weapon [heavy free-falling high-explosion aviation bombs] in a populated area, *outside of wartime* and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society" (*emphasis added*). Regarding the application of customary international humanitarian law to internal conflicts see *The Prosecutor v. Tadic*, *supra* note 39. See Abresch, *supra* note 120, at 742 ("It is also clear that [the ECtHR] will do so [apply law enforcement doctrine] by directly applying human rights law, not only without reference to humanitarian law but also in a manner that is at odds with humanitarian law.").

123 *Isayeva v. Russia*, *supra* note 119, at 44, para. 191. (This very "formal" assessment of jurisdiction and the applicability of human rights norms appears to have been made independently of the actual levels of violence, the degree of organization of the opponent or the ability of government security forces to exercise control over the territory where the conflict was taking place.).

124 See Noelle Quenivet, *The Applicability of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature*, in International Humanitarian Law and the 21st Century Conflicts 25, 31, n. 19 (Roberta Arnold & Pierre-Antoine Hildebrand eds., 2005). ("Still, this determination [of the existence of an armed conflict] is not left to the State. As the ICTR clearly announced in the *Akayesu* case 'the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgement of the parties to the conflict.' *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 603.").

125 See Abresch, *supra* note 120, at 749, where it is suggested that "if human rights law could effectively regulate such conflicts, the case for promoting the acceptance of

result in fundamental changes to the way in which both international humanitarian law and human rights law are applied during armed conflict.[126]

Notwithstanding the historical reluctance of states to address the application of international humanitarian law in non-international conflicts, the human rights community is acting to fill a perceived void. The ICRC Customary International Humanitarian Law Study, some judicial decisions and numerous academic articles are urging that the time has come when the full nature of fundamental principles governing the application of the use of force in armed conflicts not of an international character must be identified.

iii The Separation between *Jus in Bello* and *Jus ad Bellum*

It is often expressed as an article of faith that the law relating to armed conflict is neatly divided into two separate fields: *jus ad bellum* and *jus in bello*. This separation is reflected in the preamble to Additional Protocol I, where it is stated that *jus in bello* law "must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict." However, the certainty with which the separation of international law into the two streams of *jus ad bellum* and *jus in bello* is often discussed does not fully comport with the less clear and somewhat arbitrary division that exists in reality.[127]

While it is clear that the application of humanitarian law standards should not be dependent upon the Just War concept of the justness of a cause, this principle is but one of seven *jus ad bellum* principles.[128] At least one of the others has a direct impact on *jus in bello* – "*auctoritas principas*" or fighting for the right authority. It is one of the founding bases of combatant status. If someone "belongs to

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customary rules would be weaker."

126 *Ibid.*, at 750. (It was noted "[h]uman rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.") See also Watkin, *supra* note 27, at 22 & 30-34. ("The attempt to apply human rights standards to a situation of armed conflict could have an adverse impact on the integrity and strength of peacetime norms.").

127 See Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus in Bello*, Int'l Rev. Red Cross 553, (1997), for a discussion of the relatively short lineage of two terms and the linkage between the decision to make such a division with the 20th century attempt to "outlaw" war.

128 *Jus ad bellum* comprises seven principles: war must have a just cause, competent authority, the right intention, a reasonable hope of success, overall proportionality of good over harm, be a last resort and have the goal of peace. *Jus in bello* reflects two principles: distinguishing between combatants and civilians and that means of warfare are not unlimited. See James Turner Johnson, Morality and Contemporary Warfare 27-38 (Yale University Press, 1999).

a Party to the conflict",[129] then he or she can be considered a lawful combatant. Failure to fight for the right authority renders the fighters unlawful belligerents. In that respect, the *jus ad bellum* principle of "*auctoritas principas*" has a direct impact on the principle of distinction, one of the foundational principles of *jus in bello*.

This raises the question of the degree to which the standard of treatment afforded detainees should be based on "status". As I have noted elsewhere, the question of whether "unprivileged belligerents" are entitled to prisoner of war-like internment protections in occupied territory was decided 50 years ago. Those internment provisions recognize that persons actually charged with crimes can be held in pre-trial detention. What remains to be answered is why the protection afforded to "unprivileged belligerents" under the 1949 Civilian Geneva Convention "should not also be extended to those who technically may be outside the reach" [130] of the Civilian Convention. In this respect, it may be time for humanitarian law advocates to concentrate more on detailed common standards of treatment for all detainees, rather than focusing on the status of participants. Doing so would thereby avoid the fractious Just War issue of "legitimization".[131]

There is also, in aftermath of 9/11, a greater recognition of the interaction between the *jus ad bellum* and the *jus in bello,* at least in political terms, than traditional legal interpretation normally admits. In the context of the "war on terror", this includes consideration of the impact the two legal regimes have on one another with regard to the justness of the cause, public support and the impact of terrorist activity on notions of neutrality.[132] Of course, contemporary questions regarding Just War principles are not linked solely to the war on terror. For example, it has been suggested that the proportionality test applied during humanitarian interventions to assess collateral civilian injury or damage during targeting is

129 GC IV, art. 4A(2).

130 See Watkin, *supra* note 51, at 74.

131 *Ibid.*, at 72 ("By removing the direct connection to "legitimacy" there may be an opening to advance humanitarian protection for conflict detainees regardless of cause or origin. Unprivileged belligerents would not automatically be treated as "criminals". Detained persons would be treated on the basis of their humanity and not the cause they serve, while those against whom criminal acts can be established would be subject to the appropriate legal process.").

132 For example, see Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, 44 no. 1 Survival 7, 9 (2002). See also Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 Eur. J. Int'l. L. 283, 286 (2003), where it is noted that concern over conferring "inappropriate legitimacy" to insurgents "is partly accommodated by the refusal to grant a combatant's privilege or prisoner of war status to insurgents, who may lawfully be punished for resort to arms (illustrating the influence of *jus ad bellum* considerations on *jus in bello*)." However, see also Abresch, *supra* note 120, at 765. ("Whether there is any such body of law as the '*jus ad bellum* of internal conflict' may be doubted. Nevertheless, concepts of self-determination, the right of rebellion, secession, constitutional secession, etc., play an analogous role.").

more constrained than the one applied in traditional armed conflict.[133] Similarly, as is evidenced in *The Responsibility to Protect*[134], with its assessment of when it may be appropriate to intervene in the affairs of a state, there is growing pressure to consider principles derived from the Just War tradition.

As the 21st century grapples with new types of conflict, the 20th century concept of a separation between the *jus in bello* and the *jus ad bellum* may not be as relevant or as clear cut. To the extent existing law, or even prevailing political opinion, reflects that viewpoint, there may be a requirement for the *jus ad bellum–jus in bello* interface to be reconsidered and clarified.

iv The Adequacy of the Existing Positive Law Framework

It is somewhat trite to note that neither the 1949 Geneva Conventions nor the Additional Protocols are "perfect" documents. They reflect the compromise of negotiation inherent in the treaty making process. While Additional Protocol I offered a significant advance over earlier laws in its attempt to deal with the full spectrum of armed conflict (including guerrilla warfare), it does not cover all aspects of conflict, either completely or even that well.

In addition, certain provisions of existing treaty law are increasingly under scrutiny. As has been noted, the provision of article 50(3) of Additional Protocol I which removes the protection of civilian status from persons "unless and for such time as they take a direct part in hostilities" has come under review as a result of the technologically driven capability to strike precisely at individuals well behind enemy lines. Twenty-first century efforts to determine the meaning of "direct participation" are replete with disagreements over issues such as the targeting of non-state actors, whether planners can be attacked,[135] and how to reconcile the different peacetime and armed conflict meanings of the term "assassination".[136] The lack of guidance in the Additional Protocol prompted criticism as early as 1982 that its interpretation regarding an issue of life and death was left to the

133 See Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 Eur. J. Int'l L. 531, 535 (2001).

134 *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty XII (International Development Research Centre, Canadian Ministry of Foreign Affairs December 2001), available at http://www.iciss.ca/pdf/Commission-Report.pdf.

135 See Antonio Cassesse, *Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, Public Committee Against Torture in Israel 14, available at http://www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf (last visited Oct. 31, 2004).

136 Unlike killing in a peacetime context, assassination in armed conflict is linked to treachery rather than the political nature of the killing. Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 Yale Journal of International Law 609, 633 (1992).

practice of states.[137] Despite recent efforts to reach consensus on these issues, definitive guidance is unavailable over two decades later.

There are many other examples where the existing law can be improved. There was considerable furor over the use of the word "war" in the immediate aftermath of the 2001 attacks on the World Trade Center towers. While international lawyers understand the purpose of categorizing contemporary conflicts as "armed conflicts", any practitioner of humanitarian law who has attempted to explain to laymen that "war" no longer exists will be met with glazed over eyes and a desire for factual simplicity. The terminology of international humanitarian law is itself inconsistent with the view that "war" has been outlawed. Transgressions are called "*war* crimes" for both international and non-international armed conflicts. In Canadian domestic legislation such as the Emergencies Act,[138] a "*war* emergency" is contemplated. It has also been vigorously argued that the status to be applied to captured Taliban personnel in Afghanistan following the 9/11 attacks is that of "prisoners of *war*". Further, the activity regulated in Additional Protocol I consists of "methods and means of *war*fare".[139]

The international humanitarian law treaties do not, on their face, provide unqualified support to the characterization of "war" as a rhetorical term. This lack of consistency and precision is not helpful when trying to make existing law match the realities of modern conflict. As has been noted, contemporary operations are themselves termed "three block wars". A distinction must be made between the *jus ad bellum* concept of "outlawing" inter-state "war" and the very broad range of existing "de facto" armed conflict. The challenge will be to maintain the rigour of the post-World War II *jus ad bellum* goal of limiting the recourse by states to war, while maintaining a realistic approach to dealing with the significant conflict that occurs beyond the scope of state versus state hostilities. In doing so, the law must communicate with terminology that is readily understandable and relevant to decision makers outside the small international legal community.

IV The Way Ahead

Notwithstanding the obvious positive outcomes that will accrue through improved application of existing law, it is very difficult to argue that international humanitarian law in its present form fully meets today's challenges. Such challenges are only going to increase over the next decade. In North America, the first responders to modern terrorists are not the military, but rather police forces. However,

137 See Michael Bothe et al., New Rules for Victims of Armed Conflicts 302 (Martinus Nijhoff Publishers, 1982).

138 *Emergencies Act* R.S., 1985, c. 22 (4th Supp.), s. 37. (A war emergency "means war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency").

139 AP I, art. 35(1).

the threat posed can be state-like violence delivered with sufficient intensity to be considered an "armed attack" under article 51 of the UN Charter.[140] As the threat migrates to one in the "ether" with "ammunition" consisting of the "1s" and "0s" of digital weaponry, the participants in conflict will have even less resemblance to the armed forces contemplated by article 43 of Additional Protocol I.

So what can be done? Efforts must continue to enforce existing international humanitarian law norms across the spectrum of conflict. However, that should only be the starting point. If the world community only focuses on that goal, it will succeed in enforcing rules that were developed at least 25 and primarily 50 years ago.

Steps are being taken to provide clarification within the context of existing law. There is an increasing reliance on "soft law".[141] This can generate a debate about whether "soft" law is law at all, for international lawyers "basically regard them as *something minus legal commitment*."[142] However, a requirement to provide guidance in areas where the existing law does not speak loud enough remains. One example of the "soft" law approach is the United Nations Human Rights Committee's *General Comment No. 31*, which in part deals with the continued application of human rights during armed conflict.[143] Another example of a "softer" approach to articulating international law outside the treaty framework is the ICRC Customary Law Study. The Study provides a significant tool in interpreting existing law, although, perhaps inevitably considering its customary focus, it is primarily retrospective and confirmatory in approach, rather than forward thinking and prospective. Further, some states and the United Nations

140 See Watkin, *supra* note 27, at 3-4.

141 Soft law has been defined as "an important body of non-treaty standards usually adopted within the framework of the United Nations system (declarations, bodies of principles, standard minimum rules, etc.). Although not legally binding, soft law serves to interpret and elaborate treaty provisions and to develop new standards in emerging areas of international law." See *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law*, Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights 2 (2004), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/637K8G/$File/FAQs.pdf (last visited Jan. 2, 2006).

142 Onuma Yasuaki, *supra* note 82, at 105, 111.

143 See *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, paras. 10 and 11 CCPR/C/21/Rev.1/Add.13 26 May 2004 available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument, which indicates that State parties, including their "forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation", must respect and ensure the rights laid down in the International Covenant on Civil and Political Rights "to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." Further, that Covenant "applies in situations of armed conflict to which the rules of international humanitarian law are applicable."

have applied a "spirit and principles" approach when applying humanitarian law standards to operations outside the scope of inter-state conflict.[144]

However, by its very nature "soft law" provides an influential rather than determinative statement of the law. While open to the criticism that "international lawyers have failed to recognize that both hard laws and "soft laws" have their own distinctive societal functions",[145] the clearest and most effective means to ensure compliance with international humanitarian law is through the enactment of treaties that bind states. These treaties must then be combined with a commitment to implement, disseminate and enforce their provisions.

At the present time, the reluctance to change appears to have stalemated advances in the law. However, this is not the first time that the changing nature of warfare has forced a wide scale review of international humanitarian law. In the post-World War II period, the significant increase in non-international armed conflict, the introduction of new politically driven dimensions of warfare in the form of wars of national liberation, and new weapons such as cluster bomb units and fragmentation weapons forced change on the world community.[146] In respect of the Additional Protocols, it was the dedicated work of human rights advocates, like Mr. Sean McBride, which helped force the updating of international law in the late 1960s and early 1970s.[147] Ultimately, it took intervention by the General

144 See Canadian Forces Doctrine Manual: The Law of Armed Conflict at the Operational and Tactical Level, B-GJ-005-104/FP-021 at 17-1, para. 1702 (August 13, 2001), available at http://www.forces.gc.ca/jag/training/publications/loac_man_e.asp ("[t]oday a significant number of armed conflicts in which the CF may be involved are non-international in nature. As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations."). See also the United Nations Secretary-General's Bulletin *Observance by United Nations Forces of International Humanitarian Law* 38 I.L.M. 1656 (1999) under section 1 C "fundamental principles and rules of international humanitarian law" are applicable in situations of armed conflict, which include "enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence"). See also DoD Law of War Program, Department of Defense Directive, Number 5100.77 4, at para. 5.3.1 (December 9, 1998), available at http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (last visited Dec. 30, 2005). ("Heads of DoD Components shall [e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.").

145 See Yasuaki, *supra* note 142, at 111.

146 See Baxter, *supra* note 89, at 4.

147 See Suter, *supra* note 28, at 24-35. (During an extraordinary career Sean McBride was a journalist, Chief of Staff of the Irish Republican Army, politician, founder and chairman of Amnesty International, Chairman of the Geneva-based International Peace Bureau, Secretary-General of the International Commission of Jurists and winner of both the Nobel Peace Prize and the Lenin Prize.).

Assembly, the tireless work of the ICRC and significant state support to create the Protocols.[148]

In the 21st century, no champion for change has made an appearance. However, it may only be a matter of time. As was evidenced during the development of the Land Mines Convention, non-traditional stakeholders such as non-governmental organizations can have a significant influence on the development of humanitarian law. In the future, human rights NGOs may take a particular interest in areas such as the standards of treatment to be applied to persons denied POW status. The academic community may also critically analyze the scope and effectiveness of the existing international humanitarian law regime. Indeed, the time may have arisen for a group to take on a law reform commission type of role where consideration might be given to drafting initial proposals to update the existing law independent of the traditional state centric process.

What is certain is that society will continue to evolve, particularly as a result of technological innovation. Ultimately, the relevance and the credibility of international humanitarian law will depend not only on better implementation of existing law, but also on significant innovation designed to address emerging international humanitarian law issues. The advancement of international humanitarian law, and with it the protection of the victims of war, cannot be held hostage to the "heavy hand of the past".[149]

148 See Baxter, *supra* note 89, at 5.

149 See epigraph, *supra* note 1.

Chapter 11

The Law of Weaponry – Is It Adequate?

*Bill Boothby**

I Introduction

Ask a man in the street, perhaps "the man on the Clapham omnibus" from the famous legal fiction, about the Law of Armed Conflict and you may, if lucky, hear a hesitant mention of the Geneva Conventions. Ask such a tolerably informed individual about law relating to weaponry and you will achieve either blank looks or a vague reference to domestic firearms legislation. And yet it was the wish to address the seemingly purposeless suffering caused by a particular munition that prompted one of the first international law treaties of the modern era.[1] The same inspired goal has been the basis for much work in this field ever since. From those high-minded but limited beginnings, detailed rules have emerged addressing particular weapons technologies. Fundamental principles are now sufficiently widely accepted as to be regarded as customary. States have accepted obligations to consider the law when acquiring new weapons, although it is not clear that many discharge these duties. Moreover, a treaty regime has emerged[2] which facilitates the formulation of new weapons law as the need arises,[3] or at least as it is seen to arise.

While, set against a broad historical context, the evolution of law in the field may appear rapid, there are those who would argue that it is not speedy enough, nor sufficiently definitive and that unnecessary humanitarian risks are the consequence of this hesitancy over legal development. Certainly there are weapons which attract controversy but which are not the subject yet of specific legal

* The opinions expressed in this article are offered in the author's personal capacity, and should not be taken to represent the views of the Royal Air Force or of the United Kingdom Ministry of Defence.

1 St. Petersburg Declaration, 1868.

2 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (hereinafter referred to as the Conventional Weapons Convention or CCW).

3 Such new law may take the form of Protocols to the Convention.

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provision. What is the current means whereby concern in relation to a weapon is turned into hard law? Is it adequate? Are the arrangements for new law in the Conventional Weapons Convention (CCW) satisfactory or should they be changed? Are alternative approaches, such as that which gave rise to the Ottawa Convention, preferable? Does the current law serve to protect, or is it so limited in scope and depth as to be a dead letter?

Seeking to address at least some of these questions, I start by setting forth the fundamental principles of the law of weaponry. The specific rules that have emerged governing particular weapons types or technologies will then be outlined, as will the requisite legal review of weapons, a process distinguishable from the provision of legal advice on operations. At that point, I examine the Conventional Weapons Convention (CCW) process, summarising what it has produced and where it presently rests. Included is a discussion of the advantages and disadvantages of the CCW approach to making international law in this field. Finally, I address the broad adequacy of current weapons law by reference to the specific issues noted earlier.

II Fundamental Principles of the Law of Weaponry

The cornerstone of the law of weaponry lies in the principle that the right of belligerents to adopt means of injuring the enemy is not unlimited. This principle is traced by the authors of the ICRC Commentary on Additional Protocol I back to the writings of Grotius.[4] It is reflected in the Hague Regulations of 1907,[5] in article 35 of the First Protocol Additional to the Geneva Conventions,[6] and elsewhere. It is undoubtedly a principle of customary international law and thus binding on all states irrespective of their ratification of particular treaties. It means that a state, confronted perhaps by a dangerous conflict with the most adverse potential consequences, is not at liberty to use whatever means it chooses in response. Law must continue to regulate the actions of the state and of those who operate in its name.

The law may, however, not have developed sufficiently to address a particular situation. Such an absence of specific law does not imply that there is a total absence of applicable legal principle. A customary principle, known as the Martens Clause, makes it clear that:

> In cases not included in the Regulations[7]…, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of

4 Grotius, *De iure belli ac pacis*, 1625.

5 Article 22.

6 Article 35(1), hereinafter referred to as Additional Protocol I.

7 This is a reference to the Regulations annexed to Hague Convention IV, 1907.

> nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

Additional Protocol I repeats this principle in broadly similar terms,[8] save that in its version cases not covered by the Protocol or by other international agreements benefit from its provisions. In both formulations, the point is explicitly made that where there is an absence of ad hoc legal provision, a so-called legal vacuum, this does not put those involved, including combatants, at the unfettered mercy of the opposing side. Rather, all involved in the conflict must apply customary legal principles, including the principle of humanity. This has clear relevance to the topic being discussed here. It suggests that the mere fact that there is no specific law dedicated to a particular technology does not of itself mean that it will be lawful to employ it in some or all circumstances. Rather, the weapon or means or method of warfare would have to be considered in the light of the fundamental and wider principles of international law in the way described in the Martens Clause. When considering the Martens Clause in relation to a particular munition, therefore, there will be a number of questions to consider. These are:

- is there established practice of states that ought to inform the assessment of the weapon?
- from what we know of the weapon, would its use be humane?
- are there other aspects to the use of the munition that ought to offend right thinking people?

Taking together the two principles of law which we have discussed, therefore, it is clear that all military activities, including all uses of force and of weapons are controlled by the law with the purpose of maintaining the balance between military necessity and the requirements of humanity. This is the balance between what are sometimes seen as competing interests that lies at the core of this field of law. In a recent report published by Landmine Action UK, such an assumed conflict seems to underlie much of the analysis.[9] It appears, however, to the author that there will be many occasions when humanitarian and military interests will coincide, for example in seeking accuracy and reliability in munitions.

A third fundamental principle is that it is prohibited to employ "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[10] This rule also has a respectably long history. The preamble to the St. Petersburg Declaration notes that the legitimate object of weakening the military forces of the enemy is exceeded by "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their

8 Article 1(2).

9 Out of Balance, Landmine Action, Nov. 2005 (prepared by Dr. B. Rappert, Exeter University).

10 AP I, Article 35(2).

death inevitable", which clearly hints at reasoning lying behind the current rule. Article 23(e) of the Hague Regulations, 1907, talks in terms of "to employ arms, projectiles or material calculated to cause unnecessary suffering." The ambiguities inherent in the "calculated to" language are now resolved in Additional Protocol I, which uses the terms "of a nature to cause …".[11] The ICRC Customary Law Study Report, Rule 70, essentially follows the same formulation, concluding that it is a principle of customary international law, a conclusion from which this author does not dissent.

Having acknowledged the existence of the rule, the perhaps more important question is what does it mean. The first thing to note is the use of comparative language, namely "superfluous" and "unnecessary". These words involve a recognition that some, quite possibly substantial, suffering and injury including death may be the inevitable consequence of using a weapon and show that the mere fact that persons will be killed or injured does not of itself render that weapon unlawful. Indeed, recalling the second tiret of the preamble to the St. Petersburg Declaration,[12] imposing casualties on the enemy is recognised at law as being a legitimate strategy of war.

As McClelland put it, "the issue is finding the point at which the amount of suffering and injury inflicted is considered to exceed that necessary to achieve the military objective".[13] He notes two aspects to the level of suffering, qualitative and quantitative. Clearly, the more individuals affected by the munition, the greater the level of total suffering its use can be said to have occasioned. Then there is the question of the degree and nature of the injury the munition will typically cause. The ICRC has done much valuable work in this field over the years. This included the SirUS project in which wounds from different classifications of weapon were categorised using hospital data in an effort to ascertain whether certain weapons offended the rule. However, it is widely accepted, including by the ICRC, that weapons cannot be judged by reference to their wounding characteristics alone; the military utility derived from using the weapon must also be weighed in the balance.

There is, however, another aspect to the suffering and injury issue. At any moment there will be a recognised method of achieving a particular class of military advantage that involves the use of particular types of weapon in a particular way. Whether the suffering and injury caused by a new weapon are superfluous and unnecessary will therefore in part also depend on whether they exceed that to be expected from those traditional methods in current widespread use.

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11 AP I, Article 35.

12 This states "That for this purpose it is sufficient to disable the greatest possible number of men".

13 *The Review of Weapons in Accordance with Article 36 of Additional Protocol I.* J. McClelland, International Review of the Red Cross, June 2003 (hereinafter McClelland).

This rule has two purposes in international law. The first is as a rule of law in its own right and as explained above. The second function is as inspiration and justification for the negotiation of weapons specific treaties both under the Conventional Weapons Convention and otherwise. Thus, for example, the preambles of the CCW and the Ottawa Convention on Anti-Personnel Landmines mention the rule.

Consideration of the environmental dimension appeared for the first time in Additional Protocol I. Articles 35(3) and 55 prohibit the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and which thus prejudice the health or survival of the population. The meaning of this prohibition is discussed in greater detail later. For the present purposes, it is sufficient to observe that while some states regard the environmental rule as one of the fundamental principles, others reject it.

We can therefore conclude that there are a number of fundamental legal principles applicable to weapons. Their purpose is to impose limits on the suffering the use of weapons causes. They do not however provide concrete mathematical restrictions on what is legitimate. Injury and suffering, and for that matter military utility which is the motivation for the use of weapons in the first place, cannot be measured with any precision against a single scale of values. Furthermore, while medical evaluation may well identify categories of injury to be expected from certain weapons types, the military utility of a weapon in generic terms cannot be easily measured. As a result, the legal rules require, and can only realistically be expected to require, that a sensible balance be maintained with a view to avoiding the excesses which certain weapons or technologies may be expected to produce.

Creating such legal principles is however likely to prove a nugatory activity unless states develop some way of evaluating the legitimacy of new weapons against the legal rules which have been developed to control them. This is the purpose of weapons reviews. The next section of this article describes how the UK performs this task.

III Legal Review of New Weapons

This is one aspect of the law of weaponry which has been widely ratified by states and clearly fundamental to national compliance with the wider law, but which is inadequately implemented. We should start by examining the legal requirement. Article 36 of Additional Protocol I provides:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohib-

> ited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Thus, when a state studies, develops, or acquires the relevant equipment or capability, legal advice is required. The article does not specify the form of that advice, for instance, whether it should be written or oral, formal or informal. It merely requires that the State make the necessary determination. It is not seemingly necessary to review research by corporations and private individuals, which may at first glance seem to be a shortcoming. However, once a state considers procuring systems developed through that research, the obligation for legal review arises. It is of course for industry itself to assess whether particular research is sensible in the light of applicable law. No commercial advantage accrues in developing technologies that the customer base cannot legally acquire.

On one interpretation of article 36, legal input is needed in relation to all weapons-related research by a state, however preliminary in nature or however indirect its connection with a particular weapon application. If, however, the article 36 requirement is to make practical as well as legal sense, a reasonable interpretation of the treaty language must prevail. By such an interpretation, legal input is required:

- if a new weapon or system is bought, manufactured or otherwise acquired by a state,
- if a new weapons-related technology is developed, or
- if existing technology is adapted with a view to its use as a weapon, means or method of warfare, and
- if an existing weapon or system is changed, whether by upgrading or otherwise, such that there is a material change in the way in which it is operated or in the effect it is intended to have in the target area.

To avoid doubt, when a state has already legally reviewed a weapon being transferred through sale or otherwise to another state, the purchasing state, if it is a party to Additional Protocol I, must still conduct its own legal assessment. This is because the purchasing state has an independent obligation to check compliance of the weapon with the international law binding it.[14]

Beyond their timing, it is necessary to address the data required to support legal reviews. The requisite information depends on the precise nature of the equipment under review. The UK Legal Review Guidance[15] recognises this and suggests, inter alia, that required data should include:

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14 Different states have ratified different treaties, sometimes based on stated interpretations that may also differ from state to state. See also para. 1473 of the ICRC Commentary on AP I.

15 Legal Review of Newly Acquired or Developed Weapons and Associated Equipment, United Kingdom Ministry of Defence DIN 2005/04-105.

a. a technical description of the equipment including range, speed, shape, constituent materials, reliability, accuracy, desired effect, the nature of the system or sub-system required for firing, launching, releasing or dispensing the weapon, and the fusing system,
b. destructive radius,
c. nature of expected injury to persons (including medical data as available)
d. the design purpose and intended normal method of use of the weapon including types of targets,
e. test data, e.g. as to accuracy, failure rates live and inert, sensitivity of unexploded munitions which fail live, and
f. impact of unexploded munitions and debris on public health.

It must be stressed, however, that the reviewing authority will need to be consulted as to the information required to support a review of any particular project. Some of this information may require test firings, computer modelling, debris analysis, wound ballistic assessments and so on. The underlying purpose is to ensure that the legal review is supported by a thorough and accurate assessment of the weapon and its scientific characteristics.

The second, equally important, dimension to the review is consideration of the broad circumstances in which the weapon is intended for use. A note of caution needs to be sounded here. A careful distinction must always be maintained between broad intended circumstances of intended use on the one hand and a particular use of a weapon to prosecute a specific attack on the other. The former is an essential element in providing advice by way of legal review to the persons responsible for procuring the weapon. The latter will essentially comprise ad hoc advice to the appropriate commander, taking into account such factors as the actual or understood situation in the target area, the operational context of the particular attack, the military advantage to be gained, and alternative available courses of action.[16]

The legal reviewer starts by obtaining the data he needs and verifying his scientific understanding through such additional data or briefings as he considers necessary. Once he has obtained a complete picture as to the nature of the weapon, its construction, its military purpose, the broad circumstances in which it will be used and so on, he will assess the weapon or system against a number of legal criteria. These are considered in turn in the following paragraphs.

16 Since these factors are irrelevant to a generic review of a weapon system, proportionality assessments, codified in Article 51 of Additional Protocol I, will always be, in the opinion of the author, irrelevant to the legal review process. This is because they are situationally dependent. See Article 51(5) of Additional Protocol I.

A Superfluous Injury and Unnecessary Suffering

The essential question is whether the weapon or technology is of a nature to cause superfluous injury or unnecessary suffering or, for that matter, whether a likely method of using the weapon or system is of such a nature.[17] As has already been noted, the prohibition of unnecessary suffering implicitly acknowledges that causing necessary suffering to enemy combatants is lawful. It may include severe injuries and loss of life. In legal reviews, the issue is whether the weapon, when used for its intended or designed purposes, inevitably and manifestly causes injury, including death, to combatants that clearly exceeds its stated purposes (its intended uses and the military advantage to be gained from such use). This balancing act cannot be conducted in isolation. A weapon or munition's effects must be weighed in the light of comparable, lawful weapons or munitions on the modern battlefield.[18]

All would agree that weapon systems producing gratuitous suffering and injury, that is, injury and suffering not required by the accomplishment of the desired military purpose, will fall foul of this test. Increasingly, however, modern Western militaries are seeking and procuring weapons designed to cause progressively smaller degrees of suffering. Reduced yield bombs produce less "bang for your buck" by spreading fragments over lesser distances. Fuses that are more sophisticated narrow the military effect of certain bombs and missiles to the desired part of a military objective. Non-lethal technologies, careful attack planning, the timing of attacks to avoid periods when the target area is crowded, and many other precautions[19] further seek to minimise civilian casualties. Such precautions are also sometimes employed to minimise casualties among the opponent's armed forces when consistent with the war aim.

As noted earlier, however, article 35 of Additional Protocol I is written in comparative terms, namely "superfluous" and "unnecessary". As technology permits a state to prosecute lower casualty attacks, a return to former less satisfactory methods would arguably breach the requirement in article 57(2) of Additional Protocol I to minimise civilian injury and loss. Such an analysis, taken to its logical conclusion, might suggest that different standards are to be imposed on states based on their differing levels of technological sophistication. Alternatively, the rule in article 35(2) could be interpreted as a requirement that states minimise such injury and suffering to the extent feasible within the resources that a state devotes to defence. Although this may appear to be a superficially attractive approach, it would seem to be unsatisfactory that states which choose to devote

17 AP I, Article 35(2).

18 This is an adaptation of the test used by the US Army in weapons reviews, but is not expressed in identical terms to the US test.

19 Those who plan and execute attacks are required by law to take all feasible precautions. AP I, Article 57.

less effort, and thus expenditure, to weapons development should be rewarded with greater latitude. It would therefore seem that these comparative terms can only sensibly be interpreted by reference to the actual options available at the time of an attack or planned attack, with due account being taken of the way in which such military operations are conducted by the bulk of responsible states.

It is difficult to formulate an objective and universal measurement of suffering, or indeed an independently verifiable yardstick, for the purposes of this rule. As a report of a group of medical experts to the AP I Diplomatic Conference notes, "it seems impossible at the present stage of medical knowledge to objectively define suffering or to give absolute values permitting comparisons between human individuals."[20] The best approach for the reviewer would therefore seem to be to obtain reliable data as to the method and degree of wounding to be expected from the system under review, and then to compare this with the data available in relation to existing systems used in similar circumstances.

B Environmental Impact

The reviewer must consider whether the weapon is intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. As the words imply, relatively grave and long-lasting damage is required before this test is breached. Of course, certain uses of an otherwise innocuous weapon may have the prohibited consequences. However, when evaluating the legality of a weapon, the relevant question is whether the weapon, in itself, may be expected to cause the prohibited damage, or whether the weapon in its normal use will inevitably have those consequences.

Not all states are obliged to apply this test in legal reviews. The United States,[21] for instance, does not accept articles 35(3) and 55 of Additional Protocol I as customary law.[22] It is, therefore, difficult to conclude, that the rule is customary, notwithstanding the arguments deployed in support of Rule 45 of the ICRC Customary Law Study.[23] Absent US adherence, it would appear not to have achieved the required near universal adherence. Nevertheless, states party to Additional Protocol I must consider this aspect in weapons reviews, always taking into account any clarifying or qualifying statement in relation to the rule that the state may have made.

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20 Cited in ICRC Commentary to AP I, para. 1429.

21 By this is meant that the United States has not ratified Additional Protocol I and does not accept the articles as constituting customary law.

22 Understanding 2 entered by the US on ratification of the Conventional Weapons Convention, as reported in *Documents on the Laws of War,* A. Roberts and R. Guelff, 3rd ed., at p. 560.

23 ICRC Customary Law Study, Volume 1, at pp. 151-8.

Relatively severe environmental damage is required before the rule is broken. The prohibition is probably best expressed as relating to "damage as would be likely to prejudice over a long term the continued survival of the civilian population or would risk causing it major health problems".[24] Long-term for these purposes seems to be measured in decades.[25] The language of the articles makes it clear, moreover, that all three elements, namely widespread, severe and long-term, must be present for the rule to be broken.

An environmental impact statement will be required to determine the chemical composition of the weapon's detritus and explain the effect of this on natural life forms. This statement can then be used to assess whether the weapon breaches this rule.

C Discrimination

The next test examines whether the weapon or system can be used in a discriminating way. Recall that indiscriminate attacks are prohibited. Article 51(4) of Additional Protocol I describes them as follows:

> Indiscriminate attacks are:
> a. those which are not directed at a specific military objective;
> b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
> c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
> and, consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The distinction drawn earlier between generic advice on the legality of a weapon and ad hoc legal clearance of a particular attack applies with equal strength here. Thus, sub-paragraph (a) above clearly pertains to ad hoc target decision-making and not generic weapons review work. By contrast, sub-paragraphs (b) and (c) should be considered carefully by the weapon reviewer. The issue is whether the weapon or system is capable of being directed at a specific military objective and whether its effects can be limited as required in international law?

Of course, limited explosive yield, smart fusing, careful operational planning and novel technologies may contribute to a weapon being judged capable of complying with this rule. For example, certain types of weapons use sensors to locate particular kinds of targets. Reviewers must carefully consider the performance of such technology as established by tests, computer modelling or operational

24 Rapporteur's report O.R.XV, page 268, CDDH/215/Rev.1, para. 27, cited in ICRC Commentary to AP I, para. 1454.

25 ICRC Commentary to AP I, paras. 1454 and 1455.

use, e.g. by other states. Of course, any equipment may perform unsatisfactorily on a particular occasion. However, the reviewer's main concern is with the way the weapon or equipment is intended (designed) to operate, assuming there is no evidence of such unreliability as would in its own right cause the rule to be breached.

D Specific Rules Applicable to Particular Weapons

In addition to applying the more general rules set forth above, the reviewer will evaluate the weapon's technology to determine whether specific treaty and/or customary law rules either prohibit it altogether or restrict the way in which, or the occasions when, it may be used. If, for example, the programme seeks to develop a munition which is designed to be exploded by the presence, proximity or contact of a person, a reviewing authority from a state party to the Ottawa Convention would draw attention to the prohibitions in that treaty. Equally, a reviewer from a state which is not party to Ottawa, but party to Amended Protocol II to the Conventional Weapons Convention, would highlight the prohibitions and restrictions in that treaty.

A detailed consideration of all of the specific prohibitions and restrictions imposed by law in relation to particular munitions and technologies lies outside the scope of this article. The purpose in the remainder of this section is therefore to draw attention to only some of the rules that the weapon reviewer must bear in mind, and to discuss each rule in the briefest of terms in order to illustrate the nature of the review process. Other sources must be consulted for a more detailed exposition of the substantive law.

a. Poison: The use of poison or poisoned weapons is prohibited. The rule can be found in article 23(a) of the Hague Regulations[26] and in Rule 72 of the ICRC Customary Law Study. This is undoubtedly a rule of customary law binding on all states. As the ICRC Study notes, the prohibition does not apply to weapons that could incidentally poison, but only to those designed to injure or kill by the effect of such poison.[27]
b. Weapons of Mass Destruction: The Geneva Gas Protocol, the Chemical Weapons Convention and the Biological Weapons Convention, taken together, provide the most comprehensive regime for the prohibition and restriction of weapons of mass destruction upon which states have been able to agree. The clear purpose of this regime is to control the proliferation of these weapons, while prohibiting their use. The underlying objective, of course, is to prevent the unacceptable suffering that they cause. Public interest would seem to lie in securing the widest possible adherence to the principles set out in all three treaties; universal ratification would certainly

26 Regulations annexed to Hague Convention IV, 1907.

27 ICRC Customary Law Study, Volume I, at p. 253.

be an important first step in that process. The weapon reviewer who is to review any such substances, weapons or materials must examine the appropriate definitions with care and must apply the legal tests noted above to both the weapon/technology and to the intended circumstances of use. It must be further recalled that by virtue of a statement made on ratification of Additional Protocol I, the UK does not accept the applicability of the new rules introduced by that Protocol to non-conventional weapons.[28]

c. Prohibited bullets: The use of bullets which expand or flatten easily in the human body is prohibited by the Third Hague Declaration, 1899. That instrument cites as examples bullets with a hard envelope which does not entirely cover the core or those pierced with incisions. As Roberts and Guelff conclude, the Declaration codifies one aspect of the customary rule prohibiting weapons that cause unnecessary suffering.[29] The ICRC Customary Law Study, in Rule 77, recognises the prohibition as having customary status.[30] Anti-personnel use of bullets which explode within the human body is, according to rule 78 of the ICRC Customary Law Study, prohibited. Certainly, the St. Petersburg Declaration 1868 prohibits military or naval use of projectiles below 400 grammes if they are either explosive or charged with fulminating or inflammable substances. However, as the UK Manual on the Law of Armed Conflict notes, the use of such weapons in air-to-air combat became customary. "During the First World War it was found that the most effective means of destroying enemy balloons was by incendiary bullets, and the Hague Rules 1923[31] recognised this practice: 'the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.'"[32]

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28 Statement *a* in the list of statements deposited by the UK with its ratification instrument, as reported in *Documents on the Laws of War,* by A. Roberts and R. Guelff, 3rd ed., at p. 510. It reads: "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons." It seems to the author that the environmental rules described earlier were introduced by the Protocol and are thus excluded in relation to WMD by the UK statement. The legitimacy of the threat to use or actual use of nuclear weapons was of course considered by the ICJ in its advisory opinion. (*ICJ Reports,* 1996, at pp. 265-7; 35 *ILM* (1996) 831-2).

29 *Documents on the Laws of War*, A. Roberts and R. Guelff, 3rd ed., at p. 63.

30 ICRC Customary Law Study, Volume I, at p. 268.

31 Note that these rules were never incorporated into a treaty nor were they formally adopted by states. They were in fact written in draft form but many of the rules drawn up by the jurists were, and still are, regarded as customary.

32 The Manual on the Law of Armed Conflict, UK Ministry of Defence, 2004, at para. 12.63.1.

d. Anti-personnel Landmines: The Ottawa Convention 1997 prohibits the use, stockpiling, production and transfer of anti-personnel landmines and provides for their destruction. For states that are party to the Convention, therefore, any mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons, is prohibited. It is therefore important for reviewing officers to understand the mechanism of the munition under review. In particular, they must appreciate the design intent, as the definition was carefully drafted with design intent in mind. Mines which are designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person and that are equipped with anti-handling devices, are not prohibited by this Convention.[33] Anti-personnel mines are also restricted through Protocols to the Conventional Weapons Convention.
e. Weapons addressed in the Convention Weapons Convention: The 1980 Conventional Weapons Convention is an enabling treaty that does not in itself make substantive weapons-related provision. Rather, six protocols agreed to under procedures set out in the treaty serve that purpose.
   - Protocol I prohibits use of a weapon that mainly injures by fragments that cannot be detected by X-ray,
   - Protocol 2 and Amended Protocol 2 both address mines, booby traps and other devices,
   - Protocol 3 addresses incendiary weapons,
   - Protocol 4 prohibits the employment of laser weapons designed as a combat function to cause permanent blindness,
   - Protocol 5 addresses explosive remnants of war, including abandoned explosive ordnance.

When assessing a particular weapon or associated technology, the reviewer must examine the definitional articles of any apparently relevant CCW Protocol to assess whether the treaty in fact affects the weapon. Importantly, the Protocols prohibit the use of certain types of weapon, restrict the circumstances when other weapons may be used and impose clean up obligations in relation to mines and unexploded remnants of war. The weapon reviewer must therefore make it clear which sort of legal constraint applies to the weapon under review. As the Conventional Weapons Convention has been an active forum for the development of arms control treaties in recent years, it will be discussed further in the next section.

33 But note that Protocol 2 or, as the case may be, Amended Protocol 2 to the Conventional Weapons Convention must also be considered.

E Future Developments in the Law

While there is no requirement in article 36 that future changes in the law be considered, there are states such as the UK which, recognising the long periods during which weapons may be retained in the arsenal, draw attention in legal reviews to any anticipated changes in relevant international law. Doing so, and by giving legal advice early in the development phase, helps limit wasteful research and development effort. If expected changes in international law mean that a particular weapon is likely to breach an emerging norm during its planned operational life, procurement staffs may prefer alternative solutions unaffected by such risks. Although very challenging to try to predict changes in international law over an extended period, where controversy already exists or appears imminent, this factor should be considered as part of the wider procurement decision.

F Alternative Systems for Legal Review

It has already been noted that relatively few states have formal systems of legal review. Indeed, article 36 does not prescribe any particular method and, in a sense, the mechanics are not the important issue. Some states employ individual Ministry of Defence personnel or service lawyers to undertake the process, while others appoint commissions to make the determination. Additional methods are also possible. In developing and administering the UK system, the author tried to produce a method to suit UK requirements. It is for other states to select the method that best suits their procurement arrangements and legal systems.

The important point is that a state must actually conduct reviews, as this demonstrates commitment to a legally compliant arsenal. Equally, when arms manufacturers become aware that their products are legally reviewed by customer states, this may tend to influence weapon design for the better. Increasingly, states which have ratified, or are about to ratify, Protocol V to the Conventional Weapons Convention will be concerned to limit their liability for clearing explosive remnants of war by seeking to ensure through the review process that only reliable weapons are procured. Finally, and most self-evidently, the review process will tend to prevent acquisition, and thus use, of weapons that found to occasion superfluous injury and unnecessary suffering. This may help to reduce, to a degree, the overall level of suffering imposed by war.

The ICRC should be congratulated for preparing guidance for states on how to conduct these reviews. It is, however, important to ensure that such guidance can be readily implemented by all states. Excessively complicated, lengthy and prescriptive arrangements involving expensive procedures tend to discourage states from establishing such a system and may thus prove to be counter-productive. In the same way, any suggestion that states must make their legal reviews public risks ignoring vital national security interests and may prove a disincentive to article 36 compliance. A more promising approach would be to show how

humanitarian law, international law and operational effectiveness requirements converge in this field. Weapons that most accurately and reliably engage a military objective, or the most militarily significant element of such an objective, are least likely to cause excessive damage (which the user may well have to repair in the end in any event). Weapons reviewed and found to operate reliably are less likely to impose explosive remnant clean up costs on the user state later on. Weapons found on review to comply strictly with the discrimination rule may alienate the population in the target area less, while helping to maintain popular support back home for a war seen by the public and media to be carefully waged. Finally, "low suffering war", about which many are perhaps justifiably sceptical is, if realisable, likely to resonate with the wider purposes of the conflict. It is therefore difficult to over-state the importance of weapons reviews or their relevance to the accomplishment of wider defence objectives.

IV Is The Way in Which Weapons Law Is Developed These Days Adequate?

Having considered the fundamental principles of the law of weaponry, having looked at the process of weapons reviews and having briefly examined some of the rules applicable to particular weapons, we can now start to address the questions posed at the beginning of the chapter. The purpose in what follows is to assess how weapons law is now developing, to examine what appear to be two differing approaches and to try to determine whether the process meets global needs. Arguably, the most prolific vehicle for the generation of new weapons law these days is the Conventional Weapons Convention (CCW). Its procedures enable states to formulate new law to address contemporary areas of humanitarian concern. Article 8(2)(b) of the Convention covers the procedure for adoption of new Protocols to the Convention. A conference of the High Contracting Parties to the Convention "may agree, with the full participation of all states represented at the conference, upon additional protocols …"

This requirement for agreement, or consensus, may be seen as both a strength and a weakness of the CCW process. It is a strength in the sense that the law which emerges has by definition achieved the support, or at least has avoided the outright hostility, of the one hundred[34] states of the CCW community. Once adopted, such law therefore stands a good chance of ratification by a healthy proportion of such states.[35] Moreover, the requirement for consensus combined with the desire of specially affected states to ensure that the new law does not

34 Source: www.icrc.org/ihl.nsf website, searched on 18 Dec. 2005. There were 100 states party to the CCW on that date.

35 Numbers of states that are party to the CCW protocols were, on 18 Dec. 2005, as follows: Protocol I 97, Protocol 2 87, Protocol 3 93, Protocol 4 81 and Protocol 2 (Amended) 85. Source: www.icrc.org/ihl.nsf website searched on 18 Dec. 2005.

adversely affect their fundamental military interests will tend to produce new legal arrangements which are pragmatic. This pragmatic aspect implies the development of new law that is likely to be more readily implemented and respected while reflecting the military needs of states.

The weakness of the consensus requirement is that progress on matters already identified as the source of humanitarian concern can be blocked by one or more states. Thus, for example, after four years devoted to the consideration of humanitarian difficulties attributable to anti-vehicle mines, the November 2005 Meeting of States Party to the CCW was unable to agree a new Protocol on the issue in terms suggested by the Co-ordinator. It could not even adopt a mandate to negotiate an instrument in the following year.[36] Such apparent failure may cause certain states and NGOs to be tempted to go outside the consensus-based CCW process in search of a "quicker fix" elsewhere. The failure of the CCW process to achieve consensus certainly means that areas of identified humanitarian concern have not produced new law. Does this fact in itself justify abandoning the consensus approach?[37]

The alternative to the CCW approach was, arguably, seen in the 1997 adoption of the Ottawa Convention on anti-personnel landmines (APL). The negotiations in Oslo to produce that Convention were rapid.[38] A high profile campaign supported by extensive data from numerous conflict zones made the humanitarian case. The evidence, presented by a number of NGOs and certain states, established that the use of APL might give rise to civilian casualties long after the conclusion of the hostilities in which they were used.

Technology limiting the active life of such mines to the period required by their military purpose would have significantly addressed the important humanitarian issue while enabling the retention of weapons, which have undoubted military utility. Thus, the US delegation proposed to the Oslo Conference that there should be an exemption from the ban for mines the active lives of which are limited, e.g, by self-destruction or self-deactivation arrangements.[39] By the time of the Conference in Oslo, however, the prevailing view was that only a total ban on all APL would be acceptable, and that an exception available only to those states with the technology to employ it would prejudice achieving this goal. In the author's view, the development of an Austrian draft text, which was used as the basis for negotiation of the Ottawa Convention, in consultation with a limited

36 Based on the personal knowledge of the author as a member of the UK Delegation to the Conference.

37 Out of Balance, op. cit., section 9, at pp. 31-32.

38 Based on personal knowledge of the author as a member of the UK delegation to the Conference.

39 Based on personal knowledge of the author as a member of the UK delegation to the Conference.

group of like-minded states, meant that states that became involved later lacked the traction needed to propose alternative approaches.

At the time of writing, 147 states[40] are party to the Ottawa Convention. Forty have not become party. Notable among these non-participants are China, India, Egypt, Indonesia, Iran, Iraq, Israel, Pakistan, the Russian Federation, Poland, Syria, Ukraine and the United States. As far as the author is aware, none of these states has any immediate intention of so doing. It is an open question whether an exemption of the sort proposed by the US would have enabled wider ratification of the Convention. It is also perhaps worthy of note that the states party to Amended Protocol 2 to CCW include China, India, Israel, Pakistan, Poland, the Russian Federation, Ukraine and the United States. While Amended Protocol 2 restricts rather than prohibits the use of anti-personnel landmines, its adoption by these states is, at the very least, highly significant. It would seem that an approach that seeks to include the views of all affected states is needed if broad acceptance by major states of the resulting treaty text is to be achieved. States are bound to be suspicious if their views are only considered at a late stage or, worse still, not at all.

The development of new law is not necessarily the only answer when new concerns are raised in relation to particular weapons. Political statements, unilateral moratoria, export controls and other measures not involving the conclusion of treaties may all have a role to play. The beauty of law, however, is that it facilitates the development of battlefield norms that, in turn and in time, will directly influence the behaviour at the root of the problem. Determining the adequacy of that law, however, involves determining how far states recognise and implement those norms.

Perhaps a new, "rationalist approach" to the evolution of new weapons law is needed. Interestingly, states involved in the CCW process have applied such an approach when considering the apparently linked issues of explosive remnants of war (ERW) and cluster munitions. Following the conclusion of Protocol V to CCW, the question the CCW member states were considering was what further steps should be taken to address the ERW problem.[41] In a paper dated 8 March

40 The statistics and data in this paragraph are taken from the www.icbl.org and www.icrc.org websites reviewed on 18 Dec. 2005.

41 The mandate, as decided by the 27-28 November 2003 meeting of States Party to CCW in paragraph 26 of CCW/MSP/2003/3, states: "To continue to consider the implementation of existing principles of International Humanitarian Law and to further study, on an open-ended basis, and initially with particular emphasis on meetings of military and technical experts, possible preventive measures aimed at improving the design of certain specific types of munitions, including sub-munitions, with a view to minimize the humanitarian risk of these munitions becoming explosive remnants of war. Exchange of information, assistance and co-operation would be part of this work." Discussions have continued on the basis of a broadly similar mandate as reported in UN DC/2989, dated 12 Aug. 2005.

2004, the Co-ordinator suggested a three-step approach. Steps one and two consisted of identifying relevant principles of international humanitarian law and establishing the status of their implementation by states.

A group of eight states[42] in association with the International Committee of the Red Cross then developed a questionnaire.[43] The questionnaire sought the following information from states:

- what existing principles of IHL applicable to the use of force during an armed conflict are considered relevant to the use of munitions that may become ERW?
- what measures have been taken by the state to implement these principles?
- are the principles reflected in military doctrine, military manuals and rules of engagement?
- are the principles considered in planning military operations, in targeting procedures and is legal advice available at appropriate levels of command?
- are members of the armed forces trained in the principles, does the state legally review new weapons and what other measures are taken to implement the principles?

Based on the national responses, an international law expert will prepare a report for submission to the March 2006 CCW Conference of the Group of Governmental Experts. Pursuant to the same mandate, presentations focussing on the existing relevant law have also been delivered to these meetings. As a third and distinct stream of work, a scientific analytical methodology has been developed as a basis for research to determine objectively which sorts of weapon cause the ERW problem, and which types of ERW represent the greatest humanitarian hazard.

The intention behind this three-element analytical approach is to ensure that the proposals which later emerge for further action are grounded in logic. It represents a recognition that, if states are to be persuaded to create and implement new law, a number of factors must be clearly established to the satisfaction of national delegations. These include:

- the precise nature of the humanitarian concern, its causes and characteristics, and all of the available options for addressing that concern,
- the scientific etc. basis for concluding that the proposed new arrangements will mitigate or solve the identified problem,
- that the proposed arrangements will not impede the ability of states to defend themselves,
- that the proposed arrangements can be reasonably implemented by all states,
- that the new arrangements can be implemented at proportionate cost.

42 Australia, Canada, New Zealand, Norway, Sweden, Switzerland, UK and USA.

43 CCW/GGE/X/WG.1/WP.2, dated 8 Mar. 2005.

If they cannot be established before new law is created, obtaining universal ratification of that may well prove problematic. Some NGOs, however, consider that the requirements of military utility are given excessive prominence in this process.[44] In the opinion of the author, and given that international law is and will remain a matter for states to agree upon and implement, it will always be necessary to balance military requirements with humanitarian concerns. Law which fails to do so is likely to be, and remain, ineffective. The CCW process offers the best approach yet developed for achieving this goal.

V Conclusion

Among the conclusions that seem to emerge from the foregoing discussion are:

- that general principles of existing law place limits on the harm that can legitimately be inflicted on adversaries and on the environment,
- that particular technologies found to be of concern are subject to international law prohibitions or restrictions on use,
- that existing law requires states to consider the applicable law when acquiring new weapons,
- that a treaty regime exists which facilitates the making of new weapons-related international law if this is needed,
- that this regime requires consensus before any substantive development of the Convention or of its protocols can take place. While this requirement may impede development of the law, it has the merit that all states remain in control of the weapons law making process,
- that non-consensus approaches can produce new law quickly, but the potential alienation of some specially affected states may diminish the value of such a process, erode adherence to its product and limit the accomplishment in fact of the intended humanitarian aims,
- that an analytic approach to weapons issues ought to produce logical solutions. Consensus in favour of such solutions cannot be guaranteed, but an approach based on logical analysis is more likely, given time, to gain widespread international support.

The body of law relating to weapons has expanded markedly since the adoption of CCW with its Protocols. States have demonstrated a willingness to consider humanitarian concerns and, where verified to their collective satisfaction, to act consistently with the requirements of military necessity. While the inability to achieve consensus in favour of further and rapid progress in CCW in November 2005 may cause some to believe that progress on weaponry in that forum has suddenly become impossible, it is the author's view that this is far from the case.

44 Out of Balance, op. cit.

Rather, developing experience shows that proposals for new law in the weapons field must be supported by rigorous and objective justification. The suggested action must adequately and observably recognise the essential defence needs of states, and, thus, must pass the "will it work and make a difference" test. While weapons law cannot hope to obviate suffering on the battlefield (indeed, that is not its purpose), it does provide an effective means of reducing the misery to a minimum level practically achievable by states. Development of the law is a continuing process, and as new humanitarian concerns emerge and are accepted by states, further changes in the law can be expected. Whether the speed of that process will satisfy all concerned remains to be seen. It is, however, important in the view of the author that states remain in control of the process.

Chapter 12

"Combatants" – Substance or Semantics?

Charles H.B. Garraway

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – nothing more nor less."[1]

Professor Yoram Dinstein is a giant in the field of international law. I am just one of the many who have benefited over the years from his wisdom and kindness. The sign of true greatness is never to be afraid of argument or dissent. Yoram Dinstein never is – and never has been. Indeed he encourages it! One of my first major Conference presentations found me on the same panel as Professor Dinstein on a subject on which we took opposed views. To assist me in my presentation, he had sent me copies of some of his published – and unpublished – material so that I could develop my argument. He then published my paper in the Israel Yearbook on Human Rights.[2] Over the years, we have continued the dialogue and although I initially described the gap between us as "the Atlantic Divide", he soon taught me that in fact the divide is small in practice and comes down in some respects to semantics. In reality, our separate roads lead to much the same end result.

Far be it from me to accuse Professor Dinstein of any resemblance to Humpty Dumpty or any of the other characters in Lewis Carroll's stories. However, semantics are important and perhaps nowhere more so than in the study of law, whether domestic or international. Words are the tools of the lawyer's trade and therefore it is important that there is some agreement as to the meaning to be ascribed to words that are important in the legal lexicon. Courts define words and seek to dissuade the Humpty Dumptys of this world from their attempts to introduce anarchy into the use of words. In the international field, there are fewer opportunities for such decisions and greater emphasis perhaps on principles. This is particularly so in the field of international humanitarian law, the law of armed conflict as it is known in the military, where the law is based

1 Alice Through the Looking Glass, Lewis Carroll, Walker Books, London 2005 at p.128.

2 Interoperability and the Atlantic Divide – A Bridge over Troubled Waters, Israel Yearbook on Human Rights (2004), at p.105-125.

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on treaties, often containing compromise wording of which Humpty Dumpty would be proud.

And yet still words matter. The soldier, sailor, airman or marine is not interested in philosophy or principles. He or she wants to know what he or she can or cannot do. His or her orders need to be clear and concise. There is no room for ambiguity here. One of the tasks of military lawyers is to assist in that process of interpretation so that the raw material contained in the treaty texts comes out at the end of the process as clear instructions, which the lowest serviceman can then understand and implement.

It is for that reason that I wish here to return to my original disagreement with Professor Dinstein and see where we have moved and whence we are moving. The word that is the subject of so much controversy is "combatant". I deliberately leave the word in its unvarnished state. Whatever adjective some may wish to use to describe any particular category – "illegal", "unlawful", "unprivileged" or just plain "enemy" – the core of the problem of interpretation lies in the noun itself. What does it mean and, perhaps more importantly, what should it mean?

Some years ago, I was reviewing the material used at the British Joint Services Command and Staff College in their Foundation Studies Phase. In that phase, "International Law and Ethics" were taught in the same package. The essential reading listed consisted of a paper by Christopher Greenwood,[3] a chapter from a book by Peter Rowe[4] and a chapter from a book by Gordon Graham.[5] The problem was that two were by eminent scholars in international humanitarian law and one by an equally eminent scholar in the field of ethics. No attempt had been made, so far as I could find, to check for consistency.

Greenwood, in his paper, outlined in traditional terms that "a central feature of the laws of armed conflict ever since the eighteenth century has been the distinction between combatants and civilians."[6] He went on to deal with the definition of combatants under the treaty law, ranging from the Hague Regulations

3 Command and the Laws of Armed Conflict, Christopher Greenwood, Strategic Combat Studies Institute Occasional Paper No.4, Camberley, 1993 (Greenwood).

4 Chapter 9, The Geneva Conventions and Additional Protocols, in Defence: The Legal Implications: Military Law and the Laws of War, Peter Rowe, Brassey's, 1987 (Rowe).

5 Chapter 3, War, in Ethics and International Relations, Gordon Graham, Oxford, Blackwells, 1996 (Graham).

6 Greenwood, footnote 3 above, at p.14.

of 1907,[7] through the Third Geneva Convention[8] to the new rules introduced by Additional Protocol I.[9] He clearly accepted that the term "combatant" is a technical term under international humanitarian law and as such is defined within it. Rowe too used the word "combatant"[10] frequently, but did not seek to define it. Yet, it is clear from the context that it was being used again in its technical meaning.

However, when one reaches Graham, there is an entirely different approach. Understandably, he is approaching the whole subject from an opposite direction. In his early discussion on Just War, there is no mention of treaties such as the Kellogg-Briand Pact[11] or even the United Nations Charter.[12] He is looking to a deeper philosophical underpinning for his arguments. This becomes apparent also when he moves to "Justice *in Bello*".[13] He argues, "What is not so clear is the precise definition of 'combatant'". He comes up with his own definition: "Combatants are those people the purpose of whose activity is to contribute to the threat, non-combatants are those people who do not actively contribute in this sense, though they may constitute part of a relevant causal chain." He accepts that under this definition, munitions workers are combatants, but goes on to say:

> ... it is true that just where the line is to be drawn between combatant and non-combatant is in many cases obscure. For example, farmers who grow the food an army eats need not grow the food for the army. There are many historical instances in which food supplies have simply been commandeered. There are others where the farmers would have grown the food anyway, and would just as happily sell it to other purchasers. There are still other cases, however, in which a 'land army' has been created precisely in order to sustain or increase food pro-

7 Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (Hague Regulations), reprinted in Documents on the Laws of War, (Adam Roberts and Richard Guelff, eds.), 3rd Ed. 2000, Oxford, OUP, at p.73 (Roberts and Guelff).

8 Geneva Convention Relative to the Treatment of Prisoners of War, August 12 1949 (Geneva Convention III), reprinted in Roberts and Guelff, footnote 7, at p.244.

9 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I), reprinted in Roberts and Guelff, footnote 7, at p.422.

10 See for example, Rowe, footnote 4, page 148 in which he refers to a "rule of customary international law that combatants are required to distinguish at all times between civilian and military objectives and to attack only the latter."

11 The Pact of Paris, General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 1928, 94 LNTS 57.

12 Charter of the United Nations, 26 June 1945, reprinted in Basic Documents in International Law (Ian Brownlie, ed.), 5th Ed. 2002, Oxford, OUP, at p.2.

13 Graham, footnote 5, at p.11.

> duction for military purposes. Are agricultural workers non-combatants in the first two cases, but not in the third? My own inclination is to say 'yes', but it has to be agreed that there are reasons in support of varying points of view.[14]

At no stage in the discussion is there any recognition that the term "combatant" carries legal connotations under international humanitarian law. The contradiction between the narrow test to be found in Greenwood, based on legal definitions, and the wider test in Graham, based on moral ones, is striking. What is an officer confronted with these two different tests to do? The temptation must be to go for the wider definition on the basis that it is less restrictive. However, to do so would put that officer at risk of committing war crimes. What may be ethically acceptable may not be legal.

It is this confusion that lies behind much of the current debate over the meaning of the word "combatant". The Pocket Oxford Dictionary defines "combatant" as a "person or nation engaged in fighting during a war".[15] This seems in turn narrower than the ethical definition of Graham in that it involves participation in the act of fighting. This definition is perhaps closest to that adopted by Professor Dinstein himself who states:

> Under LOIAC, combatants in an international armed conflict fall into two alternative categories:
> (i) Members of the armed forces of a belligerent party (except medical and religious personnel)…. even if their specific task is not linked to active hostilities.
> (ii) Any other persons who take an active part in hostilities.[16]

Dinstein's second category fits with the Oxford definition, but his first is wider in that members of the armed forces (other than medical and religious personnel) are combatants at all times, whether or not they are "engaged in fighting". This makes it clear that the term "combatant", in this sense at least, describes a status rather than an activity. Yet both the ethical definition of Graham and the dictionary definition of Oxford depend on activity and it is as a result of that activity that the definition attaches. The key to the dispute is perhaps therefore whether the term "combatant" depends on whom you are or what you do. To understand how this situation has arisen, it is necessary to look at how the use of the term "combatant" has developed in international humanitarian law.

The Lieber Code of 1869, Article 155 states:

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14 *Ibid*, at p.12.

15 Pocket Oxford English Dictionary, 10th Ed. 2005, OUP, at p.170.

16 The Conduct of Hostilities under the Law of International Armed Conflict, Yoram Dinstein, CUP 2004, at p.27.

> All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.[17]

However, the Code does not seek to define the term "combatant". In the Oxford Manual,[18] the term does not even appear. The preferred term is usually "belligerent" and it is this term that again dominates the Hague Regulations of 1899 and 1907. Section I of the 1907 Regulations is entitled "On Belligerents" with Chapter I "The Qualifications of Belligerents".[19] Article 1 of the Regulations sets out that:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[20]

Article 3 goes on to provide:

> The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.[21]

It would seem from this that the term "combatant" was used at this time to indicate activity rather than status with the term "belligerent" used more as a term of status. This is to some extent supported by the text of Article 2, which says:

> The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading

17 General Orders 100, Instructions for the Government of Armies of the United States in the Field, (The Lieber Code), reprinted in The Laws of Armed Conflict (Dietrich Schindler and Jiri Toman eds.), 4th Ed. 2004, Martinus Nijhoff, Leiden, p.3, at p.19 (Schindler and Toman).

18 The Laws of War on Land (Oxford Manual), Oxford, 1880, reprinted in Schindler and Toman, footnote 17, at p.29.

19 Roberts and Guelff, footnote 7, at p.73.

20 *Ibid.*

21 *Ibid.*

> troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.[22]

It will be noted that persons engaging in such a *levée en masse* "shall be regarded as belligerents" provided that they comply with the terms laid down.

Contrary to popular belief, the word "combatant" does not feature in the Third Geneva Convention of 1949.[23] This is hardly surprising, as the purpose of the four Conventions is to deal with the protection of victims of war rather than with the conduct of hostilities. However, much of the Hague language dealing with belligerents was adopted in the definition of prisoners of war. Article 4A provides that:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
> (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict,

22 *Ibid.*

23 See footnote 8.

> who do not benefit by more favourable treatment under any other provisions of international law.
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[24]

These provisions, of course, go beyond the definition of belligerents in that paragraphs 4 and 5 involve personnel who are not included in the Hague definitions and are not members of the armed forces. Moreover, nobody would argue that they were in law "belligerents", although under the Graham definition, they might certainly be classed as "combatants" by virtue of the activities that they conduct.

Richard Baxter, in his seminal article on the issue of "unprivileged belligerency" written in 1951,[25] seems to indicate that the understanding of the words "belligerent" and "combatant" was beginning to change. It is unclear whether he is using the term "belligerent" as a status based assessment or one based on conduct. For example, when dealing with guerrilla fighter, he says:

> The guerrilla thus appears, like the spy, to be a belligerent who has failed to meet the conditions established by law for favoured treatment upon capture.[26]

The heading of the passage on spies is entitled "hostile conduct by persons not of the armed forces: spies"[27] and yet some of the text relates to military spies who are clearly "belligerents" in the status sense.

Later in the article, Baxter states:

> Belligerents, both civilian and military, may also assume as disguise the uniform of the enemy.[28]

Clearly, it would seem here that Baxter is using the term "belligerent" in its conduct sense, namely somebody who is engaging in hostilities.

The word "combatant" does not appear that frequently in the article and again the sense of its exact meaning is unclear. For example, Baxter states:

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24 Roberts and Guelff, footnote 7, at p.245.

25 Richard Baxter, So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs, 1951 British Year Book of International Law, at p.323.

26 *Ibid*, at p.338.

27 *Ibid*, at p.329.

28 *Ibid*, at p.341.

> Outside these three classes of persons to whom international law has offered shelter from the extreme violence of war, there are other persons who traditionally have not benefited from a privileged status under international law, namely, guerrillas, partisans, so-called 'war-traitors', *francs-tireurs*, and other persons who in the face of the enemy or behind his lines, have committed hostile acts without meeting the qualifications prescribed for lawful belligerents. The determination of the requirements to be established for those claiming prisoner-of-war status has not been easy, and it has been equally troublesome to assess the basis on which persons not so qualifying should be penalized or punished – whether as war criminals, or as violators of the laws and customs of war, or merely as persons whose acts have been harmful to the opposing belligerent. It has generally been understood that such persons are subject to the death penalty, and to that extent the law applicable to such combatants has been clear.[29]

Here the use of "combatant" seems to indicate a conduct based assessment rather than status. He also cites the World War II case of *Ex parte Quirin et al*[30] where saboteurs landed in the United States and, although members of the German armed forces, discarded their uniforms on arrival. In that case the Supreme Court stated:

"Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[31]

On the facts of the case, it would seem that the Court was here using the term "combatant" in a status capacity and distinguishing between those combatants who are acting in accordance with the laws of war ("lawful combatants") and those who have broken the law ("unlawful combatants"). The latter are subject to trial "for acts which render their belligerency unlawful". Here also "belligerency" seems to be being used as a conduct based matter.

Since 1951, the word "belligerent" has rather died out and is now looked upon as old-fashioned. "Combatant", on the other hand, has risen in popularity but again one is left with the problem of definition. Additional Protocol I of 1977[32] sought to resolve that issue. Article 43 states:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented

29 *Ibid*, at p.326-7.

30 317 U.S. 1.

31 *Ibid*, at p.31.

32 See footnote 9.

> by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.[33]

This is a clear reversal from the earlier Hague Regulations in which members of the armed forces could be combatants or non-combatants, based on their activities. Now all members of the armed forces, other than medical personnel and chaplains, are combatants regardless of whether they are actively engaged in the conduct of hostilities. Even military lawyers are now combatants! The definition here is undoubtedly based on status rather than conduct.

But Additional Protocol I goes further. It seeks to close another gap by providing a definition of "civilian". This is to be found in Article 50(1) which states:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[34]

From this, it will be seen that unless someone is a member of the armed forces of a Party to the conflict, as defined in Article 43, or alternatively within those category of belligerents entitled to prisoner-of-war status under Article 4A of the Third Geneva Convention, that person is a "civilian". This includes those categories of person contained in Article 4A(4) and (5), such as civilians accompanying the armed forces, who might otherwise qualify as "combatants" under the Graham test as outlined earlier.

It is sometimes claimed that in fact Additional Protocol I goes even further than this in extending the definition of "combatant" to include "terrorists". [35] The authority for this is claimed to be Article 44 which states:

> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not

33 Roberts and Guelff, footnote 7, at p.444.

34 *Ibid*, at p.448.

35 See, for example, Douglas Feith, Law in the Service of Terror – The Strange Case of the Additional Protocol, The National Interest, Fall 1985, at p.36.

deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
   (a) during each military engagement, and
   (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

   Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.[36]

36 Roberts and Guelff, footnote 7, at p.444.

However, what is often overlooked is the opening phrase, "any combatant, as defined in Article 43". Thereafter, wherever the word "combatant" is used, it must also refer back to Article 43. Thus, Article 44 does not extend the definition of combatant but permits certain activities to those who are already combatants.

It seems therefore that the wheel has now turned full circle. Whereas in 1907, members of the armed forces had the status of belligerents and by their conduct were classed as combatants or non-combatants, the status is now that of combatant. This brings the argument back to the position of those who do not qualify for the status of combatant but take part in hostilities nevertheless. Do they become "combatants" by their actions or do they fall within some other category? If one adopts the conduct definition of "combatant", then it makes sense to say that they do indeed become "combatants", though unlawful ones. However, it is hard to reconcile this with the language of Additional Protocol I, either in its definition of "combatant" or that of "civilian". On the other hand, if a status definition of combatant is accepted, then such people cannot become "combatants" purely by action. Thus, to use the term "combatant" in such circumstances, whether "lawful" or "unlawful", is confusing. An "unlawful combatant" can only mean somebody entitled to the status of combatant but who acts outside the rules governing that status, thus depriving himself of the privileges that would normally belong to someone with combatant status.

To then use the term "enemy combatant", particularly if it is not clearly defined,[37] merely adds to the confusion. Traditionally, the term "enemy combatant" refers to legitimate combatants who are entitled to prisoner-of-war status. It is a new usage to describe those who are deemed to be unlawful belligerents as such. What term is left for those legitimate combatants belonging to enemy armed forces?

But do these linguistic semantics actually change practices on the ground? I believe they do. In 1949, wars were still largely fought by organised armed forces. Civilians would only be involved in hostilities either as part of a *levée en masse*, in which case they were entitled to combatant status, or as part of "organised resistance movements" which in turn were given recognition in the Third Geneva Convention.[38] Where independent civilians took part in armed conflict, it was more likely to be in the context of occupation and therefore was dealt with under the aegis of the law relating to occupation, that half way house between the law relating to the conduct of hostilities and that relating to law enforcement. States were entitled to take action against persons otherwise protected, but only in so far as their security interests required it.[39] Article 4 of GC IV provides that:

37 See criticism by the United States Supreme Court in Hamdi v. Rumsfeld, 43 ILM 1166 (2004) at p.1169.

38 Art. 4.A(2), Geneva Convention III, Roberts and Guelff, footnote 7, at p.245.

39 See for example Art.5, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949 (Geneva Convention IV), reprinted in

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

However, this very wide provision is then restricted somewhat in that:

> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[40]

It was assumed that most people taking part in hostilities would be members of armed forces or belligerents otherwise defined within the Hague Regulations.[41] The Third Geneva Convention specifically provides them with prisoner-of-war status. It also provides for cases where persons who qualify as prisoners of war have committed breaches of the laws of war.[42] Whilst they do not lose their status as prisoners of war, they can be tried and sentenced for such illegal acts. It was the Soviet bloc who resisted this and argued that such people should not be entitled to prisoner-of-war status at all.[43] Thus, it was belligerent status that primarily governed prisoner of war status and, according to the Soviet bloc, illegal conduct that could remove it. The Soviet bloc reservation was not generally accepted.[44] As has already been identified, the major example of where persons who were not entitled to belligerent status took part in hostilities was provided in World War II by resistance movements. The Third Convention sought to alleviate that by making specific provision for such movements provided that they met certain criteria.[45] Individual "unlawful belligerents" were less common and again restricted to occupied territory. The danger therefore was that they would be treated as common criminals under domestic law. As a result, it made sense

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Roberts and Guelff, footnote 7, at p.301, 303.

40 Art. 4, Geneva Convention IV, *ibid*, at p.302.

41 Art.1, Hague Regulations, *ibid*, at p.73.

42 Art.85, Geneva Convention III, *ibid*, at p.73.

43 See the reservation to Geneva Convention III of Albania and others, reprinted in Roberts and Guelff, footnote 7, at p.363.

44 The United Kingdom, for one, expressed doubt as to the validity of the reservation. See John Hyden, Soviet Attitudes to Prisoners of War, Journal of the Royal United Services Institute, Vol.130, No.3 (Sept. 1985), p.22, at p.24. See also Commentary on the Geneva Conventions of 12 August 1949 (Jean Pictet, ed.), Vol.III, ICRC, Geneva, 1960 at p.424.

45 Art.4, Geneva Convention III, Roberts and Guelff, footnote 7, at p.245.

to ensure that they benefited from some of the protections given by the Fourth Convention.

However, as times have changed, so too has the nature of warfare. One of the problems facing the negotiators of the Additional Protocols was this evolution, and the corresponding change in the nature of participants in conflict. It was in the light of this that Additional Protocol I divided people into two categories, "combatants" and "civilians".[46] Each was a status determination. A combatant could lose privileges if he committed unlawful acts but would not lose his status as a combatant.[47] In the same way, a civilian would also lose protection if he committed belligerent acts – but would not, by so doing, become a "combatant".

Article 51(3) of Additional Protocol I states:

> Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.[48]

I do not intend here to discuss either what is meant by "direct part" or "unless and for such time". The meanings of these phrases are under discussion by a Group of Experts brought together by the International Committee of the Red Cross (ICRC) and the Asser Institute in the Netherlands. The debate is intense.[49] What is more important is the extent of the loss of protection. The section referred to in Article 51(3) is Section I of Part IV which deals with the "General Protection Against Effects of Hostilities" of the civilian population. It runs from Article 48 to 67 and much is directed specifically to the protection of civilians from attack, particularly the principle of distinction. It is argued, with some force therefore, that where a civilian chooses to take a direct part in hostilities, he or she loses his protection against attack – but retains his other privileges, including his rights under the Fourth Convention. Yet, does this make sense in the light of the overall purpose of Additional Protocol I to draw a distinction between those who choose to take a direct part in hostilities and those who don't?

As has been pointed out above, the Fourth Geneva Convention is primarily designed to protect enemy civilians from an opposing belligerent. The Convention was drafted on the basis that such protection was needed as civilians were, in principle, innocent victims of war, not conducting belligerent acts. It was recognized that, in particular in occupied territory, civilians might engage in "activities hostile to the security" of the belligerent power, including spying and

46 See footnote 9.

47 Art.44(2), Additional Protocol I, Roberts and Guelff, footnote 7, at p.444.

48 Art.51(3), *ibid*, at p.448.

49 Reports can be found on the Asser Institute website at http://www.wihl.nl/ and on the ICRC website at http://www.icrc.org/Web/Eng/siteengo.nsf/iwpList74/459B0FF70176F4E5C1256DDE00572DAA.

sabotage.[50] However, that is different from the situation found today where, in many conflicts, it is difficult to ascertain those who are the regular "belligerents" and those who do not even begin to meet the criteria laid down in the treaties for "belligerent", or for that matter "combatant" status. Such people are the genuine "unlawful belligerents" in that they are taking a direct and continuous part in hostilities but failing to comply with the requirements for lawfully taking such part. This is not the case of the civilian who takes up arms briefly – or even the "farmer by day, fighter by night" situation. Many of these people are indistinguishable in their conduct from armed forces.

At present, it is argued that if captured, they are either prisoners of war under the Third Convention, or civilians who are entitled to treatment as civilian internees under the Fourth, assuming that they qualify within the nationality criteria.[51] However, if they do not qualify under the definition of prisoners of war, is it right that they should then be treated in accordance with the civilian status that they hold under the negative definition of "civilian" to be found in Article 50 of Additional Protocol I? This states that:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[52]

Does this entitle them to the protections of the Fourth Convention, even if by their conduct, they have lost protection under the relevant Section of the Protocol itself? If that is so, then the "unprivileged belligerent" receives certain privileges that the "privileged belligerent", as a prisoner of war, does not. For example, the privileged belligerent can be incarcerated as a prisoner of war simply because of who he is.[53] The test for the civilian internee is much tighter. Article 42 of GC IV states:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.[54]

Whilst this may, in the case of the "unprivileged belligerent", seem a comparatively simple hurdle to cross in the light of his actions, it requires continuous

50 Art 5 Geneva Convention IV, Roberts and Guelff, footnote 7, at p.303.

51 See Knut Dörmann, The Legal Situation of "Unlawful/Unprivileged Combatants", International Review of the Red Cross,Vol.85, No.849 (March 2003) at p.45.

52 Art.50(1), Additional Protocol I, Roberts and Guelff, footnote 7, at p.448.

53 Art.21, Geneva Convention III, *ibid*, at p.253.

54 Art.42, Geneva Convention IV, *ibid*, at p.315.

review. A prisoner of war can be held, on the basis of his status alone, until "the cessation of active hostilities".[55] The civilian internee on the other hand is entitled to reconsideration and review on a regular basis. Article 43 of the Fourth Convention provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.[56]

It is to be noted that there is almost a presumption in favour of release.

Similarly, when one looks at some of the conditions of internment, they reflect a different situation. Although many of the provisions relating to prisoners of war and civilian internees are the same, Article 116 of the Fourth Convention states:

> Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible. As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.[57]

Such a provision does not appear in the Third Convention for obvious reasons. It would be clearly impracticable to impose a requirement to permit family visits where such would require allowing aliens to cross enemy lines to visit prisoner of war camps. But, if it is accepted that prisoners of war – "privileged belligerents" – cannot be allowed such visits as a matter of right, then why, subject to Article 5,[58] should their unprivileged counterparts?

It is correct that "unprivileged belligerents" can be prosecuted for their belligerent acts as they have no "combatant immunity", but then "privileged belligerents" are also liable to prosecution if they act outside the scope of their privilege, i.e., in breach of the laws of armed conflict. The difference is in what they are permitted to do, not in any immunity from prosecution. Furthermore, the sheer numbers of "unprivileged belligerents" now appearing in modern day conflict makes it impossible to deal with the problem by way of criminal proceedings. This is exacerbated by the increasing influence of human rights law. The burden of proving,

55 Art.118, Geneva Convention III, *ibid*, at p.289.
56 Art.43, Geneva Convention IV, *ibid*, at p.315.
57 Art.116, Geneva Convention IV, *ibid*, at p.341.
58 Art.5, Geneva Convention IV, *ibid*, at p.303.

to a criminal standard, acts of belligerency (including complying with modern day evidential rules) may be too exacting and again would put the "unprivileged belligerent" in a stronger position than his "privileged" counterpart.

The law of armed conflict has always been pragmatic. It has to be because it recognizes the reality of armed conflict in a way that human rights law was never designed to do. It is this recognition that enables the statement to be made that military necessity cannot justify a breach of the laws because the laws are drafted with military necessity in mind.[59] However, this need to take into account the reality of conflict also means that the law must be interpreted in a manner that complies with that reality. If the law, for whatever reason, fails to reflect reality as the nature of conflict changes, then it will be ignored. At present, a strict reading of the law in relation to "unprivileged belligerents" would indeed seem to fly in the face of reality and thus risk being ignored. On the other hand, the solution proposed by Professor Dinstein, namely that civilians who take a direct part in hostilities become "combatants", whilst superficially attractive, runs entirely counter to the philosophy underpinning Additional Protocol I and would widen the divide between those States who are Parties to Additional Protocol I and those who are not.

Is there a "middle way"? I believe that there is but it does involve some "reinterpretation" of the legal texts. I would suggest that there are now three categories of persons, "privileged belligerents", who are, in principle, entitled to prisoner-of-war status, "civilians", who are protected and, if detained, come under the Fourth Geneva Convention, and "unprivileged belligerents", civilians who choose to take a direct part in hostilities and thus lose their protection as "civilians", both under the Additional Protocol and the Fourth Geneva Convention, for so long as they take such a direct part. To some this may sound a radical proposal but it could be suggested that the germs of such a solution are already to be contained in Additional Protocol I. Article 47 provides that "a mercenary shall not have the right to be a combatant or a prisoner of war."[60] Does this mean that he is a "civilian" and therefore protected under the Fourth Geneva Convention? A more sensible reading would be that, even though he fulfils the definition of "combatant" within the Protocol, he does not have the rights attached to such status and thus is an "unprivileged belligerent", with no prisoner-of-war status. However, he does not have the status of "civilian".

If it is accepted that there is this third category, then how are they to be treated if neither the provisions of the Third or Fourth Geneva Conventions are applicable? Are they in a legal "black hole",[61] as has been suggested in relation to the detainees in Guantanamo? The answer is most certainly not. Even without

59 See, for example, A.P.V.Rogers, Law on the Battlefield, 2nd Ed., Manchester University Press, 2004, at p.4.

60 Art.49, Additional Protocol I, Roberts and Guelff, footnote 7, at p.447.

61 See Johan Steyn, Guantanamo Bay: The Legal Black Hole, 53 ICLQ (2004) 1.

reliance on fundamental human rights standards, it is possible to look at the provisions of Common Article 3 to the Geneva Conventions,[62] as well as Article 75 of Additional Protocol I.[63] In the case of the former, the International Court of Justice in the Nicaragua Case said:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect ... 'elementary considerations of humanity'.[64]

Article 75, laying down "fundamental guarantees" which apply to "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol", is generally accepted as reflecting customary international law.[65]

It is fair to point out that the current position of the United States in relation to both Common Article 3 and Article 75 is unclear. In one of the now infamous "Torture Memos", the Justice Department denied the applicability of Common Article 3 to the "war on terror" arguing that it only applied in non-international armed conflicts, defining this as "a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting Parties".[66] Whilst this is correct as a matter of treaty law, it flies in the face of the declaration by the International Court of Justice which has found general favour. Similarly, despite an assurance by Michael Matheson, then Deputy Legal Adviser at the State Department that, "[w]e support in particular the fundamental guarantees contained in article 75",[67] more recent statements by the current Administration have

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62 Art.3, common to the four Geneva Conventions, Roberts and Guelff, footnote 7, at pp.198, 223, 245 & 302.

63 Art.75, Additional Protocol I, *ibid*, at p.463.

64 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits), 76 ILR 349, at p.448.

65 See Chapter 32, Fundamental Guarantees, in Customary International Humanitarian Law, Vol.I, Rules (Jean-Marie Henckaerts and Louise Doswald-Beck eds.), CUP, 2005, at p.299.

66 See Memorandum for William J. Haynes II, General Counsel, Department of Defense from John Yoo of 9 January 2002, Application of Treaties and Laws to al Qaeda and Taliban Detainees, in The Torture Papers (Karen Greenberg and Joshua Dratel eds.), CUP 2005, at p.44.

67 See Remarks by Michael J. Matheson to the Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am.U.J.Int'l L.& Pol'y, (1987) 415, at p.427.

cast doubt on the Matheson article and on the acceptability of Article 75.[68] Indeed, it seems to have been argued that "unprivileged belligerents" have no rights at all.[69] If this were indeed so, then the situation would be serious and the "black hole" would exist. However, if it is accepted that the fundamental guarantees are applicable, then the "unprivileged belligerents" are indeed protected but not to the same extent as prisoners of war or civilians under the Fourth Geneva Convention. This would seem appropriate in view of their different status. One point should, however, be clear. As with prisoners of war and civilian internees, unprivileged belligerents can only be held as such until the end of active hostilities whereupon they must be released unless they have been tried and sentenced by due process of law for the acts that made up their unlawful belligerency.

This is not the place to go into detailed discussions on the the rights and wrongs of the decision by the United States Administration to deny prisoner-of-war status to all opposing forces in Afghanistan. Suffice it to say that, even if such decisions were held to be correct, this would only justify the detention of such "unprivileged belligerents" for as long as active hostilities continued in Afghanistan, as was recognized by the Supreme Court.[70] Much of the debate on this issue has been clouded by the decision to categorize the campaign against transnational terrorism as a "war" with consequent confusion over the appropriate legal regime to apply.

As will be seen from the above, the practical result of this analysis is much the same as that achieved by Professor Dinstein in his conduct based definition of "combatant". However, it avoids exacerbating the philosophical rift between the Additional Protocol I States and those who have not ratified and even actively oppose. Additional Protocol I is here to stay, ratified by some 165 countries. The phenomenon of persons who do not fit the traditional definitions of "belligerents" or "combatants" taking up arms and conducting hostilities is also here to stay and a practical solution must be found which meets military reality whilst providing humanitarian guarantees. If that can be done in a manner that provides an acceptable solution for all sides of the divide without compromising either legal philosophy, then it is at least worth considering. Maybe, Professor Dinstein is right as usual and the divide is as narrow as that.

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68 See the Errata Sheet of 27 September 2004 to the 2005 Operational Law Handbook, issued by the International and Operational Law Department, The Judge Advocate General's Legal Center and School, US Army, which states that Michael Matheson's article "takes an overly broad view of the US position and may cause some confusion as to US Policy."

69 In his Memorandum of 7 February 2002, Humane Treatment of al Qaeda and Taliban Detainees, President George W. Bush said, "Of course, our values as a Nation….. call for us to treat detainees humanely, including those who are not legally entitled to such treatment" (emphasis added). Reprinted in The Torture Papers, footnote 66, at pp.134-5.

70 Hamdi v. Rumsfeld, 43 ILM 1166 (2004), at p.1171.

Chapter 13

"Unlawful/Enemy Combatants:" Interpretations and Consequences

*Jelena Pejic**

Introduction

Following the heinous attacks of September 11, 2001, the term "unlawful combatant" was one of the key legal notions associated with the "war on terrorism". Today – even though one cannot be sure exactly when and by whom the shift was made – the term "enemy combatant" seems to have become the preferred designation for persons involved in or associated with acts of terrorism. The first part of this article briefly examines the concepts of "combatant" and "unlawful combatant" under international humanitarian law. The second analyzes the idea of "enemy combatant" in the context of the "war on terrorism" with a view to suggesting a different legal reading of its elements. Ultimately, the analysis leads to the conclusion that the introduction of an "enemy combatant" designation would jeopardize the structure and rationale of existing international law rules governing the protection of persons.

I Combatant Status under International Humanitarian Law

The question of who is a combatant under international humanitarian law has been so extensively examined and debated that it is mentioned here only to lay the groundwork for the sections that follow. To begin with, the term "combatant", as well as derivations such as "unlawful combatant", "enemy combatant", "unprivileged combatant" and "unprivileged belligerent", are germane only to international armed conflict. While "combatant" is sometimes used when referring to non-international armed conflict, such usage is colloquial; as a matter of

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law, "combatant" status (or the concomitant prisoner of war status) does not exist in internal armed conflicts.[1]

Combatants are persons who have the right to participate directly in hostilities.[2] The laws of war provide combatant status to members of the regular armed forces (except for medical personnel and chaplains). Certain irregular armed forces have the status under specified conditions.[3] Apart from the right to participate directly in hostilities, combatants enjoy immunity upon capture from criminal prosecution for lawful acts of war, such as attacks against military objectives.

The corollary of combatant immunity is that captured combatants may be interned as prisoners of war until the end of active hostilities without any form of process.[4] While prisoners of war may not be tried for lawful acts of war, they may be criminally prosecuted for war crimes or other criminal acts committed before or during internment. The Third Geneva Convention provides that trial will be in the same courts, using the same procedure, as for members of the armed forces of the Detaining Power.[5] Even if acquitted, prisoners of war may be interned by the Detaining Power until the end of active hostilities.

In case of doubt about the status of a person who has committed a belligerent act, such person must upon capture be treated as prisoner of war until his or her status has been resolved by a "competent tribunal".[6] While there has recently been much misunderstanding about the role and procedure to be applied by "Article 5" tribunals, it is fairly clear that they were not envisaged as judicial bodies obliged to comply with fair trial guarantees. The purpose of these tribunals, usually established close to the battle zone, is to individually determine the status of captured belligerents, not to pronounce on their criminal guilt or innocence. As the Third Geneva Convention is silent on the procedures to be followed, procedural issues fall within the purview of the Detaining Power. The 1997 US military's regulation on "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" provides a good example of how article 5

1 Persons who do not or no longer take an active part in hostilities in non-international armed conflict are covered by the rules of Article 3 common to the Geneva Conventions, of the Second Additional Protocol to the Geneva Conventions if ratified, of customary international humanitarian law and of human rights law. The texts of the 1949 Geneva Conventions and of their two Additional Protocols of 1977 is available at www.icrc.org.

2 AP I, article 43 (2).

3 The conditions for combatant and prisoner of war status are provided for in GC III, article 4 and AP I, articles 43 and 44.

4 GC III, article 118. But see also articles 109-117 regarding the direct repatriation and accommodation in neutral countries of prisoners of war before the cessation of active hostilities.

5 GC III, article 102.

6 Ibid, article 5.

– as supplemented by certain provisions of Additional Protocol I – can be elaborated at the domestic level.[7]

A The Meaning of "Unlawful Combatant"

The issue of who is an "unlawful combatant" needs to be examined in relation to the rules governing both the conduct of hostilities and the treatment of persons in the power of the adversary. The former define a civilian as any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of the First Additional Protocol to the Geneva Conventions.[8] Based on the plain language of the text, which is generally considered to reflect customary international law, it may be said that there are no "gaps" in protection as regards who may and who may not be attacked. Simply put, combatants may be targeted, while civilians may not.

Pursuant to both treaty and customary law, the civilian population and individual civilians enjoy general protection against dangers arising from military operations. This means, *inter alia,* that the civilian population and individual civilians may not be the object of attack, that indiscriminate attacks (including those that would violate the rule of proportionality) are prohibited, and that civilians may not be used to shield military objectives or to shield, favour or impede military operations.[9]

The one exception to civilian immunity from direct attack involves civilian participation in hostilities. According to Article 51 (3) of the First Additional Protocol to the Geneva Conventions (and Article 13 (3) of the Second Additional Protocol in the case of non-international armed conflict), civilians enjoy general protection against the effects of hostilities, i.e. protection from direct attacks, "unless and for such time as they take a direct part in hostilities".[10] Two points are worth noting.

First, there is insufficient agreement among military and legal experts about what acts may be said to constitute "direct participation" and how the temporal aspect ("for such time as") should be interpreted. Given the very grave consequence of targetability, the notion of direct participation warrants comprehensive examination. This is all the more important having in mind that civilians participate in hostilities in both international and non-international armed conflicts

7 United States, Army, Navy, Air Force and Marine Corps, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" (AR 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1) (Oct. 1, 1997), at http://neds.daps.dla.mil/Directives/3461_6.pdf.

8 AP I, article 50 (1).

9 Ibid, article 50 (2), (4), (5), (7).

10 Ibid, article 51 (3).

and that they contribute to the asymmetrical nature of some ongoing armed conflicts.[11]

The second point to be emphasized is that civilians who take a direct part in hostilities may be prosecuted under the domestic law of the Detaining Power for having taken a direct part in hostilities, as well as for any war crimes they may have committed**.** In other words, they do not enjoy a combatant's immunity from criminal prosecution for lawful acts of war. It must also be noted, however, that international humanitarian law does not prohibit civilians from taking up arms, as evidenced by the fact that participation in hostilities is not a violation of international humanitarian law and therefore not a war crime *per se*.

Civilians who take a direct part in hostilities in international armed conflict are often referred to as "unlawful combatants", "unprivileged combatants" or "unprivileged belligerents", even though these terms are not found in international humanitarian law treaties. Along with civilians who participate directly in hostilities, the term "unlawful combatants" also encompasses members of militias and of other volunteer corps, including those of organized resistance movements, who belong to a party to an international armed conflict, but who fail to fulfil the conditions laid down in Article 4 A (2) of the Third Convention. As summed up by one legal commentator, whose definition will also be used for the purposes of this paper, the term unlawful combatant "is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy".[12]

B The Legal Status of "Unlawful Combatants"

As already mentioned, "unlawful combatants" may be subject to direct attack while directly participating in hostilities. They may also be prosecuted under domestic law for acts that would otherwise be lawful under international humanitarian law. It is the specific status and scope of protection under international humanitarian law of "unlawful combatants" who have fallen into the hands of the adverse party that continues to generate controversy among legal practitioners and scholars.

At one end of the spectrum are those, a minority admittedly, who assert that "unlawful combatants" are outside any international humanitarian law protec-

11 The ICRC and the TMC Asser Institute have held three Informal Expert Meetings in The Hague and Geneva in 2003, 2004 and 2005 focused on the legal and practical implications of "direct participation in hostilities" by civilians. The summary reports of the Expert Meetings may be found on the ICRC's website at www.icrc.org. A fourth Expert Meeting, at which possible interpretive guidance on the notion of "direct participation" will be discussed will take place in 2006.

12 Knut Doermann, "The Legal Situation of Unlawful/Unprivileged Combatants", International Review of the Red Cross, March 2003, Vol. 85, No. 849, at p. 46.

tion.[13] The middle ground is held by those who believe that "unlawful combatants" are covered only by Article 3 common to the Geneva Conventions and/or by Article 75 of the First Additional Protocol to the Conventions.[14] Both Article 3 and Article 75 contain safety net provisions which, because of their fundamental nature, must be observed at all times.[15] The two articles do not, however, provide any guidance on many substantive and procedural legal issues, nor on how to resolve practical questions, that arise in relation to captured "unlawful combatants".

At the other end of the spectrum are those, including the author, who argue that "unlawful combatants" who fulfil the nationality criteria provided for in the Fourth Geneva Convention remain protected persons under that Convention. "Unlawful combatants" who do not fulfil the nationality criteria are covered by Article 75 and other rules of customary international humanitarian law.

The position that civilians who have taken a direct part in hostilities are covered by the Fourth Convention is based on the plain language of Article 4 of that Convention:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

While the scope of personal application is thus formulated in the most comprehensive way, it is subject to limitations provided for in the next paragraph of Article 4:

> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent state, shall not be regarded as

13 See Ingrid Detter, The Law of War, Cambridge University Press, 2000, at p. 136.

14 See Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, 2004, at pp. 29-33. See also Adam Roberts, "The Laws of War in the War on Terror", in Terrorism and the Military, International Legal Implications, Wybo P. Heere (ed.), TMC Asser Press, 2003, pp. 65-92.

15 For the customary law status of AP I, article 75 see, *inter alia*, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International law and the 1977 Protocols Additional to the 1949 Geneva Conventions, The American University Journal of International Law and Policy, Vol. 2, 1987, at pp. 427-428.

> protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

While the second sentence is somewhat confusing, the ICRC Commentary clarifies that on the territory of belligerent states protection is accorded to persons of foreign nationality and those without nationality. The exception refers to nationals of a neutral or co-belligerent state, who are unprotected so long as the State in question has normal diplomatic representation in the State in whose territory they are located. In occupied territories, protection is accorded to all persons who are not of the nationality of the Occupying Power. The sole exception are nationals of a co-belligerent state when that State has normal diplomatic representation in the occupying State.[16]

Finally, according to the fourth paragraph of Article 4, persons covered by the First, Second or Third Geneva Convention are not considered protected persons within the meaning of the Fourth Convention.

The position that civilians who may have taken a direct part in hostilities remain covered by the Fourth Convention – if they fulfil the nationality criterion – is also borne out by the derogation clauses of that treaty. Article 5, which allows for the withdrawal of certain rights and privileges to a person "definitely suspected of or engaged in activities hostile to the security of the State" who is detained in the territory of a Party to the conflict, expressly uses the term "individual protected person".[17] Likewise, Article 5 speaks of an "individual protected person" when it provides that rights of communication under the Convention may be denied those detained as spies, saboteurs or persons under definite suspicion of activity hostile to the Occupying Power's security in occupied territory.[18] Logically, acts of "sabotage" and engaging in an "activity hostile" to the security of the State or Occupying Power include direct participation in hostilities by civilians; thus "unlawful combatants" who meet the nationality criteria are "protected persons" under the Convention.

Article 45 (3) of the First Additional Protocol further buttresses this view:

> Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

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16 Jean Pictet (ed.), Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958 (hereinafter Commentary IV), at p. 46.

17 GC IV, article 5 (1).

18 Ibid, article 5 (2).

The "any person who has taken part in hostilities", and "who does not benefit from more favourable treatment" wording demonstrates that the Protocol recognizes the applicability of the Fourth Convention to certain categories of "unlawful combatants." Otherwise its reference to that Convention would be superfluous. A similar conclusion may be drawn from the second sentence of the same article, in which the drafters clearly assumed that certain categories of "unlawful combatants" in occupied territory are covered by the Fourth Convention. If that were not the case, there would be no basis for the specific limitation introduced in respect of Article 5 of the Fourth Convention.

The view that some "unlawful combatants" are covered by the Fourth Geneva Convention is also enunciated in certain military manuals. In a section dealing with "Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War", the 1956 US Army Manual provides that: "If a person is determined by a competent tribunal, acting in conformity with Article 5 (GC III) not to fall within any of the categories listed in Article 4 (GC III), he is not entitled to be treated as a prisoner of war. He is, however, a "protected person" within the meaning of Article 4 (GC IV)".[19]

It has already been submitted that an "unlawful combatant" who does not fulfil the nationality criteria of Article 4 of the Fourth Geneva Convention is, at a minimum, covered by the provisions of Article 75 of Additional Protocol I[20] and other rules of customary international law. The personal scope of application of the "Fundamental Guarantees" provisions is formulated to ensure that no individual in the power of a party falls outside international humanitarian law protection. The wording expressly encompasses all persons who are not otherwise covered by the Geneva Conventions and the Protocol:

> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based on (…).

The discussion above has not dealt with the substantive protections provided to "unlawful combatants" under international humanitarian law.[21] Rather, the aim was to demonstrate that unprivileged belligerency is a regular feature of international armed conflicts and that humanitarian law regulates the practice, even though greater specificity would be welcome. Thus, civilians who take a direct

19 US Army Manual FM 27-10, The Law of Land Warfare, 1956, at pp. 31, 98 et seq.

20 For the customary law status of AP I, Article 75 see note 15 above.

21 For an excellent overview of this issue see Knut Doermann, note 12 above, pp. 60-70.

part in hostilities lose protection from attack during such participation and are, upon capture, either protected by the Fourth Geneva Convention if they fulfil the nationality criteria or, at a minimum, covered by Article 75 of Additional Protocol I if they do not.

The view that there is an "intermediate" category of persons who are neither combatants nor civilians and are therefore outside humanitarian law coverage is not borne out by the language of the relevant treaty texts.[22] This position can also be questioned from the perspective of the logic and spirit that underlie the rules.

Unless one is advocating a complete departure from the values that underpin international humanitarian law, it is difficult to see why the current rules, inadequate in some aspects as they may be, present an obstacle to dealing with civilians who have taken a direct part in hostilities. Civilians may be targeted during direct participation and may be prosecuted under domestic law for having done so. They may be interned for the duration of hostilities and, while in detention, may be denied certain rights and privileges. It has yet to be explained what additional measures could be implemented with respect to "unlawful combatants" that would not run the risk of leading to violations of the right to life, physical integrity and human dignity that lie at the core of humanitarian law.

II The Notion of "Enemy Combatant"

On its face, the term "enemy combatant" has no specific legal meaning. It is a colloquial phrase of wide ambit that may be used to describe a person fighting on the enemy side in an international armed conflict, whether as a member of the adversary's armed forces ("lawful" or "privileged" combatant) or as a person directly participating in hostilities without being entitled to do so ("unlawful combatant" or "unprivileged belligerent"). In legal literature, the term has most often been used in the latter sense. [23]

Shortly after the launch of the "global war on terrorism" and for some time thereafter, "unlawful combatant"[24] was the generic term domestically used to encompass persons detained by the United States as part of that "war". Since then, the term "unlawful combatant" has been almost entirely replaced with the term "enemy combatant" in public discourse; it has also been given a more specific meaning. For the purposes of this paper, the definition contained in the Draft

22 Kenneth Watkin, "Combatants, Unprivileged Belligerents and Conflicts in the 21st Century", International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research, at p. 18 (www.hsph.harvard.edu/hpcr): "Ultimately, the question may not be if there is a third category, but rather whether international humanitarian law has fully and realistically accounted for the civilian who does take a part in hostilities".

23 Ibid, p. 4.

24 White House Fact Sheet, Status of Detainees at Guantanamo (February 7, 2002), at www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

Joint Doctrine for Detainee Operations of March 2005[25] will be used. While it is probable that the final text of the Joint Doctrine will differ greatly from the Draft, the definition is useful because of its comprehensiveness. It is, therefore, not being referred to as a definition "set in stone", but simply as a representative illustration of the elements of notion itself.

According to the Draft Joint Doctrine, "enemy combatant" is a detainee classification "additional" to those of the "Geneva Convention": "Enemy Prisoner of War", "Civilian Internees", "Retained Personnel" and "Other Detainees". The Draft Doctrine definition provides:

> 1. Enemy Combatant (EC). Although they do not fall under the provisions of the Geneva Convention, they are still entitled to be treated humanely, subject to military necessity, consistent with the principles of GC, and without any adverse distinction based on race, color, religion, gender, birth, wealth or any similar criteria, and afforded adequate food, drinking water, shelter, clothing, and medical treatment; allowed the free exercise of religion consistent with the requirements of such detention. There is a comprehensive list of terrorists and terrorist groups identified under Executive Order 13224, located at http://www.treas.gov/ofac/. Anyone detained that is affiliated with these organizations will be classified as EC. Furthermore, there are individuals that may not be affiliated with the listed organizations that may be classified as an EC. On these specific individuals, guidance should be obtained from higher headquarters. As defined by the Deputy Secretary of Defense, an EC is defined as: "Any person that US or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror an enemy combatant includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which United States is engaged in an armed conflict. This may include those individuals or entities designated in accordance with references E or G, as identified in applicable Executive Orders approved by the Secretary of Defense." (Deputy Secretary of Defense global screening criteria, Feb 20, 2004).
> Reference E – Comprehensive List of Terrorists and Terrorist Groups Identified Under Executive Order 13224 (updates at http://www.treas.gov/ofac/).
> Reference G Patterns of Global Terrorism. Department of State, 2002 (updates at http://www.state.gov/s/ct/rls/pgtrpt/).[26]

25 Draft Joint Doctrine for Detainee Operations, Joint Publication 3-63, Final Coordination, 23 March 2005, at http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf.

26 Ibid, at pp. I-11 and I-12.

This definition is based on the premise that the "war on terror" is an "armed conflict" and that an "enemy combatant" is any person whom "US or allied forces could properly detain under the laws and customs of war". The classification includes both individuals and groups listed as "terrorist", as well as individuals who may not be affiliated with any of the listed organizations.

It must be noted that none of the elements of the definition are particularly new. There has, since September 11, 2001, been an profusion of press releases, legal memoranda and scholarly articles examining the various aspects of the definition.[27] Therefore, a brief analysis of the respective elements based on different legal interpretations is useful.

A The "War on Terrorism" as an Armed Conflict

The definition of "enemy combatant" is linked to the existence of an "armed conflict". The posited "armed conflict" involves Al Qaeda, the Taliban "or another international terrorist organization". Given that, to the author's knowledge, no official or agency of the United States has suggested that the "war on terrorism" is a non-international armed conflict, it must be concluded that the "war" is to be qualified as a global "international" armed conflict. This approach may be questioned on both legal and practical grounds.

While the term "war on terrorism" has very much become part of daily parlance, one needs to examine, based on the rules of humanitarian law, whether the fight against terrorism may be characterized as an armed conflict in the legal sense. The answer is multi-layered. It is submitted that the "war on terrorism" may in some situations be an international armed conflict, in other instances a non-international armed conflict, and in still other cases not an armed conflict in the legal sense at all.

Under the Geneva Conventions, international armed conflicts are those fought between states. Thus, the 2001 war between the US-led coalition and Afghanistan, waged as part of the "war on terrorism", was initially an international armed conflict.[28] Humanitarian law does not envisage an international

27 See, for example, Michael Newton, "Unlawful Belligerency After September 11: History Revisited and Law Revisited" in New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts, David Wippman and Matthew Evangelista (eds.), Transnational Publishers, 2005, pp. 75-110.

28 The fact that the then government of Afghanistan, the Taliban regime, was not internationally recognized has no bearing on the applicability of the Geneva Conventions. Their applicability to armed conflicts involving a party whose government is not recognized is explicitly provided for in the Third Geneva Convention, according to which prisoner of war status shall be granted to "Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power" (Article 4 (A) (3)). After June 2002 the hostilities taking place in various parts of Afghanistan can be qualified as a non-international armed conflict, as explained further below. The same reasoning may be applied to the war

armed conflict between states and non-state armed groups because states have not been willing to accord non-state armed groups the privileges enjoyed by members of regular armed forces. The exception is an armed conflict provided for in Article 1(4) of the First Additional Protocol. However, as is well known, the inclusion of such conflicts in the Protocol is one reason why some countries have not ratified that treaty.

To say that one is witnessing a global, international war against groups such as Al Qaeda would mean that under the laws of war their followers could – and should – be considered equal in rights and obligations to members of armed forces, i.e. lawful combatants. It was already clear in 1949 that no nation would contemplate exempting members of non-state armed groups from criminal prosecution under domestic law for acts that are lawful under international humanitarian law. This immunity is, as previously noted, the crux of combatant/prisoner of war status. The drafters of the Geneva Conventions, which grant combatant and prisoner of war status under strictly specified conditions, were fully aware of the political and practical realities of international armed conflict and crafted the treaty provisions accordingly.

The "war on terrorism" can also take the form of a non-international armed conflict, such as the one taking place in parts of Afghanistan since the convening of the *Loya Jirga* and the establishment of the new internationally recognized Afghan government in June 2002. This conflict, involving the Afghan authorities supported by a coalition of allied States against a variety of non-state armed groups (among them remnants of the Taliban and Al Qaeda), is non-international in character because it is being waged with the consent and support of the Afghan government and does not involve two opposing States.

The ongoing hostilities in Afghanistan are thus governed by humanitarian law rules applicable to non-international armed conflicts, found in both treaty law (only Article 3 common to the Geneva Conventions since neither Afghanistan nor the US are party to Additional Protocol II) and customary humanitarian law. This body of rules would apply in other situations where a definable non-state armed actor (or several of them) is "party" to an armed conflict and in which the level of violence has reached that of an armed conflict.

The question remains of whether the totality of terrorist acts carried out in various parts of the world (outside situations of armed conflict such as Afghanistan or Iraq) constitute one and the same armed conflict in the legal sense. Can it be said, in other words, that the bombings in Madrid, London, Bali, New Delhi, and

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in Iraq, which was initially an international armed conflict (March 2003), but can be qualified as a non-international armed conflict after the June 2004 UN Security Council resolution which determined that international forces were continuing to operate in Iraq with the consent of the Iraqi authorities. See Security Council Resolution 1546 (2004), S/RES/1546 (2004). See also Knut Doermann and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", German Yearbook of International Law, Volume 47, 2004, pp. 293-342.

other locations are attributable to one and the same party? Can it, in addition, be claimed that the level of violence involved in each incident has reached that of an armed conflict? On both counts, it would appear not.

As regards the existence of a party to the conflict, it is difficult to see how a loosely connected, clandestine network of cells, and even more so separate groups with no link to other groups except perhaps a shared ideology, could qualify as a "party" to an armed conflict in the law of war sense. Both legally and in practice, parties to an armed conflict are armed forces or armed groups with a certain level of organization, command structure and capacity to implement humanitarian law rules. Based on available factual evidence, it is submitted that the terrorist acts being perpetrated at geographically distant points across the globe cannot be attributed to a "party" as a matter of law.[29]

Regarding the requisite level of violence, it is similarly difficult to see how the violence, which has been perpetrated separately, could be considered to have factually reached the threshold of an "armed conflict". Moreover, the way in which the authorities in the various victim States dealt with the respective situations showed that they did not consider themselves to be in an armed conflict, either *de jure* or *de facto*.

By way of example, the Spanish authorities did not apply conduct of hostilities rules in dealing with the Madrid train bombing suspects in March 2004, which they would have been entitled to do if they had implemented an armed conflict paradigm. Humanitarian law rules would have permitted them to directly target the suspects (who had holed up in a residential building on the outskirts of the city), and even to cause "collateral damage" to civilians and civilian objects in the process as long as the incidental damage was not excessive in relation to the "value" of the suspects as military objectives. Instead, they applied law enforcement rules and procedures. They attempted to capture the suspects for later trial and took care to evacuate nearby buildings in order to avoid harm to persons living nearby and to neighboring buildings and objects.[30] Other States have dealt with terrorist acts in a similar manner and will likely continue to do so.

To summarize, every situation of organized armed violence arising from or in response to terrorism must be examined on a case-by-case basis. The circum-

29 An unnamed senior Western official who monitors the activity of terrorist groups told the New York Times that the threads between the London, Madrid and Bali attacks were "not organizational". "They are threads of the mind". Quoted from Raymond Bonner, "No Qaeda Link Seen in Bali Suicide Bombings", New York Times, October 7, 2005, at www.nytimes.com/2005/10/07/international/asia/07bali.html. Bonner's lead reads: "Indonesia's counterterrorism forces say the suspected suicide bombers who carried out the attack in Bali last Saturday appear to have been a small group with no prior criminal record or link to a large organization like Al Qaeda, giving the case echoes of the London subway bombings in July".

30 See BBC News "Madrid Suspects Killed in Blast" at: www.news.bbc.co.uk/I/hi/world/europe/3597443.stm.

stances of each will determine whether it legally and factually meets the qualifying conditions as an armed conflict (international or non-international). No "one size fits all" legal approach to terrorism, particularly as to the juridical nature of the situation and the classification of suspected terrorists, is, or has proven to be, feasible in practice.

An additional point in relation to the legal qualification of the "war on terrorism" is that it has been suggested in public discourse, as well as in legal writing, that this "war" is a "new" type of international armed conflict, governed not by the rules of international humanitarian law, but by the principles of the Geneva Conventions or by customary international law.[31]

This analysis poses grave risks for all those potentially involved in, as well as for those affected by, acts of terrorist violence. The Geneva Conventions are among the most widely ratified international treaties (192 parties to date) and are themselves considered largely to reflect customary law. To maintain that the "war on terrorism" is governed by "principles" or "customary law rules" – which are necessarily rather broad in formulation and about which there is disagreement – is to introduce a level of uncertainty about the applicable legal framework that cannot be deemed acceptable from a practical or humanitarian point of view.

Even if, for the sake of argument, one tried to envisage the principles or rules that would govern a "non-treaty" international war, they could not be different from the current humanitarian law regime unless one were prepared to countenance a return to what would essentially be lawlessness. Therefore, the principle of distinction and other rules on the conduct of hostilities would have to be respected, as would many already existing international humanitarian law treaty standards on the rights and treatment of persons in the hands of the adversary.

B Detention under the Laws and Customs of War

The second component of the definition of "enemy combatant" is that it pertains to persons "who could properly be detained under the laws and customs of war". This begs the question of what is the scope and content of the expression "laws and customs of war".

Whatever scope and content were intended, the application of the laws and customs of war to the detention of "enemy combatants" is premised on a legal

31 See William K. Lietzau, "Combating Terrorism: Law Enforcement or War?" in Terrorism and International Law, Challenges and Responses, Michael N. Schmitt and Gian Luca Beruto (eds.), International Institute of Humanitarian Law and George C. Marshall European Center for Security Studies, 2003, at p. 80. ("In making these and related decisions about the treatment accorded our terrorist enemies, we are reminded daily that the current international law templates do not provide guidance clearly applicable to present circumstance. Simply put, we are operating in areas not addressed by applicable treaties and thus are participating in the development of customary international law".).

interpretation according to which the totality of the "war on terrorism" is an armed conflict in the legal sense. As suggested above, the "war on terrorism" can involve international and/or non-international armed conflict or counter-terrorism measures that fall outside armed conflict as such. It is submitted that the status and rights of detainees captured in the fight against terrorism should be determined accordingly.

Detention in international armed conflict. As noted, the detention of prisoners of war under the relevant rules of international humanitarian law does not require administrative or judicial review while the international armed conflict in relation to which they were detained is ongoing. Prisoners of war may be detained until the end of active hostilities in an international armed conflict, but are then entitled to release,[32] except for those against whom criminal proceedings are pending.[33] In the latter case, a prisoner of war may be held through completion of the criminal proceedings and, if applicable, until any sentence has been served.[34]

Under the relevant provisions of the Fourth Geneva Convention, protected persons under that Convention may be subject to internment (or assigned residence) "only if the security of the Detaining Power makes it absolutely necessary".[35] Those so detained must be released as soon as the reasons which necessitated internment no longer exist.[36] Internment shall cease as soon as possible after the close of hostilities.[37]

A protected person who has been interned is entitled to have his or her internment reconsidered as soon as possible by an appropriate court or administrative board.[38] If the internment is maintained, the court or board shall periodically, and at least twice yearly, review the case with a view to favourable amendment of the initial decision if circumstances permit.[39]

It should be stressed that the automatic periodic review referred to in the Fourth Convention is intended to provide an additional safeguard for persons interned once their initial request for release consideration has been rejected. It assumes that, as confirmed by the Fundamental Guarantees provisions of Article 75 (3) of the First Additional Protocol, the person has been informed of the reasons for internment[40] and has been afforded a right to request reconsideration.

32 GC III, article 118.

33 GC III, article 119.

34 Ibid.

35 GC IV, articles 41 and 42. In occupied territory internment is governed by GC IV, Article 78.

36 GC IV, article 132.

37 GC IV, article 133.

38 GC IV, article 43.

39 Ibid.

40 AP I, article 75 (3).

In any case, the procedure provided for is a minimum; it will advantageous if better safeguards, such as examination of cases at more frequent intervals or the setting up of a higher appeals court, are provided for by the Detaining Power.[41] One such safeguard not mentioned in the Convention would be the provision of legal counsel to persons appealing the original internment decision or undergoing periodic review.

Persons who may be interned pursuant to the Fourth Geneva Convention for reasons of security encompass, as noted above, belligerents who do not qualify for prisoner of war status, as well as civilians interned because they are deemed to pose a security risk. These include persons who have directly participated in hostilities without being authorized to do so "(unlawful combatants"), provided they fulfil the nationality criteria of the Fourth Convention.[42] Under defined conditions, some of the rights and privileges of such persons may be curtailed if their exercise would be prejudicial to the Detaining Power's security,[43] but they remain, in all circumstances, protected by the Fundamental Guarantees provisions of Additional Protocol I as a matter of customary law,[44] as well as by other rules of customary law.

Those who do not meet the Fourth Geneva Convention's nationality criteria are, at a minimum, entitled to the Fundamental Guarantees of Additional Protocol I [45] and to the protection of other rules of customary international law. While the procedure governing the internment of this category of persons is not specified in the relevant treaties, a core of procedural principles and safeguards that govern the internment of this and other categories of persons exists.[46]

It is almost superfluous to reiterate that persons who take a direct part in hostilities without being entitled to do so may be criminally charged and tried under the domestic law of the detaining state for such participation**.** Provisions regulating the fair trial rights of internees subject to criminal proceedings are laid out in the Fourth Geneva Convention,[47] and in the relevant provisions of the Article 75 of Additional Protocol I.[48]

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41 Commentary IV, article 43, p. 261.

42 GC IV, article 4.

43 GC IV, article 5.

44 AP I, article 75.

45 Ibid.

46 For a more detailed presentation of what those standards might be see Jelena Pejic "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", International Review of the Red Cross, June 2005, Vol. 87. No. 858, pp. 375-391.

47 GC IV, article 126.

48 AP I, article 75 (4).

Detention in non-international armed conflict. International humanitarian law applicable in non-international armed conflict does not specify the distinction between "internment" and "detention" of persons whose liberty has been restricted.

Given that internment is a deprivation of liberty associated only with armed conflict, it may be interpreted as the deprivation of liberty for security reasons, without the person involved being subject to criminal charges (i.e. equivalent to peacetime administrative detention). Detention, on the other hand, also includes the deprivation of liberty of persons subject to criminal charges (pre-trial detention). This distinction is employed for the purposes of this article.

While international humanitarian law treaties do not regulate the procedure applicable to internment in non-international armed conflict in any detail, there is no doubt that both customary international humanitarian law and international human rights law prohibit unlawful/arbitrary deprivation of liberty.[49] Whether a deprivation of liberty is lawful or not must be judged on the basis of the grounds for the detention and on the procedure followed. A valid reason for the deprivation of liberty must exist with regard to both the initial deprivation and its continuation.

When a person is interned in relation to a non-international armed conflict, he or she must, as a minimum, be informed promptly, in a language he or she understands, of the reasons for which the measure was taken.[50] In addition, internment should be subject to the effective control of an independent and impartial judicial body before which internees may, in particular, challenge the lawfulness of their internment and obtain release if found unlawful.[51]

The right to challenge the lawfulness of one's detention (habeas corpus) is recognized in most, if not all, domestic legal systems and considered to be non-derogable as a matter of human rights jurisprudence.[52] Further, international human rights instruments and jurisprudence provide for the right to legal assist-

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49 Thus, unlawful confinement of civilians is a grave breach of the Fourth Geneva Convention (article 147). The Elements of Crimes for the International Criminal Court state that unlawful confinement may be in relation to any person protected under one of the Geneva Conventions and not only in relation to civilians (Elements of Crimes of article 8(2)(a)(vii)). The right to liberty and security of person is a fundamental right provided for in article 9 of the International Covenant on Civil and Political Rights (ICCPR), and is also guaranteed by the regional human rights treaties.

50 *Inter alia* – ICCPR, article 9 (2); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10 and 14 (UN GA res. 43/173 of 9 December 1988). (Hereinafter BoP).

51 *Inter alia* – ICCPR, article 9(4); BoP, Principle 32. Also, UN Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

52 Ibid.

ance in any proceedings involving the lawfulness of deprivation of liberty.[53] The right to counsel is particularly essential in circumstances of prolonged or incommunicado detention.

Although international humanitarian law treaties do not specify the permissible duration of internment during non-international armed conflict, some inferences based on the provisions outlined above may be made. Given that internment is a measure taken for security reasons, there is an expectation, expressed in the Second Additional Protocol,[54] that the authorities in power will consider granting the broadest possible amnesty to persons who have participated in the conflict once it is over (such an amnesty may not, of course, include persons suspected of having committed war crimes or other crimes under international law).[55] If internment is maintained beyond the end of the armed conflict, a strong case for unlawful detention could be made regarding those not released or criminally charged fairly soon after the conflict has ceased.

International humanitarian law regulates the fair trial rights of persons subject to criminal process for offences related to a non-international armed conflict in some detail. The basic principles are provided for in Article 3 common to the Geneva Conventions and are elaborated in the fair trial guarantees of the Second Additional Protocol, considered to reflect customary international law.[56] To the extent that these provisions are insufficiently detailed to provide guidance on all aspects of the right to a fair trial, they should be supplemented with the applicable provisions of international human rights law. International humanitarian law, including its fair trial rights, is non-derogable.

Detention outside of armed conflict. Administrative detention without criminal charge remains controversial when undertaken outside of an armed conflict situation. While not expressly prohibited under international human rights law, it is subject to important safeguards. The argument can be made that administrative detention would require a state party to derogate from its obligations under the International Covenant on Civil and Political Rights.[57] Under the terms of that treaty, a derogation can be triggered by a public emergency threatening the life of the nation, a high standard. Derogation must comply with the principles of necessity and proportionality, and may not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[58]

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53 *Inter alia* – BoP, Principle 11 (1).

54 The US is not a party to Additional Protocol II.

55 AP II, article 6 (5).

56 AP II, article 6.

57 ICCPR, article 4 (1). See Report of the Working Group on Arbitrary Detention, Commission on Human Rights, E/CN.4/2006/7, 12 December 2005, ar para. 71.

58 Ibid.

The Covenant prohibits any derogations from certain state obligations, such as those pertaining to the right to life, freedom from torture and other cruel, inhuman or degrading treatment or punishment and the principle of non-retroactivity of criminal law. The procedural requirements provided for in the Covenant must likewise be fulfilled. These include the state's obligation to notify other States Parties through the UN Secretary-General of those provisions from which it has derogated and its reasons for doing so.

Non-treaty human rights standards and jurisprudence – both international and regional – have considerably expanded the scope of non-derogable rights. Thus, as mentioned, it is well accepted that administrative detention may only be ordered for reasons, and in accordance with a procedure, provided for by domestic law.[59] The person involved must be informed promptly, in a language which he or she understands, of the reasons for which the measure was taken.[60] In addition, detention must be subject to the effective control of an independent and impartial judicial body before which the detention's lawfulness may be challenged and which can direct release if the detention is found to be unlawful.[61] Detainees are likewise entitled to the assistance of legal counsel[62] and, subject to reasonable conditions and restrictions, have the right to communicate with their families.[63]

The logic underlying the few provisions that govern administrative detention under human rights law is that it is an exceptional measure. A strong case can be made that prolonged administrative detention without the application of all the necessary safeguards would amount to arbitrary detention prohibited by human rights law.

Human rights law provisions on the pre-trial detention of those suspected of criminal offenses are even more stringent. They have generated well-established interpretations from a range of regional human rights courts and monitoring bodies.[64] Suffice it to mention here that only persons charged with a criminal offense have the right to either release or trial within a reasonable time. Those brought to trial are entitled to the full range of fair trial guarantees provided for in the ICCPR and other international human rights law instruments.

59 ICCPR, article 9 (2).

60 *Inter alia* – ICCPR, article 9(2); BoP, Principles 10 and 14.

61 See *inter alia* UN Human Rights Committee, General Comment No. 29, note 51 above, para. 16.

62 BoP, Principles 17, 18 and 32.

63 Ibid, Principle 19.

64 For a good overview see, Office of the UN High Commissioner for Human Rights, Human Rights in the Administration of Justice, A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, Chapter 5.

C The Scope of Persons Considered "Enemy Combatants"

The "enemy combatant" classification in the Draft Joint Doctrine includes both members of organizations designated as terrorist (including persons affiliated to those organizations) and persons with no affiliation if designated as such. It is submitted that implementation of such a separate classification of "enemy combatants" in practice, with, perhaps, eventual codification in domestic legislation would endanger the international law framework for dealing with the protection of persons that has been outlined.

First, persons detained in relation to an international armed conflict and designated as "enemy combatants" would be deprived of the status and protections – depending on the circumstances – to which they would be entitled under either the Third or Fourth Geneva Convention or customary law such as that reflected in Article 75 of Additional Protocol I. It would, for example, suffice that a party to an international armed conflict designates members of a militia or volunteer corps fighting on behalf of the opposing side as members of a "terrorist" organization in order to deny them prisoner of war status. As was mentioned, members of such forces, provided they meet the four conditions provided for in Article 4 A (2) of the Third Geneva Convention are entitled to prisoner of war status upon capture. Withdrawal of Third Geneva Convention status and rights based not on that treaty's rules, but on unilateral decisions by one party (that an adverse party is likely to consider as non-legally motivated), would undermine the relevance and credibility of the Convention.

Second, an "enemy combatant" classification would have the same effect on the relevance and credibility of the Fourth Geneva Convention. Under the legal reading suggested earlier, a person who directly participates in hostilities without being entitled to do so is covered by the Fourth Convention if he or she fulfils the nationality criteria. For example, a national of a party to the conflict, who is not a member of the armed forces, but takes a direct part in the hostilities as a member of an intelligence organization, would be entitled, upon capture, to be considered a "protected person" under the Fourth Convention. The "enemy combatant" classification would preclude that outcome if the organization to which the person belonged was classified as "terrorist". Once again, the general scheme of humanitarian law would be rendered obsolete.

Third, if the "enemy combatant" (meaning "terrorist") designation is applied to persons taking part in a non-international armed conflict, the already fragile edifice of humanitarian law governing internal armed conflicts could crumble.

A major challenge to international humanitarian law in the "war on terrorism" context has been the tendency of states to label as "terrorist" all acts of warfare committed by opposition armed groups during non-international armed conflicts. Since the launching of the "war on terrorism", states engaged in such conflicts have almost universally labelled acts committed by domestic insurgents

as "terrorism", even though, under humanitarian law, they may have been lawful (e.g. attacks against military personnel or installations).

Non-international armed conflicts thus also lie at the centre of the delicate balance that needs to be maintained between the logic and structure of international humanitarian law, on the one hand, and anti-terrorism measures, on the other. While acts of violence against military objectives in internal armed conflicts remain subject to domestic criminal law, the tendency to designate them as "terrorist" completely undermines whatever incentive armed groups have to respect international humanitarian law.

Humanitarian law attempts to provide such an incentive by encouraging states to grant "the broadest possible amnesty to persons who have participated in the armed conflict"[65] at the end of hostilities (excluding war crimes and other crimes under international law). If all persons who took up arms against the government are labelled "terrorists", it is unlikely that a government would – or even could – consider amnesty. The stifling effect on national reconciliation, usually necessary after the end of a civil war, is obvious.

Removing the protection of international humanitarian law from persons detained in relation to an internal armed conflict by designating them domestically as "terrorists" – even when they have abided by the laws of war – could also pose grave consequences for the individuals involved. As is well known, the fair trial guarantees of Article 3 common to the Geneva Conventions[66] and of Additional Protocol II[67] are non-derogable, which is not necessarily the case under domestic law or even as a matter of international human rights law.

Finally, designating a person who is captured outside of any armed conflict as an "enemy combatant" subject to the "laws and customs" of war risks depriving him or her of rights that are guaranteed under both human rights and domestic law. As noted, under humanitarian law the term "combatant" is a legal status associated with international armed conflict only. It implies that such a person is targetable under rules on the conduct of hostilities and that he or she may be detained until the end of active hostilities. These norms were designed for the specific circumstances of international armed conflict, not for situations outside of armed conflict in which different rules govern what constitutes lawful use of lethal force and permissible deprivation of liberty. To apply law of armed conflict rules to persons not involved in an armed conflict would prejudice the protection of human life and liberty and, ultimately, the rule of law.

65 AP II, article 6 (5).

66 Common article 3 (1) (d).

67 AP II, article 6.

Concluding Remarks

Respect for international humanitarian law, as with any other branch of international law, depends to a great extent on a shared understanding – at least among those called upon to apply it – of its structure and key legal notions.

The notions that have been examined in this article – "combatant", "unlawful combatant" and "enemy combatant" – could be visually represented by a downward slide. While the term "combatant" has a generally accepted legal meaning, as evidenced by its presence in treaty law, the expression "unlawful combatant" is more complex, as explained above. It would appear that divergence arises not over the question of "who is an 'unlawful combatant'", but with regard to the legal protection that must be afforded.

It has been submitted that the term "enemy combatant", as currently used, has no specific legal meaning. It encompasses both individuals who are involved in armed conflict, as that term is understood in international humanitarian law, and persons whose actions are unrelated to an armed conflict. The issue of what legal framework applies to "enemy combatants" is similarly perplexing. They appear to be covered by the "principles" of the Geneva Conventions, but not by the Conventions themselves (although they are expected to comply with very specific international humanitarian law rules[68]). At the same time, there is no indication that they may benefit from the protection of other bodies of law, such as human rights or domestic law. Until greater clarity and better reasoning is offered in response to these and other questions, a shared understanding of the term "enemy combatant" will remain elusive.

68 See, for example, Crimes and Elements for Trial by Military Commission, Federal Register, Vol. 68 , No. 126, July 1, 2003, pp. 39381 – 39387, at: http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-16385.pdf.

Chapter 14

Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq

Avril McDonald

I would like to say how delighted and honoured I feel to have been invited by the editors to participate in this Festschrift celebrating the life and work of one of the giants of international law, including international humanitarian law, Professor Yoram Dinstein. As someone who has demanded and adhered to the most rigorous standards of analytical inquiry, Professor Dinstein has throughout his career served as an inspiration and mentor to anyone who has studied the *jus in bello* and *ad bellum*. It is difficult to offer any piece of research that would meet his exacting standards, and it is therefore with considerable trepidation, if with great affection and respect, that I offer this paper on a subject that is of growing importance and interest. As preliminary research into a topic that the author intends to study in more depth, it attempts to offer an overview of some of the most important legal issues raised in connection with the use of military contractors (focusing on the case of Iraq), a practice with potentially far reaching significance.

I The Shadow Armed Force – Military Contractors in Iraq

In terms of their total number, individual military and security contractors represent the United States of America's (US) second biggest partner in Iraq,[1] and it is clear that Operation Iraqi Freedom and military operations carried out since the end of major hostilities in Iraq in 2003 could not have been waged without them. Yet such is the opacity surrounding their use that not even the US appears to know exactly how many of them are working in theatre. Estimations

1 With more bodies on the ground than the US' main Coalition partner, the UK. Ian Traynor, 'The privatisation of war', *The Guardian*, 10 December 2003, http://www.guardian.co.uk/international/story/0,3604,1103566,00.html; Danna Harman, 'Firms tap Latin Americans for Iraq', *The Christian Science Monitor*, 3 March 2005, http://www.csmonitor.com/2005/0303/p06s02-woam.html; Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge, Cambridge University Press 2005) p. 8.

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put the number of private individuals employed on contingency contracts for the Coalition Forces in Iraq at anywhere from 20,000-30,000.[2]

The use of individual contractors in Iraq to perform key security and military roles for the coalition partners and their agencies represents the largest ever reliance by armed forces on private labour during a major armed conflict in modern times and reflects the extent to which the US armed forces, in particular, have come to depend on private contractors to carry out functions previously performed by military personnel. A 2003 investigation by Britain's *The Guardian* newspaper found that 'the proportion of contracted security personnel in the firing line [in Iraq] is 10 times greater than during the first Gulf war. In 1991, for every private contractor, there were about 100 servicemen and women; now there are 10.'[3] Lest it be assumed that these individuals are safely deployed behind the front lines and that the activities they engage in do not involve their direct participation in hostilities, it should be pointed out that, irrespective of the terms of their contracts, some individual contractors are performing essential front line roles in military operations,[4] operating very close to or at the so-called 'tip of the spear'.[5]

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2 See Anthony Dworkin, 'Security contractors in Iraq: armed guards or private soldiers', Crimes of War Project, 20 April 2004, http://www.crimesofwar.org/onnews/news-security.html; Peter Brownfeld, 'Military contractors shoulder heavy burden in Iraq', Fox News, 18 April 2004, http://www.foxnews.com/story/0,2933,117239,00.html; Avant, ibid; Dana Priest and Mary Pat Flaherty, 'Under fire, security firms form an alliance', *The Washington Post*, 8 April 2004, http://www.informationclearinghouse.info/article6026.htm; Matthew Quirk, 'Private military contractors: A buyers guide', *The Atlantic Monthly*, September 2004, http://www.theatlantic.com/doc/prem/200409/quirk; 'Mercenary strength reaches high in Iraq', UPI, 8 April 2004, http://newsmine.org/archive/war-on-terror/united-states/private-army/mercenary-strength-reaches-high-in-iraq.txt.

3 Traynor, *supra* n. 1. 'In Bosnia,…the ratio of contractors to American soldiers has ranged from one in 10 to nearly one-to-one, according to various defense analysts', Laura Peterson, 'Privatizing combat, the new world order', The Center for Public Integrity, Washington D.C., 1 May 2005, http://www.publicintegrity.org/bow/report.aspx?aid=148. See also David Isenberg, 'Corporate Mercenaries', Part 1: 'Profit comes at a price', Asia Times online, 19 May 2004, http://www.atimes.com/atimes/Middle_East/FE19Ak01.html; Deborah Avant, 'What are those contractors doing in Iraq?' *The Washington Post*, 9 May 2004, http://www.emjournal.pwp.blueyonder.co.uk/aamay010.html.

4 See Lourdes A. Castillo, 'Waging war with civilians: Asking the unanswered questions', *Aerospace Power Journal* (Fall 2000), http://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/castillo.htm; Deborah Avant, 'The Rise of the Private Security Companies', *Foreign Policy*, 13 June 2005, http://www.corpwatch.org/article.php?id=12388.

5 See P.W. Singer, *Corporate Warriers: The Rise of the Privated Military Industry* (Ithaca and London, Cornell University Press 2003) pp. 91-95; Deborah Avant, *supra* n. 1, pp. 16-22.

The individual contractors working in Iraq for the Coalition Forces are not employed directly by them but are engaged on short-term contracts by a host of companies, including large, diversified, multinational corporations such as Haliburton, and its subsidiary Kellogg, Brown, and Root; Vinnell; Bechtel Corporation; DynCorp; Global Risk Management; Military Professional Resources Inc. (MPRI); Blackwater Security Consulting; CACI Inc.; Titan; and Erinys International. It is estimated that there are well over 100 contractor companies in Iraq[6] offering a wide range of services to both state and non-state clients. The services they are contracted to provide and the activities they actually engage in vary widely: providing personal security [among others for the former Head of the Coalition Provisional Authority (CPA) L.P. Bremer[7] and a wide range of military and civilian clients]; security for important buildings and facilities (including military objectives) within and outside the Green Zone;[8] force protection;[9] rescue operations for US forces;[10] combat and combat service support;[11] developing, maintaining and operating weapons systems,[12] including remotely controlled drones,[13] and other logistics and combat functions;[14] interrogation at

6 'Contractors: Iraq', Windfalls of War, The Center for Public Integrity, 1 May 2005, http://www.publicintegrity.org/wow/bio.aspx?act=pro&fil=IQ.

7 'Security firms says its workers were lured into Iraqi ambush', *The New York Times*, 9 April 2004, http://www.freerepublic.com/focus/f-news/1114111/posts.

8 Dana Priest, 'Private guards repel attack on U.S. headquarters', *The Washington Post*, 6 April 2006, http://www.sandline.com/hotlinks/Wash_Post-Private_guards.html.

9 An advertisement for PMCs to fill a contract of up to $100,000 to guard the Green Zone stated: 'The current projected threat and recent history of attacks against Coalition Forces, and thinly stretched military force, requires a commercial security force that is dedicated to provide Force Protection Security'. David Barstow, 'Security companies: Shadow soldiers in Iraq', *The New York Times*, 19 April 2004.

10 When the US headquarters in Najaf was attacked by Iraqi insurgents in April 2004, private contractors working for Blackwater Security repelled the attackers and rescued a US marine who had been wounded. Priest, *supra* n. 8.

11 See P.W. Singer, 'Outsourcing the war: With more private contractors dying and disappearing in Iraq, some begin to question the rules of engagement', Salon, 16 April 2004, http://www.salon.com.

12 Isenberg, *supra* n. 3.

13 'When America launched its invasion in March, the battleships in the Gulf were manned by US navy personnel. But alongside them sat civilians from four companies operating some of the world's most sophisticated weapons systems. When the unmanned Predator drones, the Global Hawks, and the B-2 stealth bombers went into action, their weapons systems, too, were operated and maintained by non-military personnel working for private companies.' Traynor, *supra* n. 1; Phillip van Niekerk, 'Making a killing: the business of war', The Center for Public Integrity, Washington, D.C., 1 May 2005, http://www.publicintegrity.org/bow/report.aspx?aid=147.

14 See Craig A. Simonds, 'The role of civilians during the first Gulf War: Operation Desert Storm foreshadowed today's reliance on civilian logistics on the battlefield', *Army Logistician*, Jan-Feb. 2004; 'Contract support for Operation Enduring

prisons, most notoriously Abu Ghraib;[15] intelligence;[16] driving; translation, interpretation and linguistics;[17] training the Iraqi army and police;[18] maintenance of military supply chains and guarding military convoys; computer and technological support; procurement; catering; and so forth.[19] The individual contractors employed by these firms are nationals of various countries, including the US, the UK, Australia, South Africa, Algeria, Israel, Fiji, El Salvador, Ukraine, Nepal and Iraq.[20] Given that the individual contractors are not permanent employees even of the private military and security firms that contract them out[21] – which maintain databases of available contractor personnel, almost like a temp agency – *prima facie* there appears to be no agency or company with full control over or responsibility for the actions of individual contractors.

It is important to note that a great variety of sometimes highly diversified companies, providing a range of services to all sorts of clients,[22] could loosely be grouped under the umbrella of private military or security companies and that the use of one or other appellation to describe the companies does not necessarily accurately reflect the type of services that a particular company provides. The term private military companies rather than private security companies or defence contractors is therefore used here not to describe the companies, to legally characterise them, or to suggest that military-type services are the only services they provide, but purely for convenience. This contribution is exclusively

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Freedom', *Army Logistician*, March-April 2003, http://www.almc.army.mil/alog/issues/MarApr03/MS874.htm.

15 See The Inspector General, US Army, 'Detainee Operations Inspection,' report dated 21 July 2004, Annex E, p. E-106 (Taguba Report); AR 15-6 Investigation of the Abu Ghraib detention facility and 205th military intelligence brigade, Major General George R. Fay Investigating Officer, 25 August 2004 (Fay Report).

16 See Jonathan Werve, 'Contractors write the rules: Army policy governing use of contractors omits intelligence restrictions', Windfalls of War, The Center for Public Integrity, 1 May 2005, http://www.publicintegrity.org/wow/report.aspx?aid=334.

17 Isenberg, *supra* n. 3.

18 See Avant, *supra* n. 1, at p. 18.

19 See Michael N. Schmitt, 'Humanitarian law and direct participation in hostilities by private contractors or civilian employees', 5 *Chicago Journal of International Law* (Winter 2004) pp. 511 at 512-513; Castillo, *supra* n. 4.

20 Brownfeld, *supra* n. 2; Harman, *supra* n. 1; Isenberg, *supra* n. 3; 'Private military companies paying big bucks for elite soldiers in Iraq', World Tribune.com, http://216.26.163.62/2004/me_iraq_10_15.html.

21 See David Isenberg, 'Corporate Mercenaries', Part 2: 'Myth and mystery', 20 May 2004, Asia Times Online, http://www.atimes.com/atimes/Middle_East/FE20Ak02.html.

22 As Avant has noted, some private security companies (the term she prefers) focus on particular areas of expertise, for example, providing on site security, while others are involved in a range of activities, including military training. See *supra* n. 1 at Table 1.1., pp. 10-15.

concerned with outsourcing by the military (and other state agencies) of military and quasi-military functions to private contractors.

Until April 2004, when contractor personnel employed by Blackwater Security Inc. were ambushed in Fallujah, beaten to death and their bodies desecrated,[23] the presence of so many private contractor individuals in Iraq was a fact little known to the American or international public. Indeed, it has been observed that among the reasons motivating the reliance of US armed forces on individual contractors in Iraq is the fact that their deaths are not recorded in official US fatality figures,[24] and are subject to less public scrutiny.[25] It has also been suggested that: 'Private military companies … allow governments to pursue policies in tough corners of the world with the distance and comfort of plausible deniability.'[26] They also make possible the use of military might abroad without congressional oversight or limitations on troops.[27]

With the broadcasting on television of images of the Blackwater contractors' horrific murders, the reality of contracting out military and security services by states in a war zone, including the enormous risks these individuals face,[28] was immediately brought home to a wide audience. It provoked intense media and

23 'Bodies mutilated in Iraq attack', BBC News, 31 March 2004, http://news.bbc.co.uk/2/hi/middle_east/3585765.stm; 'High pay-and high risks-for contractors in Iraq', CNN.com, 2 April 2004, http://edition.cnn.com/2004/WORLD/meast/04/01/iraq.contractor/; Dana Priest and Mary Pat Flaherty, 'Slain contractors were in Iraq working security detail', *Washington Post*, 2 April 2004, p. A16.

24 Robert Fisk and Severin Carrell, 'Occupiers spend millions on private army of security men', *The Independent*, 28 March 2004; Isenberg, *supra* n. 3.

25 It is estimated that over 200 subcontractors have been killed in Iraq as of January 2005 and hundreds injured. See Joseph Neff and Jay Price, 'Iraq: Courts to resolve contractors' deaths', *The News and Observer*, 9 January 2005. The US military does not track subcontractors' deaths or injuries and can only estimate the numbers from the claims made for compensation under the Defense Base Act, which provides workers' compensation to persons who work under national or international government contracts. See Kirsten Scharnberg, 'Iraq: Contractor death total unclear', *The Chicago Tribune*, 24 February 2005. That using contractors is less transparent was also revealed in a statement by Charles Snyder, US Deputy Secretary of State for African Affairs made in relation to US policy in Equatorial Guinea: 'We can see some merit in using an outside contractor, because we're not using U.S. uniforms and bodies.' Peterson, *supra* n. 3; Renae Merle, 'Contract workers are war's forgotten – Iraq deaths create subculture of loss', *The Washington Post*, 31 July 2004.

26 van Niekerk, *supra* n. 13. See also Joshua Kurlantzick, 'Outsourcing the dirty work – the military and its reliance on hired guns', *The American Prospect*, 1 May 2003.

27 Leslie Wayne, 'America's for-profit secret army', *The New York Times*, 15 October 2002.

28 See David Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq*, British American Security Information Council, Research Report 2004.4, September 2004, Appendix 1: PMC Casualties in Iraq; David Levinsky, 'Iraq: Security contractors face great danger', *Burlington County Times* (US), 17 May 2005.

academic interest in the role of the contractors in Iraq and in the subject of outsourcing more generally.[29]

While states and their agencies are by no means the only clients for the services provided by contractors,[30] this paper concentrates on the use by states of contractors to perform military and quasi military functions which either leads or may lead to their direct participation in hostilities.[31] It is this contingency that gives rise to the most interesting legal questions, some of which will be addressed here: Are private contractors members of the armed forces of a party to an armed conflict, which would make them combatants? How is membership of the armed forces determined, functionally or by law, and, if the latter, by international humanitarian law or national law? Is it lawful and appropriate for states to outsource military and quasi military functions that may or will involve a contractor's direct participation in hostilities? Can states essentially create a paramilitary unit without such a unit and its members being assimilated into the armed forces? Can states avoid legal responsibility for the unlawful actions of individual contractors working on their behalf?

Iraq provides a useful lens through which to analyse the subject of military outsourcing because it is the first test bed for the really large-scale use of individual contractors in fulfilling functions that were formerly performed by the armed forces. It is there that both the advantages and disadvantages of relying on contracted labour to perform military and security functions are being manifested. In particular, the problematic legal status of individual contractors is becoming clearer in the context of Iraq, as is the necessity of satisfactorily resolving the matter without blurring the principle of distinction between combatants and civilians or weakening the protection from attack enjoyed by civilians, including contractors, taking no direct part in the hostilities.[32]

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29 For an extensive discussion in the public domain, see 'Contractors face Iraq combat', PBS Newshour with Jim Lehrer, 6 April 2004, transcript available at http://www.pbs.org/newshour/bb/middle_east/jan-june04/contractors_4-6.html.

30 Generally speaking and particularly in the context of Iraq, other clients for the services of individual contractors, particularly those providing security services, include international and non-governmental organisations and multinational and national companies, *inter alia*.

31 Even if the armed forces are not actually one of the contractual partners. In the context of Iraq, for example, many contractor individuals have been hired by the US Departments of State and the Interior, the Central Intelligence Agency (CIA) and the US Agency for International Development (USAID). See *supra* n. 5; See Barry Yeoman, 'Soldiers of good fortune', *Mother Jones*, May/June 2003, http://www.barryyeoman.com/articles/soldiersfortune.html. CACI, one of two PMCs implicated in prisoner abuses in the Taguba Report, was hired to supply computer services to the US Department of the Interior. See 'Inquiry into interrogation firm', BBC News World Edition, 27 May 2004, http://news.bbc.co.uk/2/hi/business/2754683.stm.

32 Dworkin, *supra* n. 2; Priest and Flaherty, *supra* n. 2.

The article will address the above-mentioned legal issues according to the following structure. Part II offers a capsule history of the fall from grace and return to favour of individuals and companies offering private military and security services. It then describes the use of contractors by the US armed forces, culminating in their massive deployment to Iraq beginning in 2003.

Part III addresses the legal status of contractors – both the individuals and the companies that hire them. Part IV tackles the issue of the criminal and civil liability of private contractor individuals and companies. Part V addresses the question whether states can be considered responsible for the actions of contractors and, if so, in which circumstances. Some tentative conclusions are set out in part VI. As the overwhelming majority of individual contractors deployed in military and quasi military roles in Iraq are working for the US,[33] this contribution restricts the analysis to the legal and factual situation surrounding these contractors.

As for the applicable law, given that this paper is concerned primarily with the use of private contractors to perform mainly military, but also security functions, in a country where there has at all relevant times been an armed conflict, the law of armed conflict (LOAC), otherwise known as international humanitarian law (IHL),[34] applies as the *lex specialis*. Part I.A below provides a brief discussion regarding what parts of the LOAC can be considered to be applicable.
Other aspects of international law may likewise be relevant, for example, the rules prohibiting mercenary activities. In the context of the discussion of contractor liability for wrongdoing, international criminal law and the domestic criminal laws of the US and Iraq constitute the applicable law. Given that international civil law hardly exists outside of state responsibility law, the civil liability of individual contractors and contractor companies shall be assessed by reference to national civil law. Finally, the law of state responsibility is relevant in the context of the discussion whether states can be held as responsible for the wrongful acts of contractor individuals or companies.

A The Nature of the Conflict in Iraq and the Applicable LOAC

From the moment of the first air strikes against Iraq by the US and its coalition partners on 20 March 2003, the law applicable in international armed conflict applied, the conflict being an international armed conflict between two or more states.[35] The US and Iraq are parties to the Fourth Hague Convention on

33 Barstow, *supra* n. 9.

34 These terms shall be used interchangeably in this paper. Here is hardly the place to enter into the discussion of the relevant merits of these two terms, and the author therefore expresses no views on the subject, except to point out that the term international humanitarian law is nothing if not misleading to those unfamiliar with the substance of the law.

35 Article 2 Fourth Geneva Convention. Reprinted in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 2nd edn. (Oxford, Clarendon Press 1989) pp.

the Laws and Customs of War on Land of 1907[36] and its annexed Regulations Respecting the Laws and Customs of War on Land[37] and to the Fourth Geneva Convention of 1949,[38] all of which applied for the duration of the international armed conflict. Neither state is a party to Additional Protocol I of 1977, but many of its rules would have been applicable as a matter of customary law.[39]

Occupation law,[40] namely, the relevant parts of the Hague Regulations annexed to the Fourth Hague Convention of 1907 and the Fourth Geneva Convention of 1949, became applicable as the US steadily gained effective control over the territory of Iraq.[41] Michael Kelly, who served in the Office of the General Counsel of the CPA, has opined that 'the law of occupation was in effect throughout Iraq by the end of April 2003'.[42] Michael Schmitt and Charles Garraway have noted that some resistance continued after the fall of the Saddam Hussein regime on 9 April, but that 'on 16 April, Coalition Commander, General Franks, issued a Message of Freedom to the Iraqi People. The CPA generally uses this date in its policy instruments as a reference point for countrywide occupa-

271 et seq.

36 Reprinted in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 2nd edn. (Oxford, Clarendon Press 1989) p. 44.

37 Ibid., at p. 48.

38 Ibid., at p. 272.

39 The ICRC's recently published study on Customary International Humanitarian Law identifies a great number of customary rules, particularly concerning the conduct of hostilities, applicable in both international and non-international armed conflict. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Geneva, ICRC/Cambridge, Cambridge University Press 2005) (hereafter, CIHL). See also Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross* No. 857, p. 175.

40 Article 42 of the Hague Regulations annexed to the Fourth Hague Convention of 1907 provides that: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.

41 Michael Kelly has noted that: 'This is a law that ebbs and flows in the eddies of the battle space. Its application creeps forward as the forward edge of the battle (hereafter, FEBA) moves forward. While the law does not apply in the FEBA, it comes to fruition as a force acquires or develops the capacity to exercise control of captured territory away from the combat action and therefore it may be described as the 'law of the second echelon'. Michael J. Kelly, 'Iraq and the law of occupation: new tests for an old law', 6 *YIHL* (2003) pp. 127 at 129.

42 Ibid., at p. 130.

tion.'[43] Two weeks later, on 1 May, President Bush declared that 'major combat operations in Iraq have ended'.[44]

For our purposes, the two main questions are (1) when did the occupation end, and (2) when did the international armed conflict end ? If one or both is now ended, then only Article 3 common to the Geneva Conventions and customary humanitarian law applicable in non-international armed conflicts applies, as neither Iraq nor the US is a party to Additional Protocol II.

Neither Hague nor Geneva Law is entirely clear regarding when an occupation ends. The Hague Regulations say nothing on the question, while Article 6 of the Fourth Geneva Convention is addressed to when the Convention ceases to apply, providing that: 'In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations.' Article 3(b) of Additional Protocol I is not much more helpful, stating simply that the application of the Conventions and the Protocol ceases, in the case of occupied territories, upon the termination of the occupation.

Essentially, an occupation ends when the Occupying Power no longer exercises military or administrative control over the occupied territory or when a national authority is restored. According to the British Military Manual: 'Occupation ceases as soon as the occupying power is driven out or evacuates the area. Occupation will also cease when effective control transfers to a different authority, such that the territory ceases to be under the authority of external military forces.'[45]

Officially, the Iraq occupation ended on 30 June 2004 with the handover of authority from the CPA to the Interim Iraqi Government,[46] even though there was no withdrawal of Coalition Forces at that time. Indeed, effective military control over the country was still being exercised by the Coalition Forces at the time of writing (December 2005). If one accepts that Iraqi sovereignty was restored with the election of an interim Iraqi government on 30 June 2004, then the US and the UK no longer constituted Occupying Powers from this date as they remained in Iraq with the agreement of the Iraqi Interim Government.

Regarding the cessation of the international armed conflict, although Iraq was almost fully under occupation by 16 April or at the latest 1 May 2003, the international armed conflict continued, albeit at a lower level, after this date and for the duration of the occupation as the country was not entirely pacified and

43 Michael N. Schmitt and Charles H.B. Garraway, 'Occupation policy in Iraq and international law', 9 *International Peacekeeping* (2004) pp. 27 at 29.

44 George W. Bush, Remarks from the *USS Abraham Lincoln*, 1 May 2003, http://www.white-house.gov/news/releases/2003/05/iraq/20030501-15.htm.

45 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence (Oxford, Oxford University Press 2004) p. 277, part 11.7.

46 As agreed in the Agreement of 15 November 2003 between the Governing Council and the CPA on the *Timeline to a Sovereign, Democratic and Secure Iraq*, http://iraq-coalition.org/government/AgreementNov15.pdf.

the coalition sought to quash the remaining pockets of resistance. Therefore, military operations conducted within the context of the international armed conflict and the occupation would have coincided, as would the cessation of both the international armed conflict and the occupation.

The general view is that the close of military operations signals a complete cessation of hostilities. The Rapporteur of Committee III at the Geneva Diplomatic Conference of 1949 stated that the general close of military operations was 'when the last shot has been fired.'[47] According to the ICRC Commentary to the Fourth Geneva Convention: 'When the struggle takes place between two States the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on 'debellatio'. On the other hand, when there are several States on one or both of the sides, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.'[48] This raises a question in the case of Iraq, where neither the beginning nor the end of the occupation coincided with the last shot being fired or the end of fighting.

It does appear that at least from 30 June 2004 the legal nature of the hostilities changed, and with it, the applicable law. Most likely, the international armed conflict continued until the change of sovereignty and the handover of power to the interim Iraqi government on 30 June 2004. It is difficult to show that the conflict continuing after this date is an international armed conflict, even though in some respects this conflict seems to merely be the continuation or residue of the former international armed conflict. Political power has changed hands, altering the legal status of those fighting. Now it is Iraq fighting the insurgents with the help of its allies, the Coalition Forces. The non-state party remains largely the same: *inter alia* Baathist remnants, other persons opposed to the presence of the Coalition Forces, and Islamic jihadists. The presence of foreign fighters alone would not be sufficient to render the conflict international in character where they do not represent a foreign state. However, arguably the conflict can be considered as an internationalised non-international armed conflict, given the enormous foreign military presence that remains in Iraq and the presense of foreign elements on the insurgents' side. The approach taken by the US armed forces for operational purposes at least[49] is to err on the side of caution and treat the conflict since June 2004 as being international.

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47 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 815.

48 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (Geneva, ICRC/Martinus Nijhoff 1987) p. 62.

49 The US armed forces continue to apply all of international humanitarian law to its military operations in Iraq, pointing out the need for consistency of approach and legal certainty on the part of troops, according to W. Hays Parks, US Office of

The legal qualification of the conflict may have no real bearing in practice on the question of when it would be legal to target (and kill) a contractor who is taking a direct part in hostilities. Provided he is not a member of the armed forces (which would make him targetable at all times), he can be targeted only when he is taking a direct part in hostilities, whether that be in international or non-international armed conflict. This raises the question of the duration of such participation.

As for rules on the detention of captured persons, as only common Article 3 of the Geneva Conventions and the relevant rules of customary humanitarian law applicable in non-international armed conflict continue to apply,[50] the Third and Fourth Geneva Convention would not govern the detention of any person captured after 30 June 2004. But, as Tony Rogers has rightly observed, 'persons who, before that date acquired protection under the law of war, for example, as prisoners of war or internees, would continue to benefit from that protection until final release or repatriation.'[51] From that date, all contractors, whether or not they have taken a direct part in hostilities would, upon capture, enjoy the protections of common Article 3 and of Additional Protocol II as customary law.

II The Fall and Rise of Military and Security Contracting

A An Historical Perspective

It is only in modern times that the term mercenary has come to acquire a negative connotation. Military history records the important and respectable role of the mercenary in bolstering states' armies in Greek and Roman times and in the Middle Ages in France, the UK and Italy. Until the nineteenth century mercenaries were a staple part of the armed forces of states and empires.[52]

General Counsel, Department of Defense, in an e-mail correspondence with the author. On file with the author.

50 As the ICTY pointed out in its jurisprudence, customary international law applicable in non-international armed conflict does recognise some rules regulating the conduct of hostilities. *The Prosecutor* v. *Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72. This observation is confirmed by the ICRC's CIHL, *supra* n. 39.

51 A.P.V. Rogers, 'Unequal combat and the laws of war', in 7 *YIHL* (2004) forthcoming.

52 For the role of mercenaries in conflict historically see David Shearer, 'Outsourcing War (mercenary organizations), *Foreign Policy* (Fall 1998), http://www.fsa.ulaval.ca/personnel/vernag/eh/f/cons/lectures/mercenaries.htm. See also Eugene B. Smith, 'The New Condottieri and US Policy: The Privatization of Conflict and its Implications', *Parameters* (Winter 2002-2003) p. 104; Martin van Creveld, *The Transformation of War* (New York et al, The Free Press 1991) pp. 43, 70; Michael Lee Lanning, *Mercenaries* (New York, Ballantine Books 2005); Fred Rosen, *Contract*

Mercenarism began its descent into infamy with the consolidation of the nation state as the basic political unit in international relations, the state's assertion of the monopoly on violence, and the rise of the concept of nationalism.[53] As national pride and the desire of states to discourage dependence on private military forces grew, so too did the willingness of nationals to fight on behalf of their state for little reward other than love of country and glory. Conscript and professional armies grew to replace the dependence on hired guns.

It was only in 1977 with Additional Protocol I to the Geneva Conventions that states moved to criminalise mercenarism under the law of armed conflict. Subsequently, in 1989, an International Convention was adopted to ban the practice.[54] Each treaty takes a somewhat different approach to defining mercenaries, with the Mercenaries Convention adopting a broader definition that does not require direct participation in hostilities.

As states were taking steps to prohibit mercenarism under conventional international law, two phenomena could be observed. First, despite being typecast as so-called 'dogs of war'[55] and criminalised, mercenaries never disappeared. On the contrary, they were rather active in a wide range of conflicts, particularly in post-colonial Africa, during the Cold War and subsequently.[56] To be sure, many were unscrupulous individuals with a taste for blood and adventure, but, on the plus side, mercenaries also helped poor, unstable states lacking strong militaries to defeat murderous rebel groups and, sometimes, precipitated the end of armed conflict.[57] Second, as states were meeting to adopt the Mercenaries Convention, the Cold War was ending, with consequences that would force states to think

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Warriors: How Mercenaries Changed History and the War on Terrorism (New York et al, Alpha Books 2005).

53 See Thomas Adams, 'The New Mercenaries and the Privatization of Conflict', Parameters (Summer 1999) pp. 103-116.

54 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, RES/44/34, 4 December 1989. It entered into force on 20 October 2001.

55 As immortalised by Frederick Forsythe in a book of the same name, which was published in 1981 by Random House.

56 For a thorough discussion of mercenary activities over the past decades see Singer, *supra* n. 5, Lanning, *supra* n. 54 and Rosen, *supra* n. 52.

57 For example, when the democratically elected government of President Kabbah was overthrown in Sierra Leone, the government called to the rescue Sandline International, which 'shipped 35 tons of Bulgarian-made AK47s rifles, a helicopter and provided logistical support to help restore Kabbah's government'. Duncan Campbell, 'Marketing the new 'dogs of war', Making a Killing: The business of war, An investigation by the Center for Public Integrity, 1 May 2005, http://www.publicintegrity.org/bow/report.aspx?aid=149. See also Tim McCormack, 'The 'Sandline Affair': Papua New Guinea resorts to mercenarism to end the Bougainville conflict', 1 *YIHL* (1998) p. 292.

again about the utility of relying on paid private labour to perform military tasks.

With the end of the Cold War, armed forces around the world were drastically reduced, as the perceived military threat receded. The downsizing of militaries resulted in many highly trained military personnel being made redundant, creating an enormous pool of military expertise. The private sector absorbed much of this manpower, but it needed large clients. The biggest customers for private individuals with military expertise and a yen for action turned out to be not failing African and Asian states, but the armed forces of the world's most technologically advanced militaries, in particular, the US. Many soldiers who left the armed forces through the front door returned through the back door, only out of uniform, apparently beyond military command and control and on much fatter pay checks.

B Contracting by the US Armed Forces

While the notion of a private military company, and even the term itself, may be recent,[58] the practice of employing civilians directly and of contracting out certain functions to civilians is as old as the US armed forces themselves, with civilians routinely accompanying the armed forces in the field.[59] What is new is the scale and scope of their involvement and the extent of the dependence on their services,[60] as Iraq amply demonstrates.

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58 See Campbell, ibid.

59 Indeed, the US Department of the Army has noted that: 'Contractors have supported military forces throughout history.' Department of the Army, Army Material Command Pamphlet No. 700-30, 31 January 2000, Logistics Civil Augmentation Program (LOGCAP). Elsewhere, the US Department of the Army has noted: 'Historically, civilians have played an important role in the conduct of U.S. military operations. More recently, Army civilians have established themselves as an integral and vital part of America's Army team. With distinction, they perform critical duties in virtually every functional facet of Combat Support and Combat Service Support, both at home and abroad. Serving beside their deployed uniformed compatriots they also provide the critical skills necessary to assure the availability of essential combat systems and weaponry; thereby maximizing the fighting capability of the combat soldier and success of the Army wartime and emergency mission.' US Department of the Army Pamphlet 690-47, Civilian Personnel, DA Civilian Employee Deployment Guide, Headquarters of the Army, 1 November 1995.

60 According to one authority: 'Contractor support is an essential, vital part of our force projection capability-and increasing in its importance.' Gordon L. Campbell, United States Army Combined Arms Support Command, 'Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them', A paper prepared for presentation to the Joint Services Conference on Professional Ethics 2000 Springfield, VA, January 27-28, 2000.

Even more than other states, since the end of the Cold War the US military has been severely downsized, losing about a third of its workforce.[61] This shortfall in personnel has been made up by massive outsourcing of military functions to the private sector. 'A 1995 report of the Defense Science Board, a standing committee that advises the Pentagon on technological, scientific, and other issues, suggested that the Pentagon could save up to $6 billion annually by 2002 if it contracted out all of its support functions to private vendors, except those that deal directly with war fighting.'[62] This vision has largely been realised. A two-year investigation by the International Consortium of Investigative Journalists (ICIJ) for the Center for Public Integrity found that:

> Since 1994, the U.S. Defense Department has entered into 3,061 contracts with 12 of the 24 U.S.-based PMCs identified by ICIJ, a review of government documents showed. Pentagon records valued those contracts at more than $300 billion. More than 2,700 of those contracts were held by just two companies: Kellogg Brown & Root and Booz Allen Hamilton. Because of the limited information the Pentagon provides and the breadth of services offered by some of the larger companies, it was impossible to determine what percentage of these services was for training, security or logistical services.[63]

Civilians subcontracted to the US military fulfill a wide range of functions, as shown above in the case of Iraq. It has been observed that: 'The private sector is so embedded in combat, occupation and peacekeeping duties that the phenomenon may have reached the point of no return: the US military would struggle to wage war without it.'[64]

i Forces Driving Outsourcing by the Military

The forces driving the increased dependence on contracted labour include the above-mentioned shortage of military personnel due to downsizing, its perceived cost efficiency, technological changes in the methods and means of warfare (including increased dependence on civilians in the field of weapons development and operation), and the proliferation of unstable states. There is also the increasing demand on US and other forces to take part in smaller scale peace and security operations in other countries, even though both the requisite troops and the political will to send them abroad are lacking.

As far as the cost factor is concerned, it should be noted that it has yet to be proven that contractors really are more cost effective than military personnel.

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61 Brownfeld, *supra* n. 2; Yeoman, *supra* n. 31.

62 Peterson, *supra* n. 3.

63 Ibid.

64 Traynor, *supra* n. 1; Yeoman, *supra* n. 31.

It is well known that contractor personnel are highly paid, with annual salaries at $100,000 or more and some employees taking home $1,000 a day for short-term projects,[65] far in excess of what military personnel earn.[66] Moreover, while the military may appear to save money by avoiding related costs such as housing, healthcare, insurance and training for contractors – who can be employed on temporary, flexible terms, thus avoiding the need for job benefits or redundancy payments in case of layoffs – the wisdom of not investing in contractor training at least can be questioned. Contractor personnel are hired precisely because of their expertise and supposed battle readiness and, as a result, before being deployed do not receive the same level of training[67] in military or legal matters as military personnel.[68] Contractor individuals may also lack the necessary specialised training to carry out their appointed tasks. For example, the report of the US Army Inspector General (Taguba Report) into the Iraqi prisoner abuse scandal noted that 35 percent of the interrogators provided by CACI Inc. did not have any formal training in military interrogation policies and techniques.[69] If lack of specialised training means that contractors cannot always perform their jobs properly, Avant has pointed out that the vaunted savings on training are also overstated, given that most individual contractors were members of the armed forces at some stage of their career.[70] Thus, the military has had to invest in their education and training while they were members of the armed forces, only to witness a brain drain later on as the prospect of more money lures them into the private sector.[71] While it is fully in the spirit of the age we live in to hire individuals

65 It is interesting to note, however, that not all contractors are equal when it comes to earnings. While US and European nationals attain the highest wages, nationals of developing countries, such as El Salvador, receive considerably less (from $1,2000 to $5,000 per month). Harman, *supra* n. 1.

66 Jamie Wilson, 'Private security firms call for more firepower in combat zone: Coalition Forces do little to help as bodyguards protecting foreign workers are targeted by deadly insurgents,' *The Guardian*, 17 April 2004, http://www.guardian.co.uk/Iraq/Story/0,2763,1193871,00.html.

67 See Isenberg, *supra* n. 21.

68 The experiences of Iraq seem to have forced a rethink of the wisdom of elements of this policy. See Schmitt, *supra* n. 19, p. 515. It was reported that the Pentagon plans to train contractors in how to survive insurgency attacks. 'Training is going to be expanded beyond the military to DoD contractors and civilian personnel', DoD Deputy Assistant Secretary of Defense Jerry Jennings was reported as saying. See 'Outsourcing the war', 23 November 2004. Website of the International Peace Operations Association, http://www.ipoaonline.org/news_detailhtml.asp.

69 Taguba Report, *supra* n. 15.

70 Deborah Avant, 'Think Again: Mercenaries', *Foreign Policy* (July/August 2004), http://www.foreignpolicy.com/users/register.php?story_id=2577&registered_only=1&URL=http://www.foreignpolicy.com/story/cms.php?story_id=2577.

71 Barstow, *supra* n. 9; 'Private military companies paying big bucks for elite soldiers in Iraq', *supra* n. 20; see also 'The Baghdad Boom', *The Economist*, 25 March 2004,

on short-term contracts, with no job security or benefits, there may be a hidden cost involved. It may be too much to expect a person who is treated as freelance and dispensable to have any sort of loyalty or commitment toward an institution that hires him according to its temporary needs. Whereas a lack of institutional loyalty may not be a significant problem in the case of someone working for a call centre, it would seem to be a requisite for someone performing military functions for armed forces.[72] Without some sense of belonging to, or membership in, an armed group, it is extremely difficult to maintain group cohesion and military effectiveness. Furthermore, as the market for private contractors grows, and competition for their services increases, the temptation to apply loose hiring standards increases. As the demand for contractor personnel in Iraq has grown, it has been observed that standards have fallen and increasingly there is insufficient vetting to weed out unqualified or unscrupulous individuals.[73]

Whereas both warriors and those making possible their engagement in combat were combatants, because of increasing technological sophistication, especially that resulting from the prevalence of aerial warfare, fighting today can be carried out by a relatively small number of combatants. But they require an enormous support system, which civilians increasingly provide. The military has become ever more dependent on civilian expertise in critical areas such as weapons development, maintenance and operation. The US military outsources most of its weapons development to the private sector and is no longer responsible for the day-to-day operation of a number of essential weapons systems.[74] The same is true for logistics.[75] 'Today contractor logistics support is routinely imbedded in most major systems maintenance and support plans.'[76] Given how critical many contractors are to military operations, the line between those who merely support operations and those who take a direct part in hostilities is increasingly difficult to draw.

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http://www.sandline.com/hotlinks/Economist-Baghdad.html; Morgan, 'CIA faces spy shortage as staffers go private', Reuters, 30 September 2005, http://www.freerepublic.com/focus/f-news/1494627/posts.

72 One of the requisites for building an effective military force is to instill an *esprit de corps*, meaning that an individual loses his individual identity to some extent and becomes a member of a group, whose first loyalty is the group rather than to himself. See Chapter 6 of *The Roots of Behaviour in War* (Geneva, ICRC 2004) pp. 50-54.

73 Barstow, *supra* n. 9.

74 See Avant, *supra* n. 1 at p. 19.

75 Ibid., p. 20.

76 Contractor Support in the Theater of Operations, Deskbook Supplement, 28 March 2001, http://akss.dau.mil/docs/DAD%20Supp%20(Kr%20Supp%20in%20Theater)(Mar%2001).doc.

III The Legal Status of Military Contractors

A The Legal Status of Private Military Companies

Private military companies have no status under international law. They are not subjects of international law as they are not states, international organisations,[77] individuals or any other entity with full or limited international legal personality. As yet, there is no regulation of PMCs at the international level, and there seems to be nothing in international law or indeed the domestic law of most states to prohibit the establishment of private military or security companies *per se*.

For the most part, PMCs are companies registered under the applicable domestic company law. As PMCs are incorporated in states, they are subject to all of the relevant national law (company law, tax law, contract law, etc.) rather than international law. However, this does not mean that their activities and the actions of those they employ cannot be subject to international law where relevant. For example, in states that are parties to the Mercenaries Convention or Additional Protocol I, activities of PMCs that could be deemed mercenary would be prohibited.

B The Legal Status of the Contractor Personnel

There are two principal questions, which shall be considered in the following section: (1) What is the legal status of contractor personnel? Are they combatants or non-combatants (civilians)? (2) If they are the latter, in what circumstances and for how long might they lose the immunity from attack which all civilians are presumed to enjoy? The question of whether contractors are mercenaries shall be considered later.

i Are Individual Contractors Combatants or Non-combatants?

In order to determine whether contractors (including but not only those who take a direct part in hostilities) are combatants or civilians it is necessary to first consider whether they are members of the armed forces of a party to the conflict,[78] in this case, the US. If so, they can be considered combatants under the

77 Private military companies are not and could never be considered international organisations, as that term is currently understood. They lack the two key characteristics of international organisations, namely, an association of states and the ability to exercise legal powers on the international plane. See Ian Brownlie, *Principles of Public International Law*, 5th edn. (Oxford, Oxford University Press 1998) pp. 679-680.

78 According to Article 43(1) of 1977 Additional Protocol I:

> 'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government

definition provided for in Article 43 of Additional Protocol I, pursuant to which all members of the armed forces with the exception of chaplains and medical personnel are combatants,[79] 'and only members of the armed forces are combatants'.[80] The questions that must therefore be addressed are (1) who can be considered a member of the armed forces, and (2) how does an individual become a member. Is it a *de jure* or a *de facto status*? In order to be considered a member, does an individual have to be formally admitted into the armed forces (a *de jure* status) or can an individual be considered a *de facto* member by virtue of the functions in which he engages on behalf of the armed forces? (3) Which law is determinative in this respect, international humanitarian law or domestic law?

At the outset it should be noted that it is not easy or straightforward to answer these questions and space does not permit the in depth inquiry that they merit. Moreover, the answers that international law provides could be at variance with those provided by the national law of a state utilising contracted labour, such as the US. Even if an individual contractor were to be considered a member of the armed forces under international humanitarian law, he or she might not be recognised as such by the state that has contracted for his or her services, resulting in great uncertainty and greater potential for violation of the law, for both the state, the contractor and the opposing party.

Some argue that membership in armed forces under Article 43 of Additional Protocol I is functionally determined and does not depend on some formal process of incorporation, either at an individual or group level.[81] This view is prob-

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> or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflicts.'

The ICRC Study on Customary International Law considers this to be a rule of customary international humanitarian law applicable in international armed conflict and articulates the customary rule (Rule 4) thus: 'The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.' 'For purposes of the principle of distinction, it may also be applicable to State armed forces in non-international armed conflict.' S*upra* n. 39, p. 14. As the ICRC's Commentary to Article 43 notes, the Protocol 'subordinates every combatant, even combatants belonging to a resistance movement, to a Party to the conflict, which is not the case in the Third Geneva Convention, in Article 4(A)(2)'. *Supra* n. 48, p. 513.

79 According to Article 43(2) Additional Protocol I: 'Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.' According to the ICRC, this is a rule of customary international law in international armed conflicts. CIHL, *supra* n. 39, p. 11.

80 ICRC Commentary on Protocol I, *supra* n. 48, p. 515.

81 During the second expert meeting on Direct Participation in Hostilities co-hosted by the ICRC and the TMC Asser Institute and held in The Hague in October 2004, one expert, Louise Doswald-Beck, expressed the view that 'membership in armed forces does not depend on the technicalities of national law. Decisive are the

lematic for several reasons. Although it is true that formal incorporation is not a stipulated requirement for forces, units and groups under Article 43(1), it may be implicitly required. Individuals hired under contract by the armed forces through a private military company are generally not considered by states, including the US, to be members of their armed forces, nor are they considered to be members of groups that could be assimilated to armed forces, and they are not incorporated into the armed forces but work alongside them. Indeed, it is precisely because contractors are not considered to be members of the armed forces that states see certain advantages in using them, as noted in part 1. At the domestic level, in order for an individual to become a member of the armed forces, a formal process of incorporation is usually required – the individual has to either voluntarily join the armed forces or be conscripted. In doing so, he becomes a combatant and loses his civilian immunity from attack[82] on a continuous basis until such time as he becomes *hors de combat*.

Significantly, individual contractors, at least *de jure* under domestic law, are not considered as falling under military command.[83] They cannot be disciplined by a commanding officer, which is an explicit requirement of Article 43(1). Instead, their behaviour is regulated through the terms of the contract (with the onus on the contractor company to discipline them) and, in some cases, under the domestic law of the host or the sending state.

It is not clear if a functional approach to membership of armed forces should cover only civilians taking a direct part in hostilities or all civilians, including all civilian contractors, working on behalf of the armed forces. While logic might dictate that it would apply across the board, particularly given the increased dependence of a limited and shrinking number of combatants on the essential logistical support provided by civilians working in combat support services, most

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requirements of international law and whom these persons actually appear to fight for in the eyes of the enemy. In terms of GC III, if Article 4 A [1] GC III does not cover these contractors, Article 4 A [2] GC III probably would. The need for formal uniforms is less important today and contractors are still sufficiently distinguishable by their equipment and outfits. As all other criteria are fulfilled, they can be attacked.' Summary Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, The Hague, 25 – 26 October 2004, p. 12 (hereafter, Summary Report), available at www.wihl.nl. Of course, the question whether they can be attacked is separate from whether they are actually combatants. Doswald-Beck also stated: 'In terms of AP I, contractors are fulfilling governmental functions and therefore clearly fall within the scope of the notion of "armed forces" according to Article 43 AP I. This is not eliminated by the obligation of notification in Article 43 [3] AP I, which is not a constitutive requirement.' Summary Report, p. 12.

82 A.P.V. Rogers, *Law on the Battlefield*, 2nd edn. (Manchester, Manchester University Press 2004) p. 31.

83 See Contractors on the Battlefield, US Field Manual No. 3-100.21, January 2003, p. 1-7.

not involving or requiring direct participation in hostilities,[84] the practical implications of a widespread application of the functional approach would be dire. Indeed, if a functional approach to membership of the armed forces was adopted, it would of necessity have to be restricted to contractors and civilian employees taking a direct part in hostilities and performing essential military functions, otherwise even contractors taking no part in hostilities would lose their protection and be exposed to attack. It would reverse the current presumption that contractors are civilians who should not take a direct part in hostilities and who enjoy protection from attack, and in particular expose those contractors who do not take part in hostilities, or who do so only occasionally, to increased and unnecessary danger. It also brings us back to having to make case by case determinations of who is and who is not taking a direct part in hostilities (more precisely what functions fulfilled by contractors require or permit direct participation in hostilities) and the duration of that participation – an exercise that in any event probably cannot be avoided. There is, however, merit in the idea of incorporating contractors who take a direct part in hostililities into the armed forces and recognising them as combatants,[85] as discussed *infra* in part VI.

Even if contractors working for the US Department of Defence (DoD) are not members of the US armed forces, could they be considered as volunteers fighting for a party to the conflict without joining it, either as individuals or formed groups? According to Tony Rogers: 'If those individuals or groups come under command of a party to conflict, in the sense of accepting and carrying out the orders of that party, it can be argued that they are lawful combatants, unless they are mercenaries. If they are mercenaries or they are not under command, they are not lawful combatants and the party on whose behalf they participate should take all steps in its power to expel them.'[86] In this case, however, as noted, contractors do not come under the *de jure* command of a party to the conflict,

84 In this sense, the concept of the armed forces as an entity dependent primarily on combatants is arcane. While it is true that according to Article 43 of Additional Protocol I, the armed forces consist only of combatants and all members of the armed forces are combatants, this does not take account of the enormous number of civilian personnel (both permanent employees of the military and contractors) who increasingly make possible the running of the armed forces. In this respect, Article 43 does not seem to fully realise a scenario where some armed forces would become completely dependent on civilians and the implications for the latter's protection as a result of their functions on behalf of the armed forces.

85 'A civilian who is incorporated in an armed organization such as that mentioned in [Art. 43] paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed.' Commentary Additional Protocol I, *supra* n. 48, p. 515.

86 Rogers, *supra* n. 82, p. 32.

even if in some cases military commanders may exercise *de facto* command over them.

Perhaps the most far-reaching consequence of recognising individual contractors as combatants according to the functional approach is that they would have a right under international humanitarian law to take a direct part in hostilities at all times. It could produce the following highly undesirable result: an individual contractor who is not recognised by the armed forces on whose behalf he acts as a combatant, who is not subject to military command (as a matter of national, if not international, law), and who may even be prohibited under the national law of a state from fighting, would nevertheless have a right under international humanitarian law to take a direct part in hostilities. Such asymmetry between national and international law would lead to operational chaos and would make it extremely difficult for an opposing party to observe the principle of distinction,

If the functional approach to membership was followed, contractors, as combatants, would be bound to comply with the principle of distinction,[87] including ordinarily by wearing military uniforms[88] and carrying their arms openly. They would also have to be commanded by a person responsible for his subordinates and conduct their operations in accordance with the laws and customs of war.[89] As they are currently generally considered to be civilians, contractors do not have to comply with the principle of distinction, and they do not wear military uniforms or distinguishing insignia,[90] although the contractors on the ground in Iraq

87 According to Article 44 Additional Protocol I: 'In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.'

88 Although as noted in the Commentary to Article 43: 'Wearing or not a uniform or outfit is not a decisive criterion for the status of the individual concerned,…. Even though the command must require, subject to certain exceptions, that it be worn.' *Supra* n. 48, pp. 512-513. See also See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (Geneva, ICRC 2001) p. 87.

89 Article 43(1) Additional Protocol I; Article 1 Hague Regulations.

90 Michael Schmitt has argued that: 'Since civilian employees and private contractors do not wear uniforms denoting combatant status, seldom fall under the formal command of military personnel, and generally lie beyond the reach of military discipline that the armed forces use to enforce adherence to the "laws and customs of war," it would be stretch to style them members of the armed forces.' *Supra* n. 19, at p. 526.

can easily be spotted wearing uniforms that are sometimes even more militaristic, and often indistinguishable, from those worn by soldiers.[91] If they carry arms at all,[92] they may not necessarily do so openly.[93] To avoid exposing contractors not taking part in the hostilities to danger, the functional approach to membership would require any uniform worn to be distinguishable from a military uniform. Those not wearing one would have to exercise sartorial restraint by wearing civilian clothes to avoid confusing the enemy. This might be good advice to follow in any event, as in Iraq the insurgents treat uniformed contractors indistinguishably from combatants. In their eyes, they are all seen as part of a Western occupying army.[94]

Article 43(3) of Additional Protocol I requires parties that incorporate a paramilitary or armed law enforcement agency into their armed forces to notify the other parties. However, as they do not consider individual contractors to be paramilitaries or persons who have been incorporated into or are part of the armed forces, states using contractors, such as the US, do not formally notify parties to a conflict of their existence. While paragraph 3 does not specifically refer to contractors, fighting contractors could be considered a paramilitary force and notification would be required.[95]

Rather than viewing contractors (or at least those who take a direct part in hostilities) as functional members of the armed forces, as members of paramili-

91 Philip Carter, 'Hired guns: what to do about military contractors run amok', Slate, 9 April 2004, http://www.slate.com/id/2098571/; Michael Duffy, 'When private armies take to the front lines', Time magazine online, http://www.sandline.com/hotlinks/Time-Private_armies.html.

92 US Army Field Manual 100-21, Contractors on the Battlefield, 26 March 2000, defines three conditions that must be met before contractor personnel can carry firearms. One, the relevant commander in the area of operations must give his approval. Two, the contractor company policy must permit its employees to carry arms, and three, the individual contractor employee must agree to carry a firearm. Available at http://www.geocities.com/tominelpaso/armymanual.htm. See Leslie Wayne, 'America's for-profit secret army', *The New York Times*, 15 October 2002, http://www.commondreams.org/headlines02/1013-01.htm. According to one source, only about 6,000 of the private security contractors in Iraq are armed, and then only with small arms. Wilson, *supra* n. 66; Priest and Flaherty, *supra* n. 2; Mary Pat Flaherty and Dana Priest, 'More limits sought for private security firms', *The Washington Post*, 13 April 2004, http://www.washingtonpost.com/ac2/wp-dyn/A6612-2004Apr12?language=printer.

93 See Singer, *supra* n. 11.

94 See Barstow, *supra* n. 9.

95 In any event, the ICRC Commentary notes that 'it would be desirable for the various Parties to a conflict to inform each other completely regarding the composition of their respective armed forces, even if this were only done through the communication of the laws and regulations which they have had to adopt to ensure compliance with the Protocol, as provided for in Article 84 (*Rules of application*).' *Supra* n. 48, p. 516.

tary or other armed groups or as volunteers fighting on behalf of a party, any of which would make them combatants, it seems preferable to consider private individuals employed under contract by private military and security companies and contracted out to the military, regardless of the activities they are hired to perform and actually engage in, as other than combatants. Arguably, they could not become combatants without being formally incorporated into the armed forces or some auxiliary force. National law of the state employing them and not humanitarian law would seem to be the control as far as membership of the armed forces is concerned. Thus, contractors must be considered non-combatants (civilians) under humanitarian law. This conclusion is supported by reference to humanitarian law itself, which explicitly alludes to the legal status of contractors. According to both Hague[96] and Geneva law,[97] they are considered civilians accompanying the armed forces. US Department of Defense Instruction Number 3020.41 states that where they accompany the armed forces in the field, 'contractors shall be considered as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with the appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War…'[98] According to the ICRC's CIHL study, civilians accompanying the armed forces 'are not members of the armed forces by definition'.[99] Whether or not they enjoy POW status is a separate question, the answer to which depends on whether they carry the appropriate identifying card. Even those captured without identification cards must be treated humanely, as civilian detainees according to the Fourth Geneva Convention. Contractors who do not accompany the armed forces into the field are also civilians, although the question of their POW status will not usually

96 Article 13 of the Hague Regulations provides: 'Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.'

97 Article 4(A)(4) Third Geneva Convention recognises as POWs, 'Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, … supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card ...' The ICRC Study on Customary International Humanitarian Law points out that 'civilians accompanying armed forces … are not members of the armed forces by definition'. *CIHL*, *supra* n. 39, p. 13.

98 US Department of Defense Instruction, Number 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, October 3, 2005, p. 6.

99 CIHL, *supra* n. 39, p. 13.

arise.[100] The main coalition partners in Iraq, namely, the US and the UK, certainly take the view that individual contractors are civilians. Their military manuals stipulate that contractors shall not take a direct part in hostilities and shall actively be protected from attack. In fact, it is precisely because individual contractors are not recognised by the US as combatants that the US Army Field Manual recommends that they receive adequate protection in the field.[101] Likewise, the UK Military Manual states that civilians who accompany the armed forces in the field, so far as possible, 'should not be deployed to places where they are liable to come under enemy fire or to be captured'.[102] The reality, of course, is quite different, as Iraq demonstrates. At least during military operations, Coalition armed forces in Iraq do not assume any responsibility for contractors working alongside them nor provide them with adequate protection.[103] Contractors have been left to their own devices; they generally cannot rely on military assistance.[104] In several incidents, employees of PMCs have called in vain for military backup, having to fight their own way out when under attack.[105] Moreover, they are actually providing protection in some cases to the armed forces, an activity which is considered to be direct participation in hostilities (see below).[106] They have been deployed to one of the most dangerous places in the world, where the chances of coming

100 Given that they are outside the zone of hostilities in a traditional sense, there is little likelihood of them being captured, although it is not an impossibility. While it is generally considered that IHL only applies within the territory where the conflict is taking place, such a view is increasingly out of step with the nature of some contemporary hostilities, where a hostile act begun in one country or continent (removed from the territory where the conflict is physically occurring) may be completed in another.

101 'Contractor employees, because of their status as civilians authorized to accompany the armed forces in the field, bring with them an inherent need for force protection.' *Contractors on the Battlefield*, FM 3-100:21 (100-21), January 2003, Headquarters Department of the Army, p. 6-1 (para. 6-3).

102 UK Military Manual, *supra* n. 45 at p. 40, para. 4.3.7.

103 See Barstow, *supra* n. 9. However, the experiences in Iraq appeared to be persuading the Pentagon to rethink this policy. DoD Deputy Assistant Secretary of Defense Jerry Jennings was reported as saying that the Pentagon would treat US contractors as soldiers and defence personnel, and that it would expend 'all resources, energy and time on ensuring that we bring them back. We'll leave no one behind'. See 'Outsourcing the war', *supra* n. 68.

104 When military subcontractors go missing or get into trouble, there is no defined role for the military in assisting them. Contractors in Iraq complain that they lack military backup when under attack, and are not adequately armed to fight serious military threats. Wilson, *supra* n. 66; Priest and Flaherty, *supra* n. 2.

105 Dana Priest and Flaherty, ibid.

106 Ibid.

under fire or being captured is extremely high, particularly when they are providing security for military objectives.[107]

International humanitarian law describes contractors as civilians and seems to assume that individual contractors who are authorised to accompany the armed forces in the field will not take a direct part in hostilities. If they do, either because it is an implicit requirement of their function or because circumstances force them to, how does this affect the protection that they are presumed as civilians to enjoy? Clearly, taking a direct part in the hostilities does not convert them into combatants. Therefore, their legal status does not change. However, they lose the protection that civilians normally enjoy and can be attacked during their participation. The key question, as discussed below, is therefore the temporal duration of their participation, and whether it is limited or ongoing. If it is ongoing, then they are to all extents and purposes indistinguishable from combatants, and for their own protection, as well as the sake of observance of the principle of distinction by all parties, they should properly be accorded combatant status.

If they are captured during an international armed conflict, appropriately accredited contractor personnel accompanying the armed forces may still be entitled to POW status, but in any event will benefit from the protection of the Fourth Convention.

ii Are Contractors Mercenaries?

Where individual contractors clearly do take a direct part in hostilities, either in fact or by virtue of the terms of the contract pursuant to which they are hired, an important question is whether they can be considered mercenaries. One of the indicators of mercenary activity is direct participation in hostilities, at least as far as Additional Protocol I is concerned. The answer on its face seems clear: individual contractors hired by states could not usually be considered mercenaries either under the Additional Protocol I definition[108] or even the broader definition of Article 1 of the Mercenaries Convention. Most individual contractors

107 One PMC executive stated: 'Civilian contractors are working in and amongst the more hostile parts of a conflict or postconflict scenario', Quoted in Barstow, *supra* n. 9. A measure of the level of danger is the extent of compensation claims for deaths and injuries: 'Since the start of 2003, contractors have filed claims for 94 deaths and 1,164 injuries. For all of 2001 and 2002, by contrast, contractors reported 10 deaths and 843 injuries. Labor Department officials said an overwhelming majority of the cases since 2003 were from Iraq.' Barstow, ibid.

108 Article 47 of 1977 Additional Protocol I to the 1949 Geneva Conventions states that a mercenary is a person who:

'(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compen-

are not specifically recruited to fight (although one should remember that direct participation in hostilities does not necessarily involve actual fighting), nor do they usually take a direct part in hostilities. Moreover, they are not necessarily motivated primarily by a desire for private gain, although they do receive salaries far in excess of those paid to the regular armed forces. In any event, where the party employing them is of the same nationality, they would not satisfy the definition of a mercenary in Article 47 of Additional Protocol I or Article 1 of the Mercenaries Convention.

While the criterion of nationality is an essential element of the definition of a mercenary, its limitations become clear when applied to most individual contractors. In reality, the key issue is not a contractor's nationality (as discussed, contractors of a range of nationalities are working for the Coalition Forces in Iraq), but the nature of the services provided and the dependence of the client state on those services. In some cases, contractors may be of a different nationality than the client state, while in others not. Given that the essential nature of the services provided may not differ in either scenario, it seems unfair, as well as inefficacious, to use nationality to determine the legality of the services provided and the legal status of the person involved. It would mean that nationals could escape the mercenary designation, while non-nationals would come close to being indistinguishable from mercenaries.

C Activities Engaged in by Contractors Constituting Direct Participation in Hostilities and the Temporal Duration of Their Participation

International humanitarian law does not prohibit direct participation in hostilities by civilians but merely stipulates that they shall lose protection from attack if they do so. Still, given the presumption that civilian contractors will not take a direct part in hostilities, some contractors in Iraq may not be aware that their activities constitute direct participation or realise the potential risks they are running. While from the perspective of the contractor personnel it may make no practical difference, as in Iraq they may be regarded by insurgents as fair game, from the perspective of the enemy, it makes a huge difference. To the extent that contractor personnel are directly participating in hostilities, it is not a violation of humanitarian law to attack them.

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sation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.'

This paper cannot provide any meaningful elucidation of the complex notion of direct participation in hostilities. It suffices to point out that the generally accepted meaning is engaging in attacks, or acts preparatory to attacks, on enemy personnel or objects during a situation of armed conflict,[109] although this hardly begins to shed light on the range of activities that could be covered. One of the most problematic aspects of the notion, with serious implications for contractor personnel, is its temporal duration. Should contractors who are hired by the military or another state agency to fill positions that functionally require either occasional or continuous direct participation in hostilities be considered as directly participating only during each specific act of participation (however long that period is), or should they be treated as combatants, who are basically targetable on an ongoing basis, unless they cease participation? The latter, so-called 'membership approach', would assimilate the contractor's status with that of a fighter during a non-international armed conflict who belongs to an armed opposition group and who is considered targetable as long as he does not somehow renounce membership. It is noteworthy that during the Third Expert Meeting on the Notion of Direct Participation in Hostilities, held in Geneva from 23 to 25 October 2005, there was some support for such an approach, or variations of it. A number of experts backed a 'limited membership approach', which would base loss of protection not only on membership but also on the function fulfilled by the individual working within the group. If that function required a person to take a direct part in hostilities on a regular or continuous basis, then that person would lose protection against direct attack for as long as that function was being fulfilled. A number of experts, however, expressed reservations about a membership or limited membership approach *vis-à-vis* individual contractors.[110]

Aside from resolving the temporal question, it will also be important to establish, with as much accuracy as possible, which functions fulfilled by contractors either do or may involve their direct participation in hostilities. Some of the above-mentioned activities engaged in by contractor personnel, such as providing security for civilian personnel, driving, catering, etc., do not constitute direct participation, although contractors in the proximity of military objectives expose themselves to death or injury arising from a lawful attack on those objectives.[111]

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109 See further Avril McDonald, 'The legal status of military and security subcontractors', in *International Humanitarian Law and the 21st Century's Conflicts*, Roberta Arnold and Pierre-Antoine Hildbrand, eds., (Lausanne, Berne, Lugano, Editions interuniversitaires suisses 2005) pp. 215 at 230-242.

110 See Summary Report of the Third Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, Geneva, 23-25 October 2005, available at www.wihl.nl.

111 See Yoram Dinstein, *The Conduct of Hostilities in International Armed Conflicts* (Cambridge, Cambridge University Press 2004) p. 27; A.P.V. Rogers and P. Malherbe, *Model Manual on the Law of Armed Conflict* (Geneva, ICRC 1999) p. 129; Kalshoven and Zegveld, *supra* n. 88, p. 101.

Aside from direct involvement in combat operations – a clear cut case of participation – contractor personnel might become lawful targets if they engage *inter alia* in the following activities: guarding a military objective or military personnel, certain types of intelligence activities, certain rescue operations, and operation of weapons systems.

In many cases, contractors are used to guard and defend military objectives. International humanitarian law permits some civilians to carry arms and, in exceptional circumstances, use them during armed conflicts. Military contractors are allowed to be armed and use force in personal self-defence, but it is clear that the latter should be interpreted narrowly. According to Charles Garraway: 'private security contractors can act to protect themselves and others without taking a direct part in hostilities'.[112] Michael Schmitt has stated that 'individuals simply maintaining personal security for civilians or general security against traditional crime would not be directly participating any more than police officers do'.[113]

The question is when does permissible defensive use of force become direct participation in hostilities? Defensive use of force in protection of combatants, military objectives or predictable targets would constitute direct participation.[114] In a letter to US Secretary of Defense Donald Rumsfeld, Senator Jack Reed, a member of the US Armed Services Committee, stated: 'Security in a hostile fire area is a classic military mission. Delegating this mission to private contractors raises serious questions'.[115]

As far as intelligence gathering is concerned, a contractor who gathers intelligence in enemy controlled territory is taking a direct part in hostilities,[116] although according to Dinstein: 'There is a disparity between the latter and a civilian who retrieves intelligence data from satellites or listening posts, working in terminals located in his home country.'[117] But arguably the latter may also be taking a direct part in hostilities if his actions are critical to the direct application of violence against the enemy. Michael Schmitt has argued, correctly, it is submitted, that: 'an individual performing an indispensable function in making possible the application of force against the enemy is directly participating. In other words, the appropriate test is whether that individual is an integral part of the uninterrupted process of defeating the enemy.'[118]

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112 Quoted in Dworkin, *supra* n. 2.

113 Ibid.

114 Ibid.

115 Reported in Barstow, *supra* n. 9.

116 Dinstein, *supra* n. 111.

117 Ibid. pp. 27-28.

118 Michael Schmitt, 'Direct participation in hostilities and 21st century conflicts', in *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck*, Horst Fischer et al eds. (Berlin, BWV 2004) at pp. 501 at 505.

As regards rescue operations, the US Air Force Commander's Handbook states that 'rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the US Civil Air Patrol, who engage in military search and rescue activity in wartime.'[119] However, the Handbook notes that the care of the wounded on land and the rescue of persons downed at sea or shipwrecked are protected activities under international law.

The operation of weapons systems by contractors, either directly or indirectly, is a clear-cut case of direct participation in hostilities. As noted above, civilian contractors in Iraq have been involved in both maintaining and operating weapons systems.

This author agrees with Dinstein that '[a] civilian may convert himself into a combatant',[120] but disagrees that he can do so merely by taking a direct part in hostilities.[121] Even if a civilian takes a direct part in hostilities, he retains his status as a civilian, but loses his protection from attack. Therefore, a contractor could only become a combatant through being incorporated into an armed force of a party to the conflict and not through his direct participation in hostilities. However, where a civilian contractor, through his function, takes a direct part in hostilities on an ongoing basis, even if *de jure* he remains a civilian, his *de facto* status is assimilated to that of a combatant in so far as the temporal duration of his participation would be considered to be open ended – unless he specifically withdrew from it – and he would be constantly targetable in the same way as is a combatant. As Dinstein points out, 'a person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to the other'.[122] If a membership or limited membership approach was adopted, a civilian contractor who was not considered to be a member of the armed forces, but who took a direct part in hostilities on an ongoing basis would remain a civilian, but that would be a completely empty designation as he would effectively be treated as a combatant, without enjoying all the benefits of combatancy. In fact, he would effectively be a combatant (*de facto*) and a civilian (*de jure*) at the same time, and unless he was targetable at all times, even while not engaged in hostile activities, he would be able to switch between categories. The only solution to this untenable situation appears to be either complete avoidance

119 US Air Force Commander's Handbook (1980) paras. 2-8.

120 Dinstein, *supra* n. 111, p. 27.

121 According to Dinstein, a combatant in an international armed conflict is either a member of the armed forces of a belligerent part, or any other person who takes an active part in the hostilities. '[C]ivilians are not allowed to participate activitely in the fighting: if they do, they lose they status as civilians', ibid., p. 27.

122 Ibid.

of the use of civilian contractors in activities involving direct participation in hostilities or, more realistically, legal recognition that contractors who take a direct part in hostilities on an ongoing basis are in fact combatants, who should bear the risks and enjoy the benefits of combatancy.

IV Liability of Contractors

One of the problems associated with the use of individual contractors by the armed forces or other state agencies is the contractors' perceived lack of accountability, and that of the PMCs employing them, in case they commit violations of the law. Whilst military personnel who commit crimes or civil wrongs, either at home or in the field, are subject to a well-defined code of military discipline, individual contractors are not. Generally speaking, their behaviour is regulated through the terms of the contract (with the onus on the contractor to discipline them)[123] and, in some cases, under the domestic law of the host or the sending state. The disparity in the treatment of members of the armed forces and individual contractors accused of wrongdoing has been illustrated in Iraq. Low-ranking military personnel accused of abuse of detainees held at the Abu Ghraib prison, for example, were subjected to military courts-martial, even if the resulting sentences were very low.[124] At the time of writing, no criminal prosecutions against contractors implicated in wrongdoing had been initiated either before civilian or military courts, despite reports of abuse of Iraqi civilians by contractors.[125]

A Criminal Liability

While the Uniform Code of Military Justice (UCMJ),[126] the principal legislation concerning military discipline applies at all times to members of the US armed forces, it applies to persons accompanying the armed forces only in times of war.[127] US Field Manual No. 3-100.21 explains that the reference to war covers only cases

123 According to US Field Manual No. 3-100.21, *supra* n. 83: 'Managing discipline of the contractor employees is the responsibility of the contractor's management structure, not the military chain of command. . . . It is the contractor who must take responsibility and direct action for his employee's conduct'.

124 See 'A look at convictions in Abu Ghraib cases', Associated Press, 26 September 2005.

125 See Lisa Meyers, 'U.S. contractors in Iraq allege abuses: Four men say they witnessed brutality', 17 February 2005, NBC News, http://www.msnbc.msn.com/id/6947745.

126 10 USC §§ 801-946 (2000).

127 Article 2(10) of the UCMJ provides that the Code applies to, *inter alia*, 'In time of war, persons serving with or accompanying an armed force in the field'.

of declared war.[128] This means that it does not cover contractors who accompany US armed forces in Iraq, Operation Iraqi Freedom not being a declared war.[129]

That leaves two other main possibilities for the exercise by the US of criminal jurisdiction over contractor personnel who commit crimes in Iraq – the Military Extraterritorial Jurisdiction Act (MEJA) of 2000[130] and the War Crimes Act of 1996.[131]

The MEJA covers criminal acts by, *inter alia*, persons employed by or accompanying the armed forces outside the US, including a person 'employed as a civilian employee of the Department of Defense … as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier) provided they are not a national or resident in the host state'.[132] As the person must be employed by or accompanying the armed forces outside the US, it would not cover contractors who remain in the US. 'The term "employed by the Armed Forces outside the US" means "employed as a civilian employee of DoD, as a DoD contractor or as an employee of a DoD contractor, who is present or residing outside the US in connection with such employment, and is not a national of or ordinarily resident in the host nation." The term "accompanying the Armed Forces outside the US" means a family member of a member of the Armed Forces, a civilian employee of the DoD, a DoD contractor or an employee of a DoD contractor, not a national of or ordinarily resident in the host nation.'[133]

According to Field Manual No. 3-100.21, the MEJA should only be used where international agreements or the host state's laws do not take precedence.[134] As the CPA issued Public Order No. 17 exempting contractor and other civilians accompanying Coalition Forces, *inter alia*, from the jurisdiction of Iraqi laws and courts, unless the immunity is waived by the sending state,[135] Iraq's law would

128 *Supra* n. 83.

129 Even though it was a congressionally approved conflict. See H.J. Res. 114, 16 October 2002.

130 18 USC, §§ 3261-3267 (2000). For a detailed discussion of the Act as it relates to contractor personnel see Joseph R. Perlak, 'The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel', 69 *Military Law Review* (2001) p. 92. See also Andrew D. Fallon and Theresa A. Keene, 'Closing the legal loophole? Practical implications of the Military Extraterritorial Jurisdiction Act of 2000 – civilians accompanying the Armed Forces', *Air Force Law Review* (Spring, 2001).

131 US Code, 18 § 2441.

132 The Military Extraterritorial Jurisdiction Act of 2000, Sec. 3267.

133 Contractor Support in the Theater of Operations, Deskbook Supplement, 28 March 2001, sect. 5.23.4.

134 *Supra* n. 83.

135 CPA Order Number 17 (revised), Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004.

not take precedence. The revised order outlives the CPA and will remain in force until rescinded or amended by legislation of the Iraqi government.

Persons falling under the Act are subject to federal criminal prosecution. 'Essentially, the Act applies to anyone who engages in conduct outside the US that would constitute an offense punishable by imprisonment for more than 1 year, the same as if the offense had been committed within the jurisdiction of the US.'[136] Acts falling under the MEJA include not only the most serious crimes, such as war crimes, but also lesser offences provided they attract a sentence of at least one year.

The MEJA, however, hardly covers all possible criminal wrongdoing by contractors in Iraq because it contains several gaping loopholes. As it does not cover criminal wrongdoing by persons who are nationals of or resident in the host state, it would not capture criminal wrongdoing by Iraqi nationals employed as contractors by the DoD. Nor would it cover persons who are not employed by DoD, for example, those working in Iraq employed through the US Departments of State or Interior, or the CIA. Given the Act's stipulation that the person must be employed by or accompanying the armed forces outside the US, it would also not cover individual contractors who are not actually deployed outside the US, but are based in the US or elsewhere, even though they may be involved in Iraq war operations. Such persons could include those contractors, for example, who maintain or operate weapons systems that involve the remote use of force, such as long range drones.

Where criminal wrongdoing by contractors reaches war crime level, they could potentially be prosecuted under the 1996 War Crimes Act. According to Field Manual No. 3-100.2: 'Subcontractors accused of crimes could be prosecuted under US Federal law, which makes all US citizens criminally liable for war crimes committed abroad (War Crimes Act 1996)'. So far, no contractor working in Iraq or elsewhere has been prosecuted under this legislation, or, indeed, under the MEJA. This is troubling because even though allegations of criminal wrongdoing by individual contractors have not been widespread, they do exist. The Taguba Report on detainee abuse in Abu Ghraib named three contractors implicated in those events. US Defense Secretary Donald Rumsfeld was later reported as saying that there were (in May 2004) 37 civilian contractors working at Abu Ghraib, mostly as interrogators or translators. Significantly, in terms of the responsibility of the US for the actions of contractors, discussed below, he was reported as having told Senators, 'They're responsible to military intelligence who hire them and have the responsibility for supervising them.'[137]

136 Contractor Support in the Theater of Operations, *supra* n. 76, sect. 5.23.4.

137 Quoted in James Rosen, 'Contractors' status in Iraq hits grey area', The Sacramento Bee, 23 May 2004, http://www.sacbee.com/content/news/v-print/story/9399327p-10323643c.html.

There appears to be only one precedent for the filing of criminal charges against a contractor, working not for the DoD, but for the CIA in Afghanistan. Mr. David Passaro was charged on 17 June 2004 under the 2001 Patriot Act[138] with two counts each of assault and assault with a dangerous weapon in connection with the 21 June 2003 death of Mr. Abdul Wali. The latter had died two days after being interrogated and beaten by Passaro at a detention centre in Afghanistan.[139] The case is of great significance because, if a guilty verdict is returned, it will serve as a precedent for future actions, including potentially against contractors supporting the US mission in Iraq. However, some critics consider the charging of Mr. Passaro under the Patriot Act to be a case of jurisdictional overreach.[140]

In principle there is nothing under international law to stop a civilian contractor being prosecuted for a war crime, either before an international forum having jurisdiction[141] or before a competent national court, including one that would exercise universal jurisdiction. As found by the International Criminal Tribunal for Rwanda in the *Akayesu* case, 'the laws of war must apply equally to civilians as to combatants in the traditional sense'.[142] Of course, certain elements are required to hold a civilian (or indeed anyone) liable for a war crime, most fundamentally, a link between the accused's acts and the armed conflict[143] and the requisite *mens rea*.

Criminal wrongdoing by contractors could also potentially give rise to superior responsibility on the part of those individuals exercising *de facto* if not *de jure* command and control over them. Even if contractors are not considered to be part of the armed forces of a state, and are not part of the chain of command or technically subject to military orders, in practice some do fall under the control and responsibility of military or civilian superiors.

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138 Public Law No: 107-56.

139 Scharnberg, *supra* n. 25. His trial had been scheduled to begin in October 2005 before a US federal court in North Carolina but was postponed by the Judge to allow both sides more time to file motions. If convicted, the accused faces up to 40 years imprisonment and a $1 million fine. 'Judge grants delay in Passaro trial', Associated Press, 29 September 2005, http://rdu.news14.com/content/headlines/?ArID=75012&SecID=2.

140 See David Kravets, 'CIA contractor is charged under the Patriot Act', 18 June 2004, http://www.usatoday.com/news/nation/2004-06-18-pat.-act-charge_x.htm.

141 The jurisdiction of the Yugoslav and Rwanda Tribunals is restricted to the former Yugoslavia and Rwanda, respectively. The Iraqi Special Tribunal only has jurisdiction over Iraq nationals or residents of Iraq with respect to crimes within the Tribunal's jurisdiction committed between 17 July 1968 and 1 May 2003 (Article 1(b) of the Statute). Neither the US nor Iraq is a party to the Statute of the International Criminal Court.

142 *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 634.

143 *Prosecutor* v. *Dusko Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 207.

B Civil Liability

Civil liability of PMCs or individual contractors could arise in at least two situations. First, a victim of wrongdoing committed by an individual contractor could sue that individual and/or the PMC that hired him or her. Second, an individual contractor or his next of kin could bring an action against a PMC for its wrongdoing.

The United States is unique in having the Alien Tort Claims Act (ATCA), which allows non-nationals to bring an action in tort against an individual, a state or a corporation which has committed an actionable tort abroad. The ATCA, enacted as part of the First Judiciary Act of 1789,[144] included a grant of subject-matter jurisdiction to the federal courts over 'all causes where an alien sues for a tort only, committed in violation of the law of nations or a treaty of the United States'.[145] Since the 1980 case of *Filartiga* v. *Pena-Irala*,[146] 'U.S. courts have held that there is universal jurisdiction over such acts as [genocide, war crimes and crimes against humanity] permitting the United States to provide a remedy for violations of international law through its courts, even where the conduct complained of took place entirely outside the United States'.[147]

On 9 June 2004 a suit pursuant to the ATCA on behalf of eight Iraqis detained in Abu Ghraib was filed in a San Diego Federal District Court against two US defence contractors, CACI Inc., based in Arlington, Virginia, and Titan Inc., based in San Diego, implicated in the Abu Ghraib scandal and named in the Taguba and Fay[148] reports.[149] The suit is highly significant in the context of the PMC debate as it attempts to establish a link between the motivation of the companies, namely profit, and the perpetration of abuses, including rape and electrocution of the genitals of detainees. It accused them of engaging in a conspiracy with unnamed government officials to torture and humiliate Iraqi prisoners in order to boost their profits.

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144 US Statutes at Large 1 (1789) p. 73.

145 As currently codified at 28 U.S.C. § 1350 it reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' G.B. Born, *International Civil Litigation in United States Courts: Commentary & Materials*, 3rd edn. (The Hague, Kluwer Law International 1996) p. 34.

146 630 F.2d 876 (2d Cir.1980) *ILR* 77, p. 169.

147 P.H.F. Bekker, 'The Democratic Republic of the Congo requests the World Court to order Belgium to annul the arrest warrant issued against the Congo's foreign minister', ASIL Insight, October 2000, http://www.asil.org/insigh55.htm.

148 *Supra* n. 15.

149 T. Christian Miller, 'Iraqi abuse victims sue contractor', *Los Angeles Times*, 10 June 2004.

On 27 July 2004 a second complaint was filed against CACI Inc., and Titan Inc., and three of their civilian employees[150] on behalf of five Iraqis detained at the Abu Ghraib prison.[151] It alleged that four of the complainants were 'unlawfully tortured by agents or employees' of the two companies working at the jail. The fifth plaintiff is the widow of an Iraqi who allegedly died at their hands. The companies denied the charges. The suit, brought under the Alien Tort Claims Act, as well as the Racketeer Influenced and Corrupt Organizations Act (RICO),[152] was filed in the US District Court for the District of Colombia.[153]

An unresolved question, which is particularly important given the risks that contractor personnel face in their line of work, concerns the legal responsibilities of private military and security companies towards the contractors they employ. When a contractor is injured or killed in the line of duty, or taken hostage, does he or his family have any legal remedies against the PMC? An answer may soon be given in a case currently before a US court. The families of the four subcontractors ambushed and killed in Fallujah filed a suit against their employer, Blackwater Security Services, for fraud and wrongful death before Wake County Superior Court. In April 2005, seeking to limit the remedies against Blackwater that would be available before the State Court, the defendants succeeded in having the case transferred to the North Carolina District Court (a Federal Court),[154] North Carolina being Blackwater's principal place of business. While the substantive legal issues raised in this case had yet to be determined at the time of writing, the complainants had already secured a preliminary legal victory on a jurisdictional matter. On 15 August 2005, the North Carolina District Court granted the families' motion to remand the case back to the State Court, where the families could continue to seek all available remedies without limitation, and denied the defendants' motions to dismiss the case.[155] The Court rejected the defendants' contention that the Defense Base Act, a federal law limiting death benefits for contractors working overseas, completely preempted all state law.

The decision on the merits in this suit, the first of its kind ever to be filed in a US court, will be closely scrutinised. The outcome may, however, turn on

150 Namely, Stephen Stephanowicz of CACI and John Israel and Adel Nakhla of Titan. The three men were all named in the Taguba report, *supra* n. 15.

151 Deborah Hastings, 'Iraqi prisoners claiming abuse seeking U.S. justice', Associated Press, 23 October 2004.

152 US Code 18, § 1961.

153 See Shaun Waterman, 'Defense contractors face Iraqi torture suit', United Press International, 27 July 2004, http://www.washtimes.com/upi-breaking/20040727-072734-7484r.htm.

154 Emery P. Dalesio, 'Federal judge sends lawsuit over Blackwater deaths to N.C. court', Associated Press, 15 August 2005, http://abcnews.go.com/US/wireStory?id=1040738.

155 'Federal Court Rules in Favor of the Families of American Security Contractors Executed in Iraq', 15 August 2005, PRNewswire, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-15-2005/0004088565&EDATE=.

narrow issues of US contract law rather than shed light on the wider question of the responsibility of contractors generally towards their (temporary) employees under national or international law. Under the terms of the contract, contractors are made aware of and assume the risks of their job. It is precisely because they willingly sign up for such risky assignments that they are so well paid. Furthermore, the contract in this case included a release clause under which the contractors signed away their and their families' right to sue the company in case of death, even if the deaths were the result of Blackwater's negligence or gross negligence.[156] In order to succeed, the applicants would have to show that the company acted recklessly or deliberately exposed its personnel to danger. In this case, the families are alleging that the men were not properly armed or trained,[157] issues which directly concern the preparedness of contractors to operate in a war zone and the unsatisfactory situation regarding their legal status.

V State Responsibility for the Unlawful Acts of PMCs and Contractor Personnel

No claim of state responsibility for the wrongful acts of contractors has ever been brought, and Iraq is unlikely to produce one. It is nonetheless important to consider the theoretical possibility of a case where the wrongdoing of a contractor is attributed to the state for which he works, and the possible circumstances in which state responsibility for the actions of contractors could arise. Given the ever deepening dependence on contractors, states need to be able to recognise their responsibilities under international law and the limitations on the use of contractors before responsibility arises.

The legal basis for claiming that states are not responsible for the wrongful acts of contractors is that contractors are neither employed by nor are members of the armed forces and are not empowered to act as agents of the state. They do not operate under the command or direction of the state. This contrasts with members of the armed forces or civilian employees of the armed forces for whose actions the US and other states are legally responsible under the principle of agency.[158] As long as contractors are not considered either members of the armed forces or civilian employees of the armed forces, or of another state agency, they

156 See Joseph Neff and Jay Price, 'Iraq: Courts to resolve contractors' deaths', *The News and Observer,* 9 January 2005, http://www.corpwatch.org/article.php?id=11781.

157 Scharnberg, *supra* n. 25.

158 According to the Commentaries to the Articles on the Responsibility of States for Internationally Wrongful Acts, 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.' Extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.2, November 2001, p. 80.

would not be considered members of an organ of the state under Article 4(1) of the Articles on the Responsibility of States for Internationally Wrongful Acts. Article 4(2) provides that an organ of a state is determined according to national, rather than international law,[159] begging the question whether members of the organ are also to be determined according to national law. If so, a functional approach to the determination of a contractor's status would not suffice for the attribution of state responsibility, even if it was accepted for the purpose of deciding the question of membership of armed forces under international humanitarian law. However, this would allow states using contractors to decide whether or not to be responsible for them and encourage them to avoid taking responsibility by avoiding incorporation, even where contractors clearly performed war fighting functions.

However, the actions of contractors may be attributable to a state even if contractors are not agents of the state. In the *Youmens* claim (1926), the United States-Mexican Claims Commission found that: 'Even the conduct of private persons is attributable to a State when such persons are acting on behalf of the State without having acquired the status of State organs or of other entities empowered to exercise governmental authority.'[160] Where the conduct of a private person or of a group can be regarded as an act of a state organ, such conduct can be considered an act of state.

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts encapsulate this rule of attribution in Chapter II.[161] Article 5 of the Articles concerning 'Conduct of persons or entities exercising elements of governmental authority'[162] seems relevant to the case of contractors. Some contractors might appear to be exercising elements of governmental authority, particularly if they have essential military roles. The Commentaries to the Articles indicate that: 'The article is intended to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in the place of State organs, as well as situations where

159 'An organ includes any person or entity which has that status in accordance with the internal law of the State.'

160 4 *RIAA* (1926) p. 110. See also R. Wolfrum, 'Internationally Wrongful Act', in 10 *Encyclopedia of Public International Law*, (Amsterdam/New York/Oxford, North-Holland 1987) pp. 271 at 274-275.

161 Article 2. Available online at http://lcil.law.cam.ac.uk/ILCSR/.

162 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.' Article 7 goes on to provide that: 'The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

former State corporations have been privatized but retain certain public or regulatory functions.'[163] The Commentaries specifically allude to contractors as entities that may exercise governmental authority: 'For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.'[164] It would seem that it is the PMCs, rather than the contractor individuals, that are the para-statal entities exercising governmental authority. PMCs providing contractors engaged in essential military roles, including the use of force, would perforce be para-statal entities exercising governmental authority. After all, the use of force is generally considered to be the fundamental state prerogative and the quintessential example of a state function.[165]

The question of whether a state could be held responsible for the actions of a PMC or an individual contractor exercising elements of governmental authority turns not only on what an element of governmental authority is, but also on what exactly is meant by the wording 'empowered by the law of that State' to exercise that authority. Is the involvement of a contractor in a function essential to keeping the military machine running an exercise of an element of governmental authority? Is the lawful hiring of a contractor by a state through a PMC tantamount to empowering that individual or PMC to carry out an essential government function? In the absence of conferring specific powers at the national level, meaning an actual legal delegation of state functions, can states be said to have empowered PMCs to, for example, wage war on their behalf for the purposes of state responsibility? In this respect, it is significant that the Commentaries to the Articles note that: 'For the purposes of article 5, an entity is empowered to act even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State.' Still, states might certainly dispute that their hiring through PMCs of individual contractors to perform military and quasi military roles is tantamount to conferring on those PMCs any type of para-statal status.

Another possibility for holding states responsible for the actions of contractors is provided in Article 8 of the Articles on conduct directed or controlled by a state.[166] One could imagine a situation where a contractor could fall under the *de*

163 Commentaries to the Articles, *supra* n. 158, p. 92.

164 Ibid.

165 The sociologist Max Weber considered the exercise of legitimate violence to be a core function of a state, a view which has been widely accepted. See his *The Theory of Social and Economic Organization* (New York, Free Press 1964).

166 Article 8 provides: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' On the question of the responsibility of states for private actors generally see James Crawford and Simon Olleson, 'The nature and forms of

facto if not *de jure* responsibility of a military or civilian commander, who himself or herself is an organ of the state. If the contractor acts on orders of an organ of the state or under the direction or control of a *de facto,* if not *de jure,* superior, it might be possible to consider his or her conduct an act of state. Article 8 seems specifically designed to cover such situations. The relevant Commentaries note that it addresses two factual circumstances:

> The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons acts under the State's direction or control. Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery. … Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, through not officially commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.[167]

The applicability of the Article 8 rule of attribution will in practice depend on whether the contractor actually acted under the direction or control of a state. The Commentaries state, reflecting the decision of the ICJ in the *Nicaragua* case that 'Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's control or direction.'[168]

The *Nicaragua* case shows that a state must exercise 'effective control' over non-state actors for their conduct to be attributable to it. 'It would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'[169]

The findings of the ICJ in the *Nicaragua* case seem particularly apposite to the case of military contractors operating in Iraq. In that case, Nicaragua claimed

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international responsibility', chapter 14 of *International Law*, Malcolm D. Evans, ed., (Oxford, Oxford University Press 2003) pp. 456-457.

167 Commentaries to the Articles, *supra* n. 158, p. 104.

168 Commentaries to the Articles, *supra* n. 158, p. 104.

169 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), Judgement of 27 June 1987, Merits, para. 114.

that 'the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States'. But, as the Commentaries to the Articles note: '…only in certain individual instances were the acts of the *contras* themselves held attributable to it [the US], based upon actual participation of and directions given by the State.'[170]

A less onerous and more flexible degree of control was required by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[171]

It should be remembered that the ICJ and the ICTY exercise different jurisdiction, the former focusing on the legal rights and responsibilities of states, the latter on the criminal responsibility of individuals. As the body with exclusive competence to adjudicate inter-state disputes, the ICJ's more onerous test should be considered the authoritative one in relation to questions of state responsibility, even if a more flexible test is accepted for the purposes of individual criminal responsibility.

It thus seems that while a case of state responsibility for the actions of contractors cannot be ruled out, it would have to meet several onerous factual requirements. It would have to be shown that the act complained of was in fact an act violating international law and giving rise to state responsibility and that the state either directed the action or exercised such control over the actor(s) in relation to that action as to assume responsibility for it. 'Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "directions"and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, directions or control must relate to the conduct which is said to have amounted to an internationally wrongful act.'[172]

The Commentaries also allude to actions going beyond a state's authorisation, where in carrying out a lawful authorised action a non-state actor commits an act that contravenes his original orders or directions and the international obligations of the state.

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170 Commentaries to the Articles, *supra* n. 158, p. 106.

171 *Tadić* jurisdiction decision, *supra* n. 50, para. 117.

172 Commentaries to the Articles, *supra* n. 158, p. 108.

> Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State the condition for attribution will still be met even if particular instructions may have been ignored.[173]

Finally, Article 9 of the Draft Articles seems to offer only limited possibilities for holding states responsible for the actions of some contractors because it deals with a very narrow set of circumstances.[174] According to the Commentaries: 'Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.'[175]

In conclusion, the general principles of state responsibility present two main options for holding states responsible for the actions of contractors: (1) pursuant to Article 5 of the Articles, where either PMCs or contractor personnel can be considered persons or entities exercising elements of governmental authority, and (2) pursuant to Article 8 of the Articles, where the conduct giving rise to the claim of responsibility is carried out under the direction or control of the state.

It is clear that the more deeply entwined contractors become in the military machine, the more difficult it will be for states to claim that contractors are not acting as their agents, either *de jure* or *de facto,* and to avoid responsibility for their actions. Questions of state responsibility aside, it is arguable that states hiring contractors are obliged to ensure that at least military contractors act responsibly and comply with international law, including international humanitarian law. This means that states have a duty to ensure that such persons are adequately prepared and trained for their missions, are employed in positions for which they are qualified and trained, and do not engage in illegal acts.

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173 Commentaries to the Articles, *supra* n. 158, pp. 108-109.

174 Article 9 provides: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.'

175 Commentaries to the Articles, *supra* n. 158, p. 109.

Where a state delegates an essential competence, such as war fighting, to private actors, it should not be able to escape international legal responsibility for the actions of these quasi-state actors by hiding behind a contract concluded under its national law. If military contractors are not acting on behalf of a state, then they are acting purely on their own behalf, for personal gain, and there is little if anything to distinguish them from mercenaries save the fact that in some cases they might have the same nationality as the state indirectly employing them.

VI Conclusions

This article has shown that there are a number of unresolved questions concerning the status and accountability of individual military contractors and PMCs and regarding states' responsibility for criminal or civil wrongdoing by them. These questions urgently require answers.

There are several functions that contractors perform that could be regarded as constituting direct participation in hostilities. Even if their job description does not specify involvement in combat (however that is interpreted), it may in fact require it or circumstances may draw contractor personnel into combat roles for which they are inadequately prepared or armed, as Iraq as shown.

Even if one were to consider contractors who take a direct part in hostilities as combatants under international humanitarian law based on a functional approach – and it has been shown that there are problems with such an approach – states which use them do not consider them members of the armed forces or even civilian employees of the military. Instead, they tend to regard them as contracted labour, for which neither they nor any of their agents bear any responsibility. As contractors are not considered to be part of the armed forces, *de facto* or *de jure*, they are not considered to fall under military command and they cannot be controlled or disciplined through the military chain of command. However, it has been suggested that where contractors who commit crimes fall under *de facto* military or civilian command, their military or civilian commanders could in some instances be held criminally responsible under the doctrine of command responsibility. Still, while criminal responsibility of a superior could theoretically arise under either international or national law, finding a forum able and willing to exercise criminal jurisdiction would not be easy.

Even if contractors could not be considered members of the armed forces,[176] in certain circumstances where the acts of a contractor – either a PMC or an indi-

176 That states are responsible for the actions and omissions of their armed forces is a well-established principle of customary international law. According to Schwarzenberger, the principle of compensation as stated in the first sentence of Article 3 of the 1907 Hague Regulations annexed to the Fourth Hague Convention was 'declaratory of international customary law as it stood in 1907'. G. Schwarzenberger, *International*

vidual – could be attributed to a state or where a PMC can be considered a parastatal organ, it might be possible to hold states legally responsible to other states (although probably not to individuals) for international wrongdoing. Admittedly, this possibility remains purely theoretical.

Clarification of the legal questions raised herein is highly desirable and will become increasingly necessary as states contract out ever more essential military and security functions. It seems the US did not think through all of the possible legal and operational ramifications when it downsized its military and decided to start farming out certain key functions to contractors.. Nor did it consider the growing technological sophistication of warfare and the blurring of support and essential war functions. It is increasingly difficult to delineate with a reasonable degree of accuracy the distinction between direct participation in hostilities by civilians from their provision of support functions. This is due, in part, to the ever changing methods by which war is waged, and particularly the increasing dependence on technological expertise which the military does not necessarily possess. The increasing reliance by militarily sophisticated states like the US on war fighting methods which can and are being performed by people who are not members of the armed forces prompts an examination of fundamental questions which might be considered to be settled but in fact remain open to argument.

This article focused in part on the question of who is a member of the armed forces, adopting the view that Article 43 provides an answer. As a matter of law this is true, but as a matter of fact, it is no longer the case, at least as far as the US is concerned. Leaving aside strictly legal questions regarding the nature of membership, the fact is that the US armed forces are today a system that by no means relies solely on members of the armed forces. As shown in this article, without the essential support provided by contractors and other civilians, the military would grind to a halt. In that sense, military contractors, along with other civilian employees of the military, are truly the ghosts in the machine.

If the trend towards civilianisation of the military continues, greater participation by civilians in hostilities can fully be expected. According to the legal argumentation set forth, the phenomenon of outsourcing by US armed forces results in the following legal situation: a member of the armed forces, even if he does not take a direct part in hostilities or fulfill an essentially military function, is a combatant, targetable at all times, who enjoys the benefits of POW status upon capture. A civilian contractor is never a member of the armed forces and is a civilian, even if he takes a direct part in hostilities. He is targetable only during his participation, i.e., only while actually engaged in an attack or acts preparatory to an attack, or when returning from an attack. He may also be considered a quasi combatant (or what Dinstein would deem 'an unlawful combatant'), meaning a civilian who has somehow, informally, crossed the line to being a combatant. The

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Law as Applied by International Courts and Tribunals, vol. II: *The Law of Armed Conflict* (London, Stevens 1968) p. 448.

problem with Dinstein's acceptance as a combatant of '[a]ny other person who takes an active part[177] in hostilities',[178] is that it would have the unintended effect of weakening the protection provided to civilians by the law of armed conflict, to no good effect.

If the fundamental impulse informing the law is to maximise protection of those not taking a direct part in the hostilities while at the same time not impeding military effectiveness,[179] then it makes no sense to consider as combatants those whose direct or active participation in hostilities might only be occasional, unless the purpose of targeting is to inflict punishment on those who have ceased participating. At the same time, the law must take cognisance of a reality in which many individuals other than members of armed forces may take a direct part in hostilities on a vital and ongoing basis. They include not only contractors but other actors, such as robots in the role of fighters, whose presence on the battlefield in a combatant role will become increasingly apparent.[180]

It may be necessary to re-examine some key concepts, including the notion of the state having a monopoly on violence and the relationship of this notion with the concept of sovereignty, what it means (and should mean) to be a member of a state's armed forces, and whether the concept of combatancy is or should be mainly contingent on direct participation in hostilities.

International humanitarian law, as already mentioned, does not prohibit an individual from taking a direct part in hostilities, meaning that a state would not be complicit in an international crime by hiring or permitting civilians to take a direct part in hostilities. Therefore, the main question that needs to be answered – philosophical as much as legal – is whether individual contractors can be hired by a government through PMCs to conduct hostilities or perform other essential military functions without becoming irregular 'armed forces' or paramilitary groups that must be formally incorporated into the armed forces, with such

177 The difference between direct and active participation may be only marginal and cannot in any event be entertained here. The jurisprudence of the International Criminal Tribunal for Rwanda at least indicates that there is hardly any substantive difference. In *Prosecutor* v. *Akayesu,* a Trial Chamber stated that the terms 'direct' and 'active' should be employed synonymously. Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras. 436-437. Dinstein has used the terms interchangeably, see *supra* n. 111, p. 152.

178 Ibid., p. 27.

179 As Dinstein notes, international humanitarian law does not seek to diminish commanders' military advantage but is 'intended to minimize human suffering without undermining the effectiveness of military operations'. Ibid., p. 17.

180 See Stephan M. Shaker and Alan Wise, *Men Without War: Robots on the Future Battlefield* (Washington: Pergamon-Brassey's 1988); 'Battlefield Robots Leap From Science Fiction to Reality', *National Geographic News*, 1 July 2004, http://news.nationalgeographic.com/news/2004/07/0701_040701_armyrobot.html; 'Will Segways become battlefield bots?' CNN.com, 2 December 2003, http://edition.cnn.com/2003/TECH/ptech/12/02/segway.military.ap/.

incorporation notified to the other parties. It seems unacceptable to have a large and growing number of people whose jobs may require them to behave like combatants, but who are legally civilians rather than combatants. Such people have fought for states throughout the centuries (e.g., as mercenaries and privateers[181]), and have always been legitimised by the state on whose behalf they were acting. That is the very purpose of combatancy and its extension to all groups fighting on the state's behalf.

The answer is not to create a third category, or to revive the lawful/unlawful combatant discussion. To do so would jeopardise the whole edifice upon which humanitarian law has been robustly constructed and, with the Additional Protocols, reinforced. Nor is it to consider contractors who take a direct part in hostilities as functional (if not necessarily lawful) members of armed forces, or as unlawful combatant *per se*. The better approach would be to regard contractors who are or will be involved in activities that might amount to direct participation in hostilities as lawful combatants for the duration of their participation (meaning as long as they are under contract to the armed forces) and give them the full protection and obligations of the law. This could be achieved through their formal incorporation into the armed forces or an auxiliary unit, or through other formal combatant designation made under domestic law, with full notification given to any relevant parties.

This solution would not appear to pose any problems under Article 43 of Additional Protocol I. However, determining which individuals should acquire a combatant status still requires clarification of what is meant by the notion of "direct participation" and which functions it covers. What is important is not so much whether a function is 'private' or 'public', but rather the activities an individual engages in and his importance for the conduct of military operations. This would also clear up any doubts regarding a state's responsibility for wrongdoing by contractors. Contractors could revert to civilian status as soon as the hostilities ended or they were demobilised. Contractors who do not take part in hostilties would continue to be regarded as civilians, enjoying the presumption of full protection of international humanitarian law. Another possibility, which space has not permitted discussion of, is to recognise PMCs as armed groups, making individual contractors members of such armed groups.

What is obvious, hopefully, is the need for greater clarity regarding the degree of protection from attack enjoyed by civilian contractors, and well as for a deeper examination of the implications of outsourcing for the concept and reality of a military. This is necessary for the sake of ensuring the maximum protection that the law permits for contractors themselves, particularly those not taking a direct part in hostilities, but also in order to ensure that all parties to armed conflicts can comply with the principle of distinction.

181 Regarding the latter, see Dinstein, *supra* n. 111, p. 28.

Chapter 15

Leaders, Courtiers and Command Responsibility in Shakespeare

Theodor Meron

I am happy to contribute this essay to a Festschrift in honor of Yoram Dinstein, a brilliant lawyer and a close friend. In addition to his exceptional erudition and scholarship in many fields of international law, Dinstein has an unusual interest and command of history and literature, and his knowledge of the works of Shakespeare is truly amazing. In this essay, I address some issues of professional and ethical responsibility through the focus of Shakespeare's plays. Instead of discussing technical questions of command responsibility in the modern law of war, I draw on the writings of the greatest English poet, whose sophistication and wisdom provide guidance to those in the corridors of power to this very day.[1]

Ben Jonson said that Shakespeare was a man "not of an age, but for all time." This essay will suggest some ways in which that is certainly true of Shakespeare's penetrating depictions of leaders who commit crimes. We see in his work the intellectual and moral compromises made by legal advisors faced with a national leader's determination to undertake acts of dubious legality. Shakespeare bears open the fragility of the principle under stress. I will try to connect these themes to contemporary currents in the international jurisprudence of the law of war – from Nuremburg to the International Criminal Tribunal for the former Yugoslavia.

Drawing parallels from Shakespeare's plays, I will discuss some of the overreaching themes that have long arisen in considerations of leaders' responsibility for crimes and of the subtle synergy between the leader and the soldier. One such theme I wish to explore in some detail: the tendency of leaders bent on violating the law, throughout history, to create barriers of deniability between themselves and the executioners, claiming, for example, that they did not order, did not approve, did not know. This relationship between superiors and their supporting officers or rank-and-file executioners – the subtle dance of blame shifting, compulsion, and influence – has proved vexing since time immemorial.

1 See Theodor Meron, Henry's Wars and Shakekspeare's Laws (1993), Bloody Constraint: War and Chivalry in Shakespeare (1998).

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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But first, briefly, a bit on the role of the adviser and his efforts to justify the leader's resort to hostilities, or to prove the justness of the resulting war, or to advance a particular application or interpretation of the rules. In the 15th Century *Book of Fayttes of Armes and of Chyvalrye*, Christine de Pisan, one of the first feminist writers, urged that a prince consult impartial advisers before deciding whether the war under consideration was just. Humanists, especially Thomas More, bared open the adviser's dilemma. The temptation to enter into a prince's service was great then as it is now – the humanists aspired to reform the political system by educating rulers and thus could justify their actions by what they perceived to be an obligation of service. But the danger, as one of More's protagonists, Raphael, warns in Utopia, is that the independent expert is bound to lose his independence; that the advancement-oriented councilor is bound to tell the prince what he wants to hear; that he is likely to sink into sycophancy; and that tampering with truth is the very condition of service in the councils of the mighty.

We certainly see it in Shakespeare's Archbishop of Canterbury, whose desire to please King Henry V and thereby protect the interests of the Church led him to make categorical, though patently dubious, advice to Henry that his claim to the crown of France was just and was not barred by the Salic law, which disqualified women and the female line. He tells Henry that his *jus ad bellum* claim is unimpeachable. And as is well-known, many legal academics in Nazi Germany were only too eager to develop tortured arguments justifying Hitler's actions under international law. Indeed, throughout history, and all the way to the present-day, the responsibility of advisers for unprincipled advice on the law governing resort to war and the conduct of war has been a heavy one.

Of course, the leader often needs little prompting. Lady Macbeth reminds her husband that his superior forces offer ample protection from accountability: "What need we fear who knows it when none can call our power to account?" And King Lear's Goneril makes the ultimate claim of the absolute ruler: "The laws are mine, not thine. Who can arraign me for it?"

But in Shakespeare, competing with such considerations of realpolitik is the awareness of monarchs that they bear a special responsibility for what occurs on their watch. In the great poem the *Rape of Lucrece*, Lucrece pleads in vain with Tarquinus, invoking his special responsibility as a leader. "For princes are the glass, the school, the book / where subjects' eyes do learn, do read, do look… Wilt thou be glass wherein it shall discern / authority for sin, warrant for blame?" Responsibility is a major theme elsewhere in Shakespeare as well; both Cleopatra and especially Henry V (in his famous soliloquy "Upon the King") engage in royal self-pity, railing against their special responsibility. And the soldier, Williams, warns Henry on the eve of Agincourt that, when leading his men to battle, "if the cause be not good," the King himself will have a heavy spiritual reckoning to make. So the remedy for the violation of *jus ad bellum* here lies in the spiritual, not temporal responsibility of the leaders.

The leaders' awareness of that basic political fact leads to whole arrays of strategies for avoiding accountability and diffusing responsibility. Trying to absolve himself of responsibility for the catalogue of atrocities, including rape, pillage and murder, with which he threatens the besieged population of Harfleur, Henry V claims that his troops will be uncontrollable with blood lust after the coming victory, and that consequently the leaders of Harfleur, because of their refusal to surrender, will bear the true responsibility for their people's suffering: "Therefore, you men of Harfleur, / take pity of your town and of your people / while yet my soldiers are in my command." Compare this self-serving disclaimer with Henry's strict instructions to his troops to respect the rights of populations in occupied France and his order to execute Bardolph for the war crime of stealing a religious object from a Church. In that case, Henry sang quite a different tune: "We would have all such offenders so cut off, and we here give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdaineful language." If Henry was strong enough to insist that Bardolph be hanged for theft in order to set an example for others and ensure humanitarian treatment of the French population, surely he could have threatened to punish his troops in Harfleur severely if they failed to maintain discipline.

Henry's threat to the leaders of Harfleur was not just wartime propaganda. He was perfectly capable of countenancing vile actions where it served his purpose. At the battle of Agincourt, Henry ordered his men to kill every single French prisoner; he used no euphemisms, code words, or evasions in issuing this order: "Every soldier kill his prisoners. Give the word through." Several thousand French prisoners were killed, the flower of the French nobility was destroyed. Even today, killings on such a scale would be regarded as a major atrocity. Perhaps his directness came because he considered the order justified as a reprisal for the French army's killing of the boys who were guarding the rear encampment. (Although I think the attack on the rear encampment was justifiable under the laws of war.) Perhaps it was because Henry feared that the French were regrouping for another attack and outnumbered as the English troops were, he believed that the killing was an act of self-defence and military necessity. The latter claim was a real one. Whatever the case, the men in his forces knew full well that this action was not one of which they – or the King – should be proud: Pistol, who is not a knight, calls it throat-cutting, and Gower says sarcastically that "the King most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant king." It is worth noting that the court chronicler of the real life Henry does not even mention the order to kill the prisoners, but describes the killing almost as an act of nature.

I Orders and Executions

Let me now turn to the responsibility for and the articulation of an order to commit an act that the participants recognize as a crime. The need to communicate the murderous purpose has always clashed with the ancient desire to avoid a record of illegal orders. Even the Nazi leaders resorted to euphemisms in referring to the Holocaust. No explicit written order from Hitler to carry out the final solution has ever been found. At the height of their power, the Nazis treated data on the killing of Jews as top secret.

The first Shakespearean illustration I will discuss is King John's order to his servant Hubert to eliminate Prince Arthur, who presents a risk to John's entitlement to the crown of England. In enlisting Hubert, King John tells him that Arthur is "a very serpent in my way" who merits death. But when Hubert reports to the King that he has killed Arthur, John, characteristically for Shakespeare's kings, disowns the order, complaining that "it is the curse of kings to be attended / by slaves that take their humours for a warrant" and thus resort to killing. Hypocritically to be sure, but very significantly, King John tells Hubert that had he advised him not to proceed with his murderous design, he would have desisted from his murderous purpose.

By denying his own role, the King forces Hubert to show him the warrant of execution bearing the King's signature. Legal forms are thus adhered to. Typically for the ambivalence of Shakespeare's kings, John does not reward Hubert but banishes him from the Court.

It is worth observing, as a side note, that in Shakespeare's play, Hubert takes pity on Arthur and does not actually kill him (though he tells Richard that he has done so). Particularly interesting is the exchange between Hubert and Arthur during their encounter, in which Hubert invokes the need to comply with orders even if they are unlawful, while Arthur argues that orders to commit murder may not be obeyed, and that orders of execution are only valid when issued in compliance with both the substance and the form of law. In an exchange set in the Middle Ages, Shakespeare thus squarely anticipates the 20th century debates about the Nuremberg Defense.

Take this episode from *Richard III*. Richard tells his prime minister, Lord Buckingham, first indirectly, to rid him of the two princes, the sons of King Edward IV. Buckingham feigns not to understand what is involved. Richard turns to blunt language, accusing Buckingham of dullness: "Shall I be plain? I wish the bastards dead, and I would have it suddenly perform'd." Buckingham, tries again to avoid commitment and asks for time to reflect. A courtier observes: "the King is angry," and Buckingham is aware of the dangers of not supporting the King all the way. Richard then turns to hired murderers to assassinate the princes. Buckingham's qualms of conscience are, however, short lived. He returns to the King offering his consent in exchange for the earldom that had

been promised to him, but Richard steers the conversation to other subjects. He already found other means to carry out his desires.

Buckingham's temporary vacillation about assisting Richard in killing the sons of Edward IV causes Richard to lose confidence in him and threaten his life. By this time, Buckingham's hands are already dirty. Of course, Buckingham is a courtier who can no longer be trusted and who knows too much. His complacent immersion in the evil doings of a tyrannical regime, triggered by both promises of wealth and power and by terror and intimidation, make him too dangerous to be ignored.

Let us turn to another episode in *Richard III*. Brackenbury, the Lieutenant of the Tower of London, is given a written order to hand over the imprisoned Duke of Clarence to the hired thugs of Richard. The submissive Brackenbury chooses not to question the purpose of the order, but engage in a deliberate self-deception. Famously, he says, "I will not reason what is meant hereby, Because I will be guiltless of the meaning."

Even in the terrifying murder scene, Clarence invokes protection of both the secular and the religious law, but the murderers claim authority resulting from the King's warrant.

Can Brackenbury be compared to another type of collaborator, for example a non-German policeman in occupied Europe executing written Nazi orders to round up Jews and deliver them for deportation to an unspecified but ominous destination? Resettlement, forced labour, or worse? He, too, chooses not to question the orders and thus to remain "guiltless of the meaning." By agonizing over his "guiltlessness," Brackenbury shows awareness of his moral dilemma, which the strength of his legal defense of superior orders cannot resolve. The failure of Brackenbury to question the order appears morally reprehensible as deliberate self-deception. Brackenbury's options were more limited than those of the policeman, as non-compliance would bring about his own death. Nevertheless, under the absolutist theory of moral responsibility, murder can never be allowed. Under the utilitarian view of moral responsibility, on the other hand, Brackenbury may be justified in turning over the keys. If he refuses, Clarence will be killed anyway and he will die as well.

Consider the dilemma of Dražen Erdemović, a soldier in the army of Republika Srpska who participated in a firing squad during the mass executions of Bosnian Muslims at Srebrenica. Here is his duress plea before an ICTY trial chamber:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because they would have killed me.

In the absence of evidence supporting the claim of extreme necessity, the Trial Chamber did not accept Erdemović's claim. The Appeals Chamber rejected duress as a legal defense for crimes against humanity and war crimes involving the killing of innocent persons, but recognized it as mitigation. Following a plea agreement which took into account the mitigating circumstances, Erdemović was sentenced to just five years imprisonment.

Shakespeare also uses the murder of the Duke of Clarence to emphasize the tension that can arise between legal justification on the one hand, and the demands of personal conscience on the other. When hiring the two murderers to kill Clarence, Richard is concerned that they might have second thoughts, instructing them to hurry and to refrain from any discussion with Clarence. He is promptly reassured by one of the murderers: "Be assured, / we go to use our hands and not our tongues." Later, however, one of the murderers does hesitate: fearing, he says, "not to kill him, having a warrant, but to be damned for killing him, from which no warrant can defend me." Clarence attempts to draw out precisely this sense of private morality, exhorting the murderers to think of the prohibition of murder in the ten commandments, rather than enforcing an edict of the ruler. His appeal, of course, is to no avail.

Now consider the killing of Richard II. Forced to abdicate in favor of Henry Bolingbroke, who becomes Henry IV, the imprisoned Richard, like all deposed monarchs, presents a danger as long as he breathes. Henry wants him assassinated by Sir Piers Exton. The order to kill is never explicitly stated. It is the courtiers who transform Henry's desire into an operational order. Exton: "Did the King not say 'have I no friend will rid me of this living fear' Come, let's go. / I am the King's friend, and will rid his foe." Shakespeare makes Henry's words resemble the statement attributed by oral tradition to Henry II in 1170 before the murder of Thomas à Becket in the Canterbury Cathedral: "Will no one rid me from this turbulent priest?"

The most intriguing aspect of this episode is King Henry's reaction when Exton and his men arrive with Richard's body and Exton claims credit for his deed. Henry disowns the act and punishes Exton with exile.

Exton's fate is reminiscent of the complaint voiced by the Second Knight, one of the murderers of Archbishop Thomas à Becket in T.S. Eliot's *Murder in the Cathedral*: "King Henry – God bless him – will have to say, for reasons of state, that he never meant this to happen; and at the best we shall have to spend the rest of our lives abroad."

II Command Responsibility

I turn now to the overlapping issues of responsibility for acts of subordinates and for actions a leader had the power to prevent. I discuss the following episode from *Antony and Cleopatra*, which Shakespeare borrowed from Plutarch's *Parallel Lives*. The triumvirs of Rome: Mark Anthony, Octavius Caesar and Lepidus

are dining and drinking heavily on the boat of their former competitor, Sextus Pompey. The scene presents an unparalled opportunity for assassination of the triumvirs, and Menas, Pompey's friend, urges him to let Menas kill the visiting leaders and become the ruler of Rome. Pompey desires nothing more than to remove the triumvirs, provided that his honor is not soiled, and his responsibility is not involved. But once he is apprised of the plot, his chivalry forces him to forbid the assassination: "Being done unknown, I should have found it afterwards well done, but must condemn it now." He leaves his friend with a message for next time, however: "[T]his thou should have done / and not have spoke on't." "In me it would have been a vile act, in you, good service." "Repent," Pompey says in essence, not for having considered the murder, but for having told me of your intent.

Pompey's episode illustrates the concept of command responsibility or the Yamashita principle. Yamashita, the commander of the Japanese forces in the Philippines, was charged after the Second World War with having failed to prevent his soldiers from committing massacres, murder, pillage, and rape. While he protested that he had not personally directed the commission of these atrocities, and that he lost control over his troops, the US Supreme Court held that commanders must be responsible for their subordinates if they fail to employ due diligence to prevent such war crimes. The Yamashita principle was the first authoritative articulation of the modern rule of command responsibility: if a superior knew, or had information that would have enabled him to conclude, that his subordinates were about to commit, or had already committed, a breach of the law of war, and if the superior did not act accordingly, taking all feasible measures to prevent or punish the breach, he would be deemed responsible for his subordinates' crimes. Pompey is both the host and the commander of the troops on board. Since Menas informs him of his criminal purpose, Pompey is put on notice, and acquiescence would make him criminally responsible.

The Yamashita doctrine was not incorporated in the Geneva Conventions of 12 August 1949 but was codified as what appears to be a due diligence standard in Article 86(2) of the Additional Protocol I to the Geneva Conventions and in the statutes of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda. The case law of the Tribunals has further clarified the place of the Yamashita principle in international law. In the leading case of Celibici, which involved the question of the responsibility of leaders of a concentration camp in Bosnia/Herzegovina, the Appeals Chamber drew on the Nuremberg jurisprudence, Yamashita, the US Army Field Manual and Additional Protocol I to conclude that the principle of superior responsibility encompasses not only senior military officers but also political leaders and other civilian superiors in positions of authority, that the term superior includes authority based on de facto powers, and that command responsibility is not a form of strict liability. Resonating with Menas' statement to Pompey, the Appeals Chamber concluded that the test of "had reasons to know" for establishing the responsibility of the superior meant

that criminal liability would attach only if information was available to him which would have put him on notice of offences committed by subordinates. The triumvirs are guests on Pompey's boat and he is both the host and the commander of the troops aboard. Consent or even acquiescence would make Pompey accessory to the crime or a party to the conspiracy to commit a crime. By preventing the murder, he meets his legal obligations. But his readiness to applaud the crime as long as he has not heard about it beforehand is morally objectionable.

The case of General Radislav Krstić illustrates some of the complexities, and the pitfalls, of command responsibility. The General, who became commander of the Drina Corps of the Bosnian Serb Army on the eve of Srebrenica, had knowledge of the genocidal intent of some of the members of the Main Staff, but there was no evidence that he shared their genocidal intent, that he ordered any of the murders, or that he directly participated in them. The evidence established only that Krstić knew the murders were occurring but nonetheless permitted the Main Staff to use personnel and resources under his command to facilitate them. On the basis of these findings, the Appeals Chamber reversed the General's conviction as a participant in a joint criminal enterprise to commit genocide, and entered, instead, a conviction for the lesser crime of aiding and abetting genocide.

The reasons why the Appeals Chamber did not enter a conviction based on the General's command responsibility are noteworthy. The Chamber found that the most Krstić could have done was to report the use of his assets in facilitating the killings to the Main Staff and to his superior, General Mladić – the very people who allegedly ordered the executions and allegedly were active participants in them. Although Krstić could have tried to punish his subordinates for their participation, it is unlikely he would have had the support of his superiors for doing so. The feasibility of prevention and punishment is thus central to the command responsibility case law of the Tribunal.

A comparison between Shakespeare's depictions of leader-subordinate interaction and modern cases dealing with command responsibility, suggests the extent to which the existence and basic form of certain principles of humanitarian law have long been appreciated, by advisors, soldiers, and even leaders intent on doing something that runs afoul of these laws. Indeed, the present system of humanitarian law, which has the Hague and the Geneva Conventions as its base, which was enforced in Nuremberg, and which is now enforced at The Hague, is derived from the medieval rules of chivalry, with their emphasis on honor as an underlying value and as a guarantee of respect for the rules. This is the ideal articulated in Shakespeare's dramas. In the Middle Ages, the focus of Shakespeare's Histories, chivalry was the principal normative system providing a code of behavior for knights, nobility and the entire warring class in the endemic wars in which they were involved. It was, of course, closely linked to the Church. Yet, as we have seen in the episode with the triumvirs, Shakespeare imported chivalric notions into plays set outside the Middle Ages, depicting even Romans, Greeks and

Trojans as knights. In the chivalric system, honor and shame played an important role in the enforcement of the rules; the sanction of dishonor for the knight who violated his knightly duties, thus becoming a traitor to chivalry and to his knightly vow, was often quite effective. But as nowadays, the applicability of the protective norms was often evaded.

Let me give an example from the English conquest of Limoges, led by Edward, the Black Prince, during the Hundred Years' War. Because the Bishop of Limoges, who had been Edward's adviser, had turned the city over to the French, Edward ordered that the city be taken by assault, that terms for surrender be refused, and that quarter be denied. What followed stands out as one of the most horrible slaughters of French civilians, even in the context of the cruel Anglo-French wars, justified by the English as a situation of treacherous rebellion. However, Froissard, the famous French chronicler, reports that in a battle between a group of French knights and English nobles, the French knights explicitly invoked the law of arms and the right of quarter, which was promptly granted. No such rights were given the town's populace.

The chivalric system of humanitarian law worked reasonably well in Christian Europe, but its scope was narrow. It did not protect peasants or commoners. Knights or "gentlemen" were careful not to surrender to commoners, because they expected no mercy, nor did they give any to captured commoners. Internationally, the system did not apply in the relations between Christian and non-Christian states, or between Christians and others. It was a crime to deny quarter to a Christian knight. It was a crime to rape a Christian woman. But it was not a crime to massacre and to rape the entire Muslim and Jewish population of Jerusalem during the First Crusade.

With painful slowness, this idea of norms governing conflict eventually attained universality. But now, in a reversion to the moral parochialism of premodern Europe, this universality is being challenged, not so much by sovereign states, but by members of transnational terrorist networks vis-à-vis those whom they regard as non-believers.

We have come full circle. We are back to the selective application of the rules which characterized the Middle Ages. The new challengers reject all of the fundamental rules of humanitarian law. Can international law perform in such asymmetrical situations? When terrorists proclaim and practice disregard for humanitarian rules, they weaken the incentive for others to comply with the law. To protect the rules we must address the underlying problem of the lack of shared values. Education, training, persuasion and emphasis on values that lie outside the law, in addition to law enforcement, must be pursued if values of humanity are to regain dominance. This requires unity, time, and patience. How long will we need to restore the universality of international humanitarian law?

Chapter 16

Civilian Detentions in Iraq

*Andru E. Wall**

It is a tremendous honor to contribute an essay to this volume commemorating Professor Yoram Dinstein on the occasion of his seventieth birthday. We first met when Professor Dinstein held the Charles H. Stockton Chair of International Law at the US Naval War College. Being a young military lawyer and aspiring scholar, I was naturally enthralled by the breath and depth of his expertise on international law. Taking time that few in his position would, Professor Dinstein graciously mentored me: patiently explaining nuances in the law of armed conflict with a passion that evidenced both his love for the law and commitment to it. I am honored to call him a mentor and friend.

During November 2005, over eight hundred men in the small farming village of Ar Rabit in the al Anbar Province of western Iraq were roused from their homes and detained by US and Iraqi military forces. According to the New York Times, the men were often detained based on little more evidence than the word or gesture of a single informant.[1] Over three hundred of the men were sent to the infamous Abu Ghraib prison on the outskirts of Baghdad.

The Marine commander overseeing the operation, Colonel Stephen W. Davis, justified the detentions with a dismissive "[w]elcome to the insurgency"; he explained the use of confidential informants with every realist's favorite maxim: "the enemy of my enemy is my friend."[2] The informants came from a local militia called the Desert Protectors who offered their services to Coalition Forces, ostensibly at least, to help rid their region of insurgents. Of course, whether a love of democracy or tribal vendettas was their primary motivation will likely never be known.

How could such seemingly capricious detentions be lawful in 2005? While it is well established that the law of armed conflict allows belligerents, includ-

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* The views presented herein are the author's and not necessarily those of the US government.

1 Kirk Semple, *U.S. Forces Rely on Local Informants In Ferreting Rebels in West Iraq*, New York Times, Dec. 10, 2005, at A1.

2 *Id.*

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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ing occupiers, to conduct battlefield detentions, wasn't sovereignty transferred to the Iraqi people in June of 2004? Not only did detentions in Iraq continue after the transfer of sovereignty, but they skyrocketed – from around 4,000 detainees in the custody of Coalition Forces in the spring of 2004 to over 11,350 less than one year later.[3] By December 2005 over 14,000 detainees were being held by Coalition Forces and a day seldom passed without a press release issued by the Multi-National Force in Iraq (MNF-I) announcing a military operation in which "terror suspects" were captured. What was the legal basis for these detentions? What evidentiary standard applied? What, if any, due process safeguards were in place to ensure innocent men were not deprived of their freedoms? And when, if ever, would these detainees be released?

These are the questions this article will answer. It focuses solely on the legality of civilian detentions and the review of those detentions required by international law. It does not address the operational and intelligence aspects of detainee operations, nor will it address standards of care for detainees (including the salacious details of the Abu Ghraib abuse scandal). Those issues have already been addressed in countless investigations and articles.[4]

I Defining the Debate

As an entire book could easily be written on the conduct and legality of detention operations during Operation Iraqi Freedom, the scope of this article must necessarily be refined and limited.

A Occupation, Post-Transfer of Sovereignty, or the Transitional Period?

As this article is being written in late 2005, the situation in Iraq continues to evolve from a wartime purely law of armed conflict paradigm to one of peacetime law enforcement. The legal basis and implementation of detention operations in

3 Bradley Graham, *U.S to Expand Prison Facilities in Iraq*, Washington Post, May 10, 2005, at A15.

4 See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 American Journal of International Law 820 (October, 2004); *Final Report of the Independent Panel to Review DoD Detention Operations* (Aug. 24, 2004) [hereinafter Schlesinger Report]; Major General Fay, Investigating Officer, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade* (Aug. 25, 2004) [hereinafter Fay Report]; Major General Taguba, AR 15-6 Investigation of the 800th Military Police Brigade (27 May 2004) [hereinafter Taguba Report]. The Schlesinger and Fay reports are available on the US Department of Defense website at http://www.defenselink.mil, while versions (redacted, classified, and declassified) of the Taguba Report are available on numerous other Internet websites.

Iraq will be considered in two phases: the occupation and the transitional period.[5] These periods encompass the fall of Hussein's government in April 2003 to the transfer of governing authority from the Coalition Provisional Authority (CPA) to the Iraqi Interim Government (IIG) on June 28, 2004, and then from June 29, 2004 to December 2005 when Iraq's new parliament was elected, respectively.[6]

B Who Are Coalition Forces?

While the United States led the invasion to topple Saddam Hussein and install democracy in Iraq, dozens of other countries contributed ground forces to the effort. As such, press releases, official pronouncements, and military orders all referred to the collective "Coalition Forces". After the transfer of sovereignty in June 2004, Coalition Forces included members of the Iraqi security apparatus – local and national police and the Iraqi National Guard. While the political benefit of the American decision to refer to all operations in Iraq under the collective Coalition Forces is apparent, the embrace of that term by this author is solely for reasons of simplicity and clarity.

The Combined Force Land Component Commander (CFLCC) led coalition ground forces during the invasion of Iraq through June 2003, when it was replaced by the Combined Joint Task Force – 7 (CJTF-7), which was in turn succeeded by the Multi-National Force – Iraq (MNF-I) prior to the transfer of sovereignty in June 2004. As they comprised the overwhelming majority of Coalition Forces, American soldiers and Marines captured the vast majority of detainees; however, other Coalition Forces also detained Iraqis and, if warranted under applicable regulations, transferred the detainees to a Coalition Theater Internment Facility. As such, when this paper addresses the legal basis and implementing policies for detainee operations by Coalition Forces, it is referring to operations conducted under the command and control of CFLCC, CJTF-7 or MNF-I. Any restrictions placed on individual Coalition Force members by their country's law or regulations, or any policies applicable to forces not under the command and control of CFLCC, CJTF-7 or MNF-I, are beyond the purview of this article.

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5 As an interesting aside, in June 2004 US government and MNF-I officials and documentation spoke of the transfer of sovereignty from the Coalition Provisional Authority to the Iraqi Interim Government. More recently, US officials speak and write of the event as a "transition of governance authority". This revision in terminology was intended to emphasise that Coalition Forces had no designs of "ownership" upon Iraq and were simply caretakers, vice-sovereigns, in between the fall of Hussein and establishment of a new Iraqi government.

6 Alternatively, these periods could be viewed as occupation and post-occupation, but since the US-led coalition in Iraq refused to utter the word "occupation", its arguably legally obtuse but non-offending and politically correct phraseology will be employed here.

C Combatants and EPWs

The right of armies to capture and hold enemy combatants as prisoners of war until the termination of active hostilities is well established. This right is grounded in customary international law and codified in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GC III).[7] On the rare occasions after the fall of Saddam Hussein when captured individuals invoked their right to treatment as an enemy prisoner of war (EPW), Coalition Forces conducted a tribunal in accordance with the provisions of Article 5 of GC III. After the transfer of sovereignty, Coalition Forces retained very few EPWs in their custody. EPWs were either released, transferred to the legal custody of the Iraqi Interim Government (IIG) for prosecution for criminal offenses unrelated to their combatant status, or held as security internees if independent facts established the individual posed a threat to the security of Coalition Forces. If a former member of the Iraqi Army, including a former prisoner of war who had been released, was detained for acts against the security of Coalition Forces, he was treated as a security internee – including potential criminal prosecution by the Central Criminal Court of Iraq.[8]

D Former Regime Elite, EPWs or War Criminals?

The detained former high-ranking members of Saddam Hussein's regime were generally classified as either enemy prisoners of war or suspected war criminals: the former if they served in the Iraqi armed forces or in the military chain-of-command, and the latter if they were outside the military command structure but nonetheless suspected of grave breaches of the Geneva Conventions or crimes against humanity. The Geneva Conventions and customary international law provided the basis for these detentions. All state parties to the Geneva Conventions are obligated to "search for persons alleged to have committed, or to have ordered to be committed," grave breaches of the Geneva Conventions and shall prosecute such individuals in their own courts or hand them over to

7 "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [hereinafter GC III], 75 U.N.T.S. 135, Documents on the Laws of War 244, 289 (Adam Roberts & Richard Guelff eds., 3d ed., 2000).

8 This practice was consistent with customary international law, which provides that when an Occupying Power disbands or demobilizes the military of the occupied country, former members of that military, including released prisoners of war, are converted to civilian status and are not thereafter generally entitled to treatment as prisoners of war. Howard S. Levie, Prisoners of War in International Armed Conflict 66-8 (1979)(Vol. 59, US Naval War College International Law Studies). This issue was raised at the 1949 Diplomatic Conference, which only went so far as to extend continued entitlement to prisoner of war status if the state was not completely occupied. See Article 4(B)(1), GC III, *supra* note 7.

the courts of another High Contracting Party for prosecution.[9] Customary international law long ago outlawed crimes against humanity, which were defined by the Nuremberg Tribunal in 1945[10] and more recently in the statute of the International Criminal Court.[11] After the transfer of sovereignty, these individuals were transferred to the legal custody of the IIG and held under Iraqi indictment as criminal suspects.

E Legal Custody v. Physical Control

In an attempt to guarantee security and ensure accountability while simultaneously assisting the IIG in re-establishing the rule of law in Iraq, the "U.S. national contingent of Multinational Force-Iraq (US-MNF-I)" executed a Memorandum of Understanding (MOU) with the Ministry of Justice of the IIG regarding "Custodial Support For Criminal Suspects" in June 2004. This MOU invoked the need to hold individuals suspected of committing atrocities and war crimes accountable as mandated in United Nations Security Council Resolution 1546 (2004). The parties agreed that the IIG "and any successor" would have "legal authority over" criminal suspects awaiting trial who were "placed under the physical custody of US-MNF-I" under the terms of the MOU. In other words, individuals suspected of war crimes, crimes against humanity, or other atrocities were

9 GC III Art. 129, 130, *supra* note 7, and Article 146 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter GC IV], Roberts & Guelff, *supra* note 7, at 301, 356. GC IV Article 147 reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

10 "[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, vol. XXII, IMT Secretariat, Nuremberg, 1948 pp. 413-14. For a discussion of whether the Nuremberg "war connection" requirement remains in customary international law, see M. Cherif Bassioni, *The Normative Framework of International Humanitarian Law* 1, 4-5 (Michael N. Schmitt, ed., 2000)(Vol. 75, US Naval War College International Law Studies).

11 Article 7 of the Rome Statute of the International Criminal Court (1998), *reprinted* in Roberts & Guelff, *supra* note 7, at 667, 674.

transferred to the legal control of the Iraqis while remaining under the physical control of US forces.

This MOU created more than a legal fiction, however, as it required the IIG to present MNF-I with written requests and arrest warrants for all individuals transferred under the MOU. The primary role retained by MNF-I included "exclusive discretion regarding all matters of security", ensuring that criminal suspects represented by counsel were not questioned without their counsel being present, and providing "access and cooperation to the International Committee of the Red Cross". Significantly, the MOU provided:

> Both parties hereby acknowledge that the transfer to Iraqi criminal jurisdiction of a detainee who had previously been held in prisoner of war captivity by MNF-I, shall constitute release from prisoner of war captivity and termination of prisoner of war status, notwithstanding the fact that MNF-I maintains custody of the detainee at the request of the MOJ in accordance with this MOU.

Thus, with a stroke of the pen and exchange of paperwork, former regime elite members held in the custody of Coalition Forces mutated from enemy prisoners of war or war crimes detainees to criminal suspects in the legal custody of the Iraqi government.[12]

F Civilians, Illegal Combatants, Security Internees or Detainees?

What do you call someone who takes up arms in an international conflict without complying with the customary prerequisites for belligerent immunity? More importantly, is this person a combatant under the Third Geneva Convention, a civilian under the Fourth Geneva Convention, or do they fall into a legal lacuna between the two? These questions remain at the heart of a fundamental and continuing debate over the applicability of the international law of armed conflict to the global war on terror. It also exposes considerable differences between the United States and many of its allies in the global war on terror, not to mention sparking passionate debates among academics and practitioners of international humanitarian law. A considerable number of law review articles have debated these questions.[13]

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12 This ensured compliance with GC III, which requires release of prisoners of war after the close of hostilities (Art. 118) unless they have been indicted for criminal offenses (Art. 119).

13 *See*, e.g., Murphy, *supra* note 4; Yoram Dinstein, *Unlawful Combatancy*, 32 Israel Yearbook of Human Rights 247-70 (2002); Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, 34 Israel Yearbook of Human Rights 1-14 (2004); Silvia Borelli, *Casting light on the legal black hole: International law and detentions abroad in the "war on terror"*, 87 International Review of the Red Cross 39 (2005); and Michael H. Hoffman, *Rescuing the Law of War: A Way Forward in an Era*

The position of the United States is, quite simply, that customary international law requires compliance with the four criteria codified in the 1907 Hague Convention IV on Land Warfare and Article 4 of GC III in order for the individual to earn the privileges of a lawful belligerent, most importantly combatant immunity and entitlement to prisoner of war status. If an individual takes up arms without complying with these requirements for lawful belligerency (other than in rare exceptions such as a *levée en masse*), then that person is not entitled to the protections of GC III. In other words, if an individual wants the privileges of combatant immunity and prisoner of war status, he must comply with the four requirements, which are intended to protect civilians and minimize unnecessary suffering. However, if the individual partook in an international armed conflict, he cannot be deemed a civilian (a protected person) in the sense of GC IV – especially since GC IV affords, in some respects, even more rights than those afforded to prisoners of war under GC III (e.g., a POW may be held until the end of the conflict, while a civilian may only be held if and for as long as he is a security threat).[14]

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of Global Terrorism, Parameters 18-35 (US Army War College Quarterly)(Summer 2005).

14 *See* Murphy, *supra* note 4. While the debate over the applicability of GC IV is somewhat understandable, the argument that GC III should apply irrespective of compliance with the four criteria is bewildering as it is contrary to the historic understanding and application of the laws of war. See, *e.g.*, Richard R. Baxter, *Unprivileged Belligerency*, 28 British Yearbook of International Law 323 (1951); and Richard R. Baxter, *The Law of War*, Readings in International Law from the Naval War College Review 209, 216-7 (Richard B. Lillich & John Norton Moore, eds., 1980)(Vol. 62, US Naval War College International Law Studies):

> The requirement of treating individuals in arms as prisoners of war applies only to members of the regular armed forces and to members of resistance movements who are commanded by a responsible person, wear a fixed distinctive sign, carry arms openly, and conduct their operations in accordance with the law of war.

Just as the US position is not new, neither is (or was) it unique to the United States. See, *e.g.*, the British Army's manual The Law of War on Land (1958). Courts in Singapore, Malaysia, and Israel, to provide just three examples, have applied the four criteria to the question of whether irregular belligerents are entitled to treatment as prisoners of war under GC III. See Stanislaus Krofan & Aor. V. Public Prosecutor (Singapore Federal Court, 5 Oct. 1966), 10 Military Law Review 346 (1968); Public Prosecutor v. Oie Hee Koi (Privy Council, 4 Dec. 1967), 42 International Law Review 441 (1971) [the Privy Council of the British House of Lords was the court of last resort of the Federation of Malaysia]; and The Military Prosecutor v. Omar Mahmud Kassem and Others (Israeli Military Court, Ramallah, 13 April 1969), 47 International Law Review 470 (1971). The British manual and relevant excerpts of these cases are also reprinted in Documents on Prisoners of War 694-5 (Howard S. Levie, ed., 1979)(Vol. 60, US Naval War College International Law Studies).

The argument against the US position is simply that there cannot be a gap in coverage between GC III and GC IV: you are either a combatant under GC III or a civilian under GC IV.[15] To argue, however, that refusal to apply either GC III or GC IV as a matter of law leaves the person without legal protection, exposes a profound misunderstanding of the laws of war. Customary international law, epitomized by the so-called Martens Clause, still applies – there is no area outside the purview of the humanitarian dictates of customary international law.[16] What are stripped away by the inapplicability of GC III and GC IV are many of the formalistic, anachronistic requirements that had as their inspiration world war between Western powers.

In any event, during the periods at issue here, the overwhelming majority of individuals detained by Coalition Forces were not privileged combatants entitled to protection as prisoners of war under GC III. While the US government preserved its legal right (exercised rarely) to hold an Article 5 tribunal and determine an individual was an illegal combatant, the general policy and practice was to treat all detainees as security internees under GC IV.[17] As such, the terms "security internee" or "detainee" will be used interchangeably here and the use of the terms should not be interpreted as an assertion or implication that the individual was not engaged in hostile acts against Coalition Forces. The use of the terms "civilian detention" or "civilian detainee" simply means the detainee

15 O. Uhler and H. Coursier (eds.), Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary 51 (ICRC, Geneva)(1950); *Prosecutor v. Delalic et al*, Judgment of the ICTY, IT-96-21-T, para. 271 (16 November 1998). See also Silvia Borelli, *Casting light on the legal black hole: international law and detentions abroad in the "war on terror", supra*, note 13.

16 Ivan Shearer, *Rules of Conduct During Humanitarian Intervention*, Legal and Ethical Lessons of NATO's Kosovo Campaign 71, 72 (Andru E. Wall, ed., 2002)(Vol. 78, US Naval War College International Law Studies). What has come to be known as the Martens Clause first appeared in the Preamble to the 1989 Hague Convention II on land warfare:

> Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Roberts & Guelff, *supra* note 7, at 8-9. The 1907 Hague conventions, each of the four Geneva Conventions of 1949, as well as the 1977 Additional Protocol I to the Geneva Conventions also include this clause.

17 This was a policy decision and was not made out of sense of legal obligation. Legally, Coalition Forces (or at least the US element) believed illegal combatants were not entitled to the protections of either GC III or GC IV; however, to prevent the operational complexity of different due process systems for different categories of detainees, the policy decision was made to provide all detainees were the level of review required by GC IV.

was not entitled to the protections of GC III and, as such, the legal standards or principles applied by Coalition Forces were contained in GC IV and customary international law.

G International or Non-International Conflict?

According to the International Committee of the Red Cross (ICRC), the transfer of sovereignty to the Iraqi Interim Government on June 28, 2004 ended the state of international armed conflict that existed between Coalition Forces and Iraq.[18] Thus, the transfer of sovereignty also shifted the controlling body of law from the international law of armed conflict to the law governing non-international armed conflicts. The position of MNF-I was that no such shift in controlling norms occurred.[19]

Common Article 2 of the four Geneva conventions of 1949 provides that it applies to all cases of armed conflict between two or more parties. The ICRC's official commentary on this article states: "[a]ny difference between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2".[20] Even Protocol II limits non-international armed conflicts to those that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces".[21] The ICRC's counter-argument is that when the foreign troops are present with the permission of the host state and subject to its control (characteristics applicable to Coalition Forces after the transfer of sovereignty), then they are agents of the host state and the international character of the conflict is erased.

Notwithstanding the transfer of complete sovereignty from the Coalition Provisional Authority to the Iraqi Interim Government and subsequently to the Iraqi Transitional Government (after the elections in January 2005), Coalition

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18 See *Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority*, ICRC. Available at the ICRC website, http://www.icrc.org/Web/Eng/siteengo.nsf/html/63KKJ8 (visited in December 2005).

19 Furthermore, it is US policy to apply the international law of armed conflict to non-international armed conflicts as a matter of policy (in other words, for reasons of efficacy, not out of a sense of legal obligation). DoD Directive 5100.77, DoD Law of War Program, para. E-1 (July 10, 1979); The Commander's Handbook on the Law of Naval Operations, para. 6.1.2 (1995).

20 Pictet (ed.), Commentary on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War 22-23 (1960).

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Roberts & Guelff, *supra* note 7, at 483, 484. MNF-I's position is also strengthened considerably by the fact that it is states that create customary international law – not non-governmental organizations. So if even this issue is a gray area in the law, MNF-I can point to its state practice as evidence of, at a minimum, a developing customary norm.

Forces continued to carry out major combat operations in Iraq against insurgents and terrorists, including so-called foreign fighters.[22] Active hostilities continued into 2006. Leave it to lawyers to argue that the presence of over 160,000 foreign troops carrying out major combat operations in a country is something other than an international armed conflict. While it is difficult to conceive a bright-line shift from international to non-international armed conflict, at a minimum one would expect cessation of active or offensive hostilities and that foreign troops, if present at all, would serve little more than minor supporting roles – certainly that they would be outnumbered by the host country's own forces. In the absence of a clear shift and the presence of state practice to the contrary, this paper will apply the norms of the international law of armed conflict to its analysis of detention operations in Iraq, as these were the norms applied by Coalition Forces.[23]

II Civilian Detentions during the Occupation of Iraq

The vast majority of individuals detained by Coalition Forces during Operation Iraqi Freedom were not enemy prisoners of war. In fact, by May 2003, no more than a few hundred EPWs remained in the custody of Coalition Forces.[24] Most detainees were only held in the field for a few hours or days, but by the end of the occupation, Coalition Forces held over 4,000 detainees.

22 The term "foreign fighters" was used by Coalition Forces to describe individuals from countries outside Iraq who illegally entered Iraq for the purpose of waging jihad against Coalition Forces, to include Iraqi security forces. The vast majority of these foreign fighters were from Syria, Saudi Arabia and northern Africa.

23 The ICRC post referenced in note 18 states that a shift from international to non-international armed conflict would require that "persons arrested before 28 June [2004] and currently interned by the MNF-I should either be released, charged and tried or placed within another legal framework that regulates their continued internment." However, the law of non-international armed conflicts remains relatively undeveloped, relying primarily on common Article 3 of the Geneva Conventions and customary international law. The respected International Institute of Humanitarian Law in San Remo, Italy published a proposed Code of Conduct for Military Operations during Non-International Armed Conflict, which recognized the right to intern or detain persons "for reasons related to the hostilities". While the Code does not purport to be a complete restatement of the law of non-international armed conflict, it does assert the belief that it reflects "the key principles of that body of law." The Code is available online at http://www.michaelschmitt.com (accessed in December 2005).

24 Fay Report, *supra* note 4, at 4.

A The Legal Basis for Detention

i Security Internees under GC IV

As a general rule, civilians may not be interned during international armed conflicts.[25] GC IV provides exceptions to this rule when detention of civilians is mandated by the security needs of the Detaining Power or when necessary to protect the individual.[26] GC IV attempts to strike a balance between a civilian's civil liberties and an army's need to occasionally control civilian movement. Article 41 provides that if lesser means of control are inadequate, then a civilian may be interned.[27] In non-occupied areas, internment is only permissible "if the security of the Detaining Power makes it *absolutely necessary*."[28] Occupying powers may intern civilians "for *imperative reasons of security*".[29]

GC IV also imposes slightly different standards of review depending on whether the internment is conducted by a "Detaining Power" under Articles 41-43 or by an "Occupying Power" under Article 78. Article 78 simply mandates that Occupying Powers make decisions regarding internment "according to a regular procedure", which includes a right of appeal and periodic review ("if possible every six months") by a "competent body set up by said Power." Articles 41-43 are somewhat more specific in requiring that the basis for the internment by Detaining Powers be reviewed both initially ("as soon as possible") *and* at least every six months thereafter. Such reviews must be conducted "by an appropriate court or administrative board designated by the Detaining Power for the purpose." If internment is maintained, the reviewing authority "shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision, if circumstances permit." GC IV requires that individuals detained by an Occupying Power be released "as soon as possible after the close of hostilities"; however, GC IV continues to apply so long as they remain detained.[30]

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25 GC IV Art. 79; Roberts & Guelff, *supra* note 7, at 327.

26 Article 5 allows for the derogation of protections when the individual is suspected of acts hostile to the security of the State; Article 27 includes a general recognition of the right of parties to take "control and security" measures over protected persons as necessitated by the conflict; Articles 41-43 allow for internment when "absolutely necessary" for reasons of security or control; Article 68 allows for the internment or imprisonment of persons who commit offenses intended to harm the Occupying Power; and Article 78 recognizes the right of Occupying Powers to intern protected persons "for imperative reasons of security." *Id.*

27 *Id.* at 315.

28 Article 42; *Id.*, at 315 (emphasis added).

29 Article 78; *Id.* at 327 (emphasis added).

30 Article 133; *Id.* at 347.

While Articles 41-43 seem to set a somewhat higher standard for internment than that applicable to Occupying Powers, including a requirement to look for "favorable amendment" to the internment decision, the standards for review established by Coalition Forces during the occupation appear designed to ensure compliance with this higher standard. Because of the logistical and procedural challenges inherent in maintaining numerous classes of detained individuals, Coalition Forces generally applied GC IV to all detainees as a matter of policy (except prisoners of war and criminal suspects). It must be understood that this decision was for policy reasons and not out of any sense of legal obligation.[31]

ii Occupation Law

Prior to the transfer of governing authority to the IIG on June 28, 2004, Coalition Forces were required by the 1907 Hague Convention IV on the Laws of Land Warfare to "take all the measures in [their] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[32] This provision, as a principle of customary international law, provided additional justification for the detention of civilians who posed a threat to the security of Coalition Forces.[33]

B Implementing the Law

Between April 2003 and June 2004, Coalition Forces were authorized to detain civilians whom they reasonably believed either posed a threat to their security or mission, or were suspected of committing a serious crime. The standard "reasonably believed" was defined as "under the circumstances that exist at the time, sufficient facts upon which a reasonable person would rely to make a decision." The definition of "posed a threat" was interpreted broadly and included individuals who were a threat to the security of coalition forces, or its mission, or were of intelligence value. This included persons detained for committing offenses (including attempts) against Coalition Forces, members of certain non-govern-

31 For example, GC IV only applies to civilians who fall into the hands of a power of which they are not nationals: this would, as a matter of law, exclude any American citizens detained by American forces in Iraq. Also, GC IV does not apply to nationals of neutral countries with which the detaining power has normal diplomatic relations. So while Coalition Forces generally applied GC IV to foreign fighters captured in Iraq as a matter of policy and efficacy, there was no corresponding legal obligation to do so.

32 Roberts & Guelff, *supra* note 7, 69, 81.

33 For more on the law of occupation, see Michael N. Schmitt and Charles H.B. Garraway, *Occupation Policy in Iraq and International Law*, 9 International Peacekeeping: The Yearbook of International Peace Operations 27-61 (2004).

mental organizations or the state infrastructure, or any person accused of committing war crimes or crimes against humanity.

The detention of criminal suspects was dictated under occupation law given that there was often no functioning Iraqi law enforcement or judiciary mechanism in place. Civilians could be detained if there was probable cause to believe they had committed a serious crime, including Iraqi-on-Iraqi crime, but they had to be turned over to Iraqi authorities as soon as reasonably practicable – i.e., they were not held as security internees.[34] Serious crime was defined as any felony under US law, including murder, rape, robbery, arson, assault, burglary, or larceny. The evidentiary standard for criminal detentions was described as probable cause: "a reasonable certainty that a crime has been committed or is being committed and that the person to be detained has committed, is committing or is aiding another to commit the offense." An important distinction was thus made, although often lost in its application, between a standard of reasonable belief for security internments, and a probable cause standard for detention of criminal suspects.

C Review by the Detaining Commander

Generally, the decision on whether to detain a civilian was made by the senior Coalition Force soldier or Marine on the scene. As the detainee was processed further to the rear (military jargon that also means higher up the chain-of-command), superior commands routinely reviewed the detention decision. As the occupation established itself and detention mechanisms were put in place, temporary holding facilities were usually located at the brigade and division levels, where military lawyers were involved in the review process. Strict time limits were placed on how long lower level units could hold civilians before transfer to higher authority or release. The initial time limit of twenty-one days was lowered to fourteen days in 2004. If a subordinate command wanted to hold a detainee beyond that time limit, they had to brief their superiors and obtain an extension from CJTF-7/MNF-I.

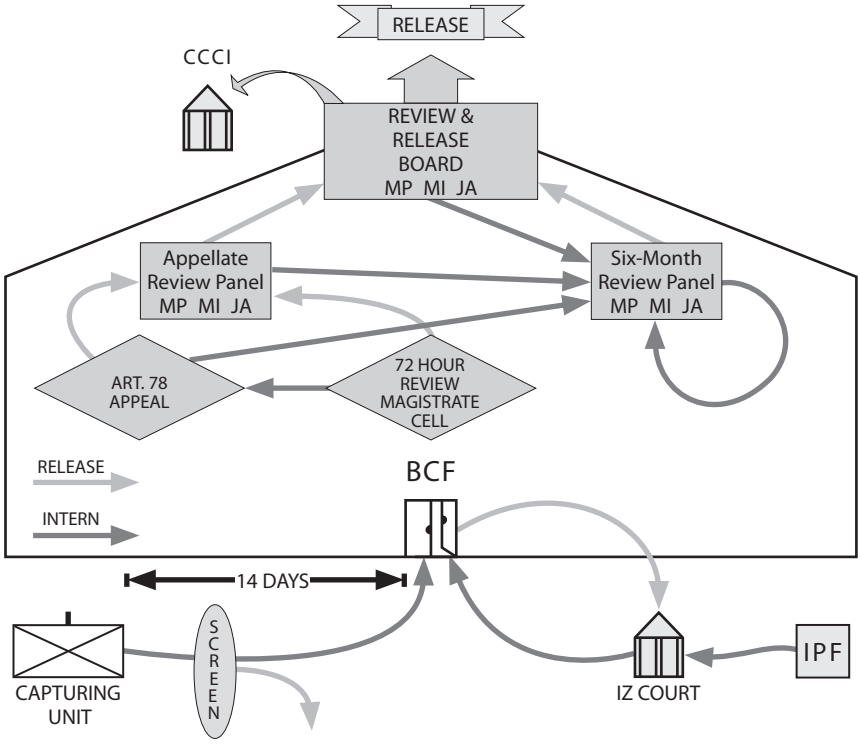
By late in 2003, Coalition Forces developed more sophisticated procedures for review of detention determinations at the theater level. Take, for example, the typical case where Coalition Forces stopped an Iraqi male at a traffic checkpoint and during the ensuing search of the Iraqi's vehicle, a rocket-propelled grenade launcher and five grenades were discovered. As the possession of such weapons violated CPA Order 3 – Weapons Control,[35] the Iraqi male would be detained. If there was a functioning Iraqi criminal court in the locale of the offense and the judge was willing to handle prosecutions for weapons violations (rare), then the

34 CPA Memorandum 3, Section 5(1), 27 June 2004.

35 Coalition Provisional Authority Number 3 (Revised)(Amended); available at http://www.iraqcoalition.org/regulations (accessed in December 2005).

individual would be turned over to the local authorities for prosecution. In the most common scenario, the unit that detained him would interview the detainee and then process him through to the brigade level. By this point a detention package was assembled that included, at a minimum, a Coalition Provisional Authority Apprehension form and sworn statements from two individuals attesting to the basis for the detention. Ideally, photographs of the detainee with the weapons would also be included. A military lawyer normally reviewed the package at the brigade level and, assuming he found a reasonable basis for continued detention, forwarded the detainee and package on to the division level where a military lawyer again reviewed the case. Finally, the detainee and supporting package were transported to Abu Ghraib.

D Headquarters Review and Internment



Within seventy-two hours of a detainee's arrival at the Baghdad Confinement Facility (BCF) at Abu Ghraib, a military magistrate (judge advocate) determined whether a legal basis for detention existed. If the detaining unit had a reason-

able basis for concluding the detainee posed a threat to the security of Coalition Forces, which they certainly would in the case of the weapons possession hypothetical, and the detaining unit provided documentation to support the determination (the apprehension form, two statements, and any other evidence), then the Detention Review Authority would find a reasonable basis for detention existed.

The Magistrate's Cell (consisting of 2-5 military magistrates functioning as Detention Review Authorities, a few supporting paralegals and two interpreters) then notified the detainee of their status (either security internee or criminal suspect) and the basis for the determination. The Status Notifications were translated into Arabic and included a notice of the right to appeal their detention under Article 78 of GC IV. Nearly all detainees filed appeals, which were then translated into English.

An Appellate Review Panel comprised of three officers – military police, military intelligence, and judge advocate – then reviewed the security internee's complete file. Again, detention was recommended only if the panel found a reasonable basis to believe the detainee's internment was necessary for imperative reasons of security of Coalition Forces. The detainee was advised of the finding. In accordance with Article 78 of GC IV, each detainee file was then reviewed at least every six months thereafter to determine if the basis for internment remained. Initially, criminal detainees were excluded from the Article 78 review process; however, as the insurgency grew and delays were encountered in energizing the Iraqi criminal justice system, criminal suspects were included in the Article 78 review process.

If either the Detention Review Authority, the Appellate Review Panel, or the Six-Month Review Panel found that no reasonable basis for internment existed or that continued internment was no longer warranted, then the detainee's case file was forwarded to the Review and Appeal Board. The Review and Appeal Board was comprised of the CJTF-7 C2 (Brigadier General Barbara Fast, who was the senior intelligence officer for Coalition Forces), the Commander 800th Military Police Brigade (Brigadier General Janis Karpinski) who was in charge of all detainee operations from about April 2003 through the spring 2004), and the CJTF-7 Staff Judge Advocate (a US Army Colonel and the senior military lawyer). The CJTF-7 C2 served as President of the board and made all final decisions on release.

As the number of detainees swelled, the Review and Appeal Board was replaced by the Review and Release Board, which consisted of three officers of field grade or higher rank – one military police, one military intelligence, and one judge advocate. The Board made a final recommendation on whether reasonable grounds for continued internment existed or whether the detainee should be released. Procedures were in place to coordinate communication between the reviewing authorities and the detaining unit, which was provided opportunities to forward additional information from the field. The Deputy Commanding

General of CJTF-7 (and its successor MNF-I) made the final determination on internment or release, although in some minor cases that authority was delegated to the Review and Release Board.

III Detention of Civilians after the Transfer of Sovereignty

Over several months during the spring of 2004, a whirlwind of controversy accompanied the release of shocking photos of detainee abuse at Abu Ghraib. The fallout from that scandal and the shifting legal foundation as sovereignty was passed from the Coalition Provisional Authority to the Iraqi Interim Government led to significant changes in the operational command structure of detention operations and minor adjustments in the procedures governing detention review. In actuality, the entire detainee operations review and release process was in constant evolution. Coalition Forces did not adequately plan for the detention of significant numbers of civilians and, thus, were constantly trying to "get ahead" of the inherent challenges.[36] From the beginning, this was a Sisyphean task.

A The Legal Basis for Detention

i United Nations Security Council Resolution 1546 (2004)

On June 13, 2004, the United Nations Security Council, acting under Chapter VII, unanimously adopted Resolution 1546, which welcomed "a new phase in Iraq's transition to a democratically elected government" and looked forward "to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq."[37] The resolution annexed two letters from US Secretary of State Colin Powell and the President of the Iraqi Interim Government, Dr. Ayad Allawi.

The persistent necessity for civilian internments was expressly asserted in Secretary Powell's letter to the President of the Security Council, which stated that MNF-I would:

> [C]ontinue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, *internment where this is necessary for impera-*

36 *See*, generally, Schlesinger Report, *supra* note 4. The invasion plan did not even call for the military police unit that was assigned primary responsibility for detention operations to arrive in theater until about thirty days after the invasion.

37 United Nations Security Council Resolution 1546 (2004).

> *tive reasons of security*, and the continued search for and securing of weapons that threaten Iraq's security [emphasis added].

President Allawi's letter requested a Security Council mandate for MNF-I that included "the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the Security Council."[38] In Resolution 1546, the Security Council granted the requested mandate and specifically decided "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution."[39] Thus, the detention or internment of civilians, grounded in the customary law of armed conflict, received the blessings of a Security Council Chapter VII mandate.[40] The only limitation or defining parameter for the detentions was that they be "necessary for imperative reasons of security."[41]

While Coalition Forces believed that GC IV did not apply as a matter of law to detentions that occurred after June 28, 2004, they continued to apply the principles of GC IV to security internees detained under the UNSCR 1546 mandate. In this regard, Coalition Forces were in agreement with the ICRC, although for different reasons. The ICRC believed GC IV no longer applied because the conflict became a non-international armed conflict after the full resumption of sovereignty by the IIG. Coalition Forces believed it remained an international armed conflict, but that the UNSCR 1546 mandate supplanted GC IV, as evidenced in part by the use of language from occupation law (GC IV Art. 78's term "imperative threat to security") and application of that language outside of an occupation. In many senses, Coalition Forces were creating new customary international law – taking the UN Security Council's general authorization of detentions, and defining the specific parameters and strictures of those detentions by drawing from the customary international law of armed conflict and the basic principles of the Geneva Conventions.

ii Iraqi Domestic Law

Coalition Provisional Authority Memorandum Number 3 (Revised), which became part of Iraqi domestic law pursuant to the Transitional Administrative

38 *Id.* at Annex.

39 *Id.* Notably, the resolution provided that the mandate would "expire upon the completion of the political process set out in paragraph four above" – i.e. the adoption of a permanent constitution "leading to a constitutionally elected government by 31 December 2005."

40 When acting under Chapter VII, the Security Council can essentially legislate, as resolutions adopted under Chapter IV are legally binding on all member states.

41 Secretary Powell's letter, *supra* note 37.

Law, authorized Coalition Forces to detain individuals believed to have committed criminal acts. Such persons were to be handed over to Iraqi authorities as soon as practicable, but could remain under the physical control of Coalition Forces if so requested by Iraqi authorities for security or capacity reasons.

B Under Responsible Command

As several investigations identified deficiencies in the command and control of detainee operations, the Deputy Commanding General of MNF-I was named the Commander, MNF-I Task Force 134 (Detainee Operations). While he remained a Deputy Commanding General of MNF-I, his primary duty was the command and control of all detainee operations in Iraq. The first commander chosen for this challenging assignment was Major General Geoffrey Miller, a hands-on, tough-talking, no-nonsense, hard-charging Texan who made a name for himself and cemented his relationships with US Secretary of Defense Donald Rumsfeld and fellow Texan President George W. Bush during his preceding tour as Commanding General of the detention facility at Guantanamo Bay, Cuba. A decisive leader who did not suffer fools lightly, General Miller immediately took steps to, in his words, "restore America's honor".

The changes instituted by General Miller included stronger command and control (i.e., accountability) throughout the detention process, improved detention facilities, unified and strengthened efforts to assist Iraqi courts in prosecuting terrorists, and numerous improvements to the detainee review and release process. Significantly, General Miller left no question that he was in charge of detainee operations. He was a constant presence at Abu Ghraib (in contrast to the previous general overseeing Abu Ghraib, Brigadier General Janis Karpinski, who rarely visited) and every Saturday evening he toured the detention camps and spoke with detainees.[42] They often raised questions regarding the status of their cases and appealed directly to General Miller, who then tasked his staff with reviewing and briefing him on the cases. If the basis for detention was weak or contrived, the detainee would be processed for expedited release.

C Implementing the Mandate

In response to the basis for detention articulated in Secretary Powell's letter and incorporated into the UN Security Council mandate, guidance was promulgated to Coalition Forces permitting detention only "for imperative reasons of security". Non-exclusive examples of security imperatives included: attacks

42 Coalition Force headquarters were at Camp Victory, which was adjacent to the Baghdad International Airport. Abu Ghraib is a small town on the outskirts of Baghdad: it was about a five minute helicopter ride and twenty minute drive from Camp Victory to the Abu Ghraib prison complex.

on Coalition Forces; interference with the mission accomplishment or movement of Coalition Forces; entering or attempting to enter a restricted area; illegal weapons possession; or committing, attempting, conspiring, threatening or soliciting another to commit/aid/abet the commission of a serious crime against Coalition Forces. Additionally, members of terrorist organizations or insurgent groups known to carry out attacks on Coalition Forces could also be detained for imperative reasons of security.[43]

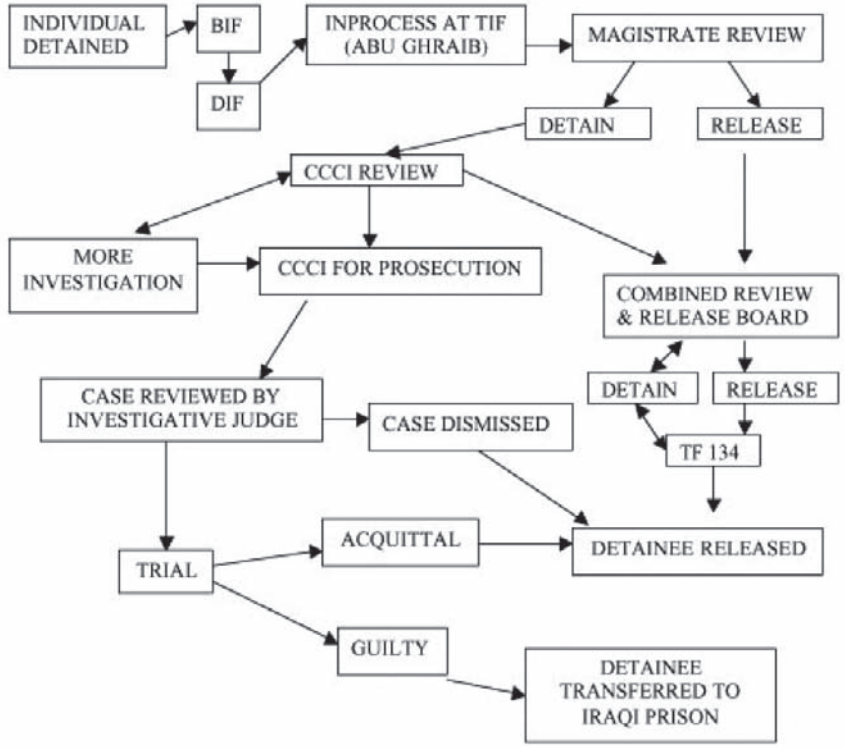
Officially, individuals could be detained for their intelligence value for no more than 72 hours; however, anecdotal evidence suggested that longer intelligence detentions were common. The argument in favor of intelligence detentions was that, for example, if an individual knew who was responsible for carrying out attacks on Coalition Forces and did not provide this information to Coalition Forces, then withholding it constituted an imperative threat to the security of Coalition Forces, as they would remain vulnerable to imminent attack. (This was more than a mere hypothetical for many Coalition Force units operating in small villages where all the Iraqi locals knew each other.) The argument against such detentions was that the individual himself did not pose an imperative security threat and it was typically too difficult to reasonably establish what an individual knew. Furthermore, detaining individuals on the basis of what they were believed to know could be a slippery slope leading to mass, unwarranted detentions, which would ultimately be counter-productive to the establishment of democracy and the rule of law in Iraq.

D From Initial Detention to Abu Ghraib

While detaining units continually refined their processes, the initial stages of review that immediately followed a civilian's detention remained essentially unchanged from those in place during the occupation. Detainees were first transported to a brigade internment facility (BIF) where they could be held for up to 72 hours. If the BIF Detention Review Authority determined that probable cause to detain existed, the detainee was transferred to a division internment facility (DIF). The detainee could be kept for up to fourteen days for interrogation at the DIF. During the initial 72 hours at the DIF, the DIF Detention Review Authority conducted another review to determine whether there was probable cause to detain the individual. If the DIF Detention Review Authority determined that continued detention was appropriate, written documentation of such was included with the detainee file for forwarding to the theater internment facility (TIF) at Abu Ghraib. Until the detainee was forwarded to the TIF, the cognizant commander (brigade or division) could authorize a detainee's release. Once the detainee arrived at the TIF, only the Commander Task Force 134 could generally authorize a detainee's release.

43 The list of such organizations and groups is not publicly available.

E The GC IV Review and Release Process



Between June 2004 and December 2005, Task Force 134 operated theater internment facilities at Abu Ghraib, Camp Bucca in the desert of southern Iraq, Camp Suse north of Baghdad, and Camp Cropper near the Baghdad International Airport. All detainees were in-processed through Abu Ghraib and then transferred to whichever facility security needs and military necessity dictated. The plan, announced by President Bush in his State of the Union Address in January 2005, was to expand Camp Bucca and close the infamous detention camp at Abu Ghraib. However, with the detainee population on a continuous upward trend, there was never enough excess capacity to close Abu Ghraib.

The detainee's first stop at Abu Ghraib was the in-processing facility. There he was photographed and fingerprinted, his personal property was cataloged and stored (including any evidence that accompanied him to Abu Ghraib), and

he underwent a medical examination.[44] Within seventy-two hours of a detainee's arrival at Abu Ghraib, a military magistrate reviewed his case to determine whether there was a reasonable basis to believe the detainee posed an imperative threat to the security of Coalition Forces. Beginning in early 2005, the military magistrate also assigned a security threat level classification to the detainee: low, medium, high, or extreme risk.[45] The Magistrate's Cell then notified security internees of their status, the basis for internment, and the right to appeal under Article 78.[46] This notification was provided as soon as practicable; however, during periods of mass detentions (such as during the second battle for Fallujah in November 2004 when hundreds of detainees were in-processed at Abu Ghraib on nearly a daily basis over a two-to-three week period), many days could pass before the notice was delivered to the detainee.

The next stop for the detainee's file was the Central Criminal Court of Iraq Liaison Office at Abu Ghraib. There the file was reviewed with an eye towards possible criminal prosecution. If the basis for detention was an offense also punishable under Iraqi criminal law, such as assault on Coalition Forces or illegal weapons possession, and the file contained sufficient evidence to ensure the Iraqi equivalent of an indictment (sworn statements from two eyewitnesses to the crime was the absolute minimum and photos or physical evidence were required in the case of weapons possession), the file was forwarded to the Central Criminal Court of Iraq for prosecution.[47] By December 2004, about 25% of cases were being referred for prosecution. If the basis for detention was not punishable under Iraqi criminal law (e.g., membership in a terrorist organization known to engage in attacks on Coalition Forces) or the file did not contain sufficient evi-

44 The provisions of Article 97 of GC IV were complied with, including giving detainees a receipt for any retained property.

45 These classifications were implemented in an attempt to quantify the level of security threat for individual detainees. There was a practical impetus to this: if the number of detainees exceeded capacity and Coalition Forces needed to quickly identify several hundred detainees for release, then they could chose those classified at the lowest risk level. There was also a public affairs aspect in that these classifications could be used to justify continued detention. Over 87% of detainees were classified as either high risk or extreme risk and less than one percent were classified as low risk. Whether these classifications accurately reflected the risk posed by individual detainees, or whether the magistrates classified at a high or extreme risk level to justify the actions of Coalition Forces is difficult to objectively judge. Most disturbing to this author is that the security risk classifications were conducted by military lawyers with little or no training in intelligence or counter-insurgency operations. In other words, lawyers were making operational rather than legal assessments of security risk determinations.

46 Even after the end of the occupation, the notice of right to appeal continued to reference Article 78 rather than Article 43.

47 The Central Criminal Court of Iraq and its prosecution of detainees is discussed in greater detail in Andru E. Wall, *Prosecuting Insurgents and Terrorists in Iraq*, 36 Israel Yearbook of Human Rights 181-203 (2006).

dence to refer the case for prosecution (e.g., circumstantial evidence, which the CCCI generally wouldn't consider, or statements from confidential informants who would not testify), then the file was forwarded to the Combined Review and Release Board.

The Combined Review and Release Board (CRRB) was created in the summer of 2004.[48] Its membership consisted of nine board members: three MNF-I officers (military police, military intelligence, and a judge advocate) and six representatives from the Iraqi government (two representatives each from the ministries of Human Rights, Interior and Justice). The CRRB was responsible for reviewing each detainee file at least every six months in accordance with Article 43 of GC IV. If a case was referred for prosecution but no action was taken to indict the detainee within six months, then the CRRB reviewed the file and made a determination on continued internment just to ensure compliance with GC IV.

Once a detainee's case was docketed with the CRRB, the detaining unit was notified and provided an opportunity to provide supplementary evidence or argument justifying continued detention. The CRRB met regularly, initially two to three and then up to seven times a week, and reviewed on average well over 100 cases a day. A military attorney from the Task Force 134 legal office verbally summarized each file, an interpreter orally translated this summary into Arabic, and the board members were then provided a brief opportunity to ask questions and debate the merits of detention. The CRRB could recommend 1) continued detention, 2) release with a guarantor,[49] or 3) unconditional release. All recommendations were by majority vote. Between August 2004 and November 2005, the CRRB voted to release 12, 052 detainees and continue internment for 9,903.

The results of the CRRB hearing were provided to the detaining units, which then had seven days to submit comment – i.e., concur or non-concur. If the detaining unit (or a superior in its chain-of-command) did not concur with a CRRB recommendation for release, that fact and any supporting basis was documented in the detainee's file and it was returned to the CRRB for further consideration. Recommendations for unconditional release or release with guarantor were forwarded to the Commander, Task Force 134 for approval. While General Miller (and his successor Major General William Brandenburg) retained final release authority, CRRB recommendations to release were followed over 99% of the time.

48 A second CRRB was created in May 2005 in order to keep pace with the increasing review workload.

49 Release with a guarantor essentially involved a tribal leader or other community leader vouching for the detainee and "guaranteeing" the detainee would not engage in anti-Coalition Force activity.

IV A Model for the Future?

Against the backdrop of the Abu Ghraib abuse scandal, the idea that the conduct of detention operations in Iraq could provide a fitting model for the internment of civilians in future conflicts probably strikes most as preposterous. Nevertheless, if the scandal is placed in proper perspective,[50] a picture of evolving, orderly due process in the midst of an utterly disorderly conflict slowly begins to emerge. Considerable thought was given to the spirit and letter of the law throughout the detention review process. Magistrates grappled with fairness, evidentiary standards, understanding the context of the detentions (evidence collection in a hostile wartime environment does not involve yellow tape and extensive forensic analysis) and the meaning of "reasonableness" in determining whether someone posed an imperative threat to the security of Coalition Forces. Board members were haunted by the conflicting evils of detaining an innocent person and releasing a terrorist to attack and kill. Policy makers continually negotiated with, prodded and cajoled Iraqi government officials to assume ever-greater responsibility for and jurisdiction over the detention process – all in furtherance of the goal of replacing wartime security detentions with peacetime criminal accountability and the rule of law.

A Is a Ten-Second Review Really Procedural Due Process?

Perhaps the greatest criticism this author can lodge against the legal aspects of detainee operations in Iraq relates to the actual conduct of the review and release boards, specifically the Combined Review and Release Board.[51] Article 43 of GC IV simply mandates that any "protected person who has been interned … shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designed by the Detaining Power for that purpose." If detention is continued, the board must "give consideration" to the detainee's case at least every six months. Since detailed implementing guidelines for "reconsidered" and "give consideration" are not provided, the level of thoroughness necessary to comply with the spirit of GC IV is admittedly open to some interpretation. Is a thorough review required, or passing thought sufficient?

Like every other function within detainee operations in Iraq, the CRRB was consistently trying to "catch up" with the continual flood of new detainees. By January 2005, the CRRB was meeting at least three times a week for all-day ses-

50 The despicable actions of a few influenced perhaps by a lack of clear guidance on proper interrogation techniques.

51 This author does not minimize the evil of the Abu Ghraib abuse scandal or the other allegations of detainee abuse, but chooses not to comment here on these issues as they are beyond the purview of this paper and have been addressed, along with recommended remedial measures, in the investigations referenced in note 4.

sions. During a typical session, the board considered well over 100 cases – i.e., it spent no more than a couple minutes on each case. Two Task Force 134 military lawyers (who split the workload) reviewed the docketed cases the preceding day and prepared two or three sentence summaries, which they briefed to the board and a translator orally conveyed in Arabic. The detainee file was then passed around from one board member to the next for each to inscribe their vote on a sheet attached to the file. By the time the file was passed to the third or fourth board member, a new detainee file was usually being briefed.

Other barriers to true review were observed. Initially, the MNF-I officers on the board registered their votes first. However, it appeared the Iraqi boarded members tended to vote with the military board members to a degree that suggested lack of independent consideration. Thus, the order of voting was reversed, which resulted in fewer unanimous votes and more of an Iraqi lead in release recommendations. It was also observed that the Iraqi board members tended to stereotype to a degree incompatible with Western notions of fairness. For example, Iraqi board members routinely cited such facts as the detainee's tribal or religious affiliations as the basis for their vote to detain. When these facts were omitted or absent from the file, Iraqi board members were observed looking at the detainee's photo and overheard commenting in Arabic words to the effect "oh, yes, he's a terrorist" and then voting to detain.

Arguably, more resources should be assigned to review boards such as the CRRB. This is not to suggest that they should become mini courts with rights to appear and the right to counsel, but perhaps board members should spend more than a few seconds individually reviewing each file before making the decision to deprive someone of their freedom.

B GC III, GC IV, or Evolving Customary International Law?

From the standpoint of the development of customary international law, scholars will struggle with the conflicting examples of state practice presented by the United States. During Operation Enduring Freedom in Afghanistan, the United States asserted its belief that unlawful combatants were entitled to the protections of neither GC III nor GC IV, deciding instead to hold unlawful combatants until the end of an interminable conflict while simultaneously depriving them of the privileges accorded prisoners of war or detained civilians. During Operation Iraqi Freedom the United States clung to this position in principle, but in practice (with rare exception) generally afforded unlawful combatants the due process protections of GC IV.[52] The detainee review and release procedures implemented by Coalition Forces after the transfer of sovereignty essentially used the requirements of GC IV, specifically those found in Articles 41-43 (initial review as soon as possible and subsequent reviews at least every six months), as a baseline for the

52 See footnote 17 and accompanying text.

development of due process and humanitarian safeguards in the implementation of UN Security Council Resolution 1546.

One wonders if, with the benefit of experience and hindsight, policy-makers realized they could accomplish their goals of preventing detainees from returning to the fight against the United States, while simultaneously avoiding a cacophony of criticism from the international community. A fitting example of how these twin objectives were met in Iraq is the handling of detained foreign fighters.[53] While comprising less than 10% of the insurgents or terrorists fighting Coalition Forces in Iraq, foreign fighters were responsible for the most dramatic and bloody attacks. They typically distinguished themselves from ordinary Iraqi fighters in that they neither gave nor requested quarter – they fought fiercely to the death (one reason why they comprised less than 5% of the detainee population). Nevertheless, by December 2004, several hundred foreign fighters were in the custody of Coalition Forces.

Recognizing that at some point active hostilities and the detention of security internees would end, Coalition Forces and the Iraqi government established protocols for the turnover of foreign fighters to the Iraqi government for prosecution. Prosecution and conviction was surprisingly simple under what was essentially a strict liability policy: mere presence in Iraq without a valid passport entry (which no one had) equaled an illegal boarder crossing under Iraqi law. Since the vast majority of the foreign fighters (being "true believers") admitted they entered Iraq illegally for the purpose of waging jihad against the infidel Coalition Forces (again, not a legal reason for entry under Iraqi law), the Iraqi judges of the Central Criminal Court of Iraq generally found mitigating circumstances to be lacking and adjudicated sentences ranging from five to seven years imprisonment. If the foreign fighter was captured during a firefight with Coalition Forces, or otherwise in possession of illegal weapons, an additional five years could be, and typically was, tacked on to the Iraqi passport violation conviction.

The contrast between detentions in Afghanistan and Iraq is stark. The foreign fighters captured in Afghanistan and transported to Guantanamo Bay, Cuba, were denied protection under either GC III or GC IV, thus generating widespread international criticism. They have been held in detention for four years now, absorbing considerable resources and generating increasing criticism with each passing day. What was gained by this policy? In practical terms, it only added the ability to remove the detainees from Afghanistan – a practice prohibited by Article 49 of GC IV.[54] The foreign fighters in Iraq, on the other hand, were

53 As mentioned in section II, GC IV does not apply to nationals of neutral countries with which the detaining power has normal diplomatic relations. So while Coalition Forces generally applied GC IV to foreign fighters captured in Iraq as a matter of policy and efficacy, there was no corresponding legal obligation to do so.

54 In fact, "unlawful deportation or transfer" of a person protected under GC IV is a grave breach under Article 147.

generally afforded the due process protections of GC IV, which proved no real impediment to intelligence collection, consumed less resources than the Afghan detainees (exact figures are not publicly available, but the costs would seemingly be considerably less for the Iraqi detentions), and, most importantly, they were convicted under Iraqi law by Iraqi judges and sentenced to five to twelve year prison terms in an Iraqi prison. If you were a policy-maker, which model would you chose in future conflicts?

Chapter 17

Transformative Military Occupation: Applying the Laws of War and Human Rights

Adam Roberts *

Within the existing framework of international law, is it legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic and legal order within an occupied territory? This is the central question addressed here. To put it in other ways, is the body of treaty-based international law relating to occupations, some of which is more than a century old, appropriate to conditions sometimes faced today? Is it still relevant to cases of transformative occupation – i.e. those whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule? Is the newer body of human rights law applicable to occupations, and can it provide a basis for transformative acts by the occupant? Can the UN Security Council modify the application of the law in particular cases? Finally, has the body of treaty-based law been modified by custom?

These questions have arisen in a number of conflicts and occupations since 1945 – including in the tragic situation in Iraq since the US-led invasion of March–April 2003. They have arisen because of the cautious, even restrictive assumption in the laws of war (also called international humanitarian law or, traditionally, *jus in bello*) that occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should therefore, by implication, make as few changes as possible. This conservationist principle in the laws of war is in potential conflict with the transformative goals of certain occupations.

This survey suggests that the law on occupations remains both viable and useful, and has proved reasonably flexible in practice. The article explores two particular ways in which potential conflicts between the conservationist principle on the one hand, and transformative goals on the other, may be mitigated. One is the application of international human rights law, which offers principles and

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procedures that can help to define the means and ends of an occupation. Another is the involvement of international organizations, especially the United Nations, that can assist in setting or legitimizing certain transformative policies during an occupation.

The existence of a possible legal justification for pursuing transformative projects in military occupations might be thought to have two consequences, but neither of them follows automatically from it. Firstly, it is no basis for general optimism about transformative occupations. Law may allow for certain possible courses of action, but that does not mean that transformative goals are always desirable or attainable. Only in exceptional circumstances are occupations likely to bring about a successful democratic transition in a society. There is ample ground for scepticism about the propositions that democracy can be spread by the sword, and that the holding of multi-party elections is in itself evidence that a society is moving beyond authoritarianism.[1]

Secondly, a legal framework for a transformative project under the *jus in bello* does not mean that, under the *jus ad bellum*, there can be said to be anything approaching a general right of states to invade other sovereign states with the stated purpose of reforming their political systems in a democratic direction. Since at least the time of the French Revolution of 1789 there have been many visions and projects of democratic transformative conquest. In contemporary international law a transformative political purpose is not on its own a justified cause for intervention.

The question of whether there can be a justification of intervention on transformative grounds overlaps with the long-standing and contentious question of 'humanitarian intervention'. There is a strong tradition of scepticism among international lawyers about whether, in the absence of a specific UN Security Council authorization, there can be said to be any 'right of humanitarian intervention'.[2] However, there is scope for a nuanced view that allows for some possibility of humanitarian intervention even without specific Security Council authorization. In such a view, it is neither logical nor helpful to frame the consideration of interventions in humanitarian crises in terms of a general 'right' of humanitarian intervention. Rather, humanitarian intervention is an occasional necessity, in which the legal issues on both sides are finely balanced, and in which states taking military action must accept a degree of legal risk. If it were to be accepted along such lines that on rare occasions intervention on humanitarian grounds might be justifiable, even without explicit UN Security Council authorization,

1 On the distinction between the external trappings of democracy, and political systems in which freedom is deeply entrenched, see especially Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton, 2003).

2 Yoram Dinstein has been characteristically consistent, clear and unequivocal in denying the existence of such a right. See Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge: Cambridge University Press, 2005), pp. 70–3, 90–1 and 315.

any individual case of intervention would need to be based on very careful consideration of the particular factual situation and the legal issues involved.[3]

The question as to whether an occupant is entitled to have transformative goals is in principle distinct from the question of the original reason for the intervention. The distinction is especially important because, at least in some cases, an occupation may be initiated primarily as a response to the international conduct of the target state – such as its offensive military operations, or its violations of international commitments on any of a wide range of matters. In such cases the transformative purpose of an occupation may be at best a secondary reason for invading, or may emerge as a goal only after the armed conflict and/or the resulting occupation has commenced. Yet there is an element of artificiality in the proposition that transformative goals may be acceptable, but only as a by-product of military action, not as its real justification.

Several episodes, including in the defeated Axis countries post-1945 and Iraq since 2003, indicate that a transformative political purpose can often arise in occupations, and also in some other situations resembling occupations in certain respects (such as UN administrations of post-conflict territories). In the cases where occupation law is applicable, the lawfulness, or lack of it, of such a purpose has to be assessed partly as a question relating to the lawful powers of an occupant.

This survey, which focuses mainly on the *jus in bello* question of what should be the limits of the powers of an occupant, is divided into four main parts. (I) The first part looks at certain underlying rules of the laws of war that set a framework of minimal alteration of the existing order in the occupied territory, and considers certain challenges to them. (II) The second part discusses the question of the applicability of the international law of human rights to military occupations. Because this is a relatively new and controversial issue, this part includes not only a general discussion, but also brief reference to certain occupations, and analogous situations, in which this question has arisen. (III) The third part looks at post-1945 foreign military presences with a fundamentally transformative purpose, and considers, *inter alia*, what the implications of such a purpose are for the law governing occupations. This part focuses particularly on the role of international organizations (especially the UN), and on Iraq since 2003. (IV) The fourth part suggests some general conclusions about transformative military presences, looking mainly at the challenges to, and continuing relevance of, the laws of war and also human rights law.

3 For elaboration of such a view, see Adam Roberts, 'The So-Called "Right" of Humanitarian Intervention', *Yearbook of International Humanitarian Law*, vol. 3, 2000 (The Hague: T.M.C. Asser Press, 2002), pp. 3–51.

I The Laws of War

The assumption that, the occupant's role being temporary, any alteration of the existing order in occupied territory should be minimal, has been at the heart of the provisions on military occupation in the laws of war. Three aspects of the law relating to occupied territories exemplify this requirement: the prohibition of annexation, the rules regarding the occupant's structure of authority, and the rules regarding the maintenance of existing legislation in occupied territory. The first, the prohibition on annexation, has survived, battered but unbowed. The second and third are under much greater pressure. Each is considered in turn.

All three of these rules are related to the understanding of occupation as a concomitant of war, and a temporary state of affairs pending a peace agreement. In this sense these rules fit well within the main stream of *jus in bello*. However, it has long been accepted that occupation is not always a mere temporary phase during a war. For example, there is a tradition of thought about *post-debellatio* occupation, which occurs when at the end of a war a country is so completely defeated that it has virtually ceased to exist as a state.[4] Modern transformative occupations are distinct from *post-debellatio* occupation, but they do bear certain similarities to it. In the period since 1945 several occupations have endured long after the hostilities that caused them: the Israeli-occupied territories, northern Cyprus and Iraq are cases in point. This phenomenon has given rise to thoughtful consideration by some writers as to whether occupation law faces a crisis of relevance. At the most general level, the question has been raised as to whether occupation law should be viewed as coming under a new umbrella labelled *jus post bellum*, but such suggestion is tempered by awareness of the importance of effective implementation of the existing body of occupation law, which is seen as remaining relevant to many problems raised in modern occupations.[5]

A Prohibition of Annexation

The rule of international customary law that prohibits unilateral annexation of territory, at least while a conflict is still continuing, is a necessary foundation for the whole idea that occupation is subject to a distinct regulatory framework. The rule is a reminder of the limits imposed on an occupying power – limits that might also have implications for 'transformative' occupations. Although annexation and transformation are conceptually and legally very different, they do have

4 Adam Roberts, 'What is a Military Occupation?', *British Year Book of International Law 1984*, p. 249, at p. 267.

5 Daniel Thürer and Malcolm MacLaren, '"Ius Post Bellum" in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?', in Klaus Dicke *et al.* (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005), pp. 753–82.

one thing in common – they tend to involve extending to the occupied territory the type of political system to which the occupying power adheres.

Many acts of annexation have been defended by use of the rhetoric of transformation. Thus, when in September 1911 Italy presented an ultimatum to the Ottoman Government, it complained that Tripoli and Cyrenaica had been left in a 'state of disorder and neglect', insisting that 'these regions should be allowed to enjoy the same progress as that attained by other parts of Northern Africa. This transformation, which is required by the general exigencies of civilization, constitutes, so far as Italy is concerned, a vital interest …' In November 1911 Italy decreed that Tripolitana and Cyrenaica were under complete Italian sovereignty. Many saw this annexation as illegal. As Sir Thomas Barclay wrote, shortly after:

> If annexation could be decreed by an invader without the consent of the invaded Power the whole population of the annexed territory might at once be made to pass under the allegiance of the invading sovereign, its legitimate acts of defence be made rebellious and punishable as such and the troops opposed to the invader be made to forfeit their right to be treated as belligerent. This is a *reductio ad absurdum* of any such proposition.[6]

Modern practice, which finds expression in several international agreements, denies the right in most circumstances to unilaterally annex occupied territory – i.e. to change its legal status to that of a component part of the occupant's sovereign state. Even if the whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right to annexation.[7]

If the Occupying Power does (illegally) annex the whole or part of the occupied territory, the population must not by that act be deprived of the benefits of the 1949 Geneva Convention IV.[8] Kuwait provides an example of the international community observing this principle in response to an attempted annexation. On 2 August 1990 Iraq occupied Kuwait. On the same day the UN Security Council demanded that Iraq 'withdraw immediately and unconditionally', and

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6 Sir Thomas Barclay, *The Turco-Italian War and its Problems* (London: Constable, 1912), p. 45. On the strong international Muslim feeling about this conquest see the additional chapter by the Rt. Hon. Ameer Ali at pp.101–8. Texts of Italy's ultimatum of 26 September 1911 and its Decree of Annexation of November 1911 are at pp. 109–11 and 113–14.

7 The prohibition on annexations is part of customary law, and finds expression in the UN Charter, Art. 2(4); and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, approved in GA Res. 2625 (XXV) of 24 Oct. 1970. See also Georg Schwarzenberger, 'The Law of Belligerent Occupation: Basic Issues', *Nordisk Tidsskrift for International Ret 1960*, p. 10, at pp. 12–18.

8 1949 Geneva Conv. IV, Art. 47.

on 6 August, declaring itself 'determined to bring the invasion and occupation of Kuwait by Iraq to an end', it imposed economic sanctions on Iraq.[9] On 8 August Saddam Hussein announced the merger of Kuwait with Iraq – i.e. annexation. On the following day the UN Security Council decided 'that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity; and is considered null and void.'[10] The Council subsequently stated explicitly that 'the Fourth Geneva Convention applies to Kuwait.'[11] Thus, in this case at least, the most drastic form of transformation of a territory and its political order – namely incorporation into another state – was viewed as clearly contrary to international law and the rules governing occupations remained a valid benchmark by which the actions of an occupant were to be judged.

Other cases of annexation or quasi-annexation demonstrate that the prohibition of annexations, while crystal clear in theory, is by no means as straightforward in practice. A principal problem is that many cases of annexation or attempted annexation have been in circumstances where the original status of the annexed territory was itself less than one of full sovereignty. The Chinese invasion of Tibet (1950), the Indian invasion of Goa (1962), and the Indonesian invasion of East Timor (1975) are all cases in point. Only the last of these three actions was eventually reversed, in 1999–2002.

Annexation has often been seen, quite naturally, as linked to aggression. Many international lawyers have propounded the principle that unilateral acts inconsistent with fundamental rules of international law should be viewed as null and void, and no prescriptive rights should evolve in favour of the aggressor. Thus, annexation resulting from aggression should not be recognized. Yoram Dinstein raises the interesting question of how effective the legal principle of non-recognition can be in the long term. 'If the *de facto* control of the territory annexed by the aggressor continues uninterrupted for generations, the non-prescription rule may have to give way in the end. International law must not be divorced from reality.'[12]

What if an occupation arises, not from an act of aggression, but following a defensive war, in which a state defending its territory occupies neighbouring lands? This is one factually well-grounded view of the position of Israel in respect of the territories occupied since 1967. In certain parts of these territories (the Golan Heights, and East Jerusalem with extended boundaries) there have been subsequent acts of annexation or quasi-annexation, taking mainly the form of

9 SC Res. 660 of 2 Aug. 1990, and SC Res. 661 of 6 Aug. 1990. The texts of these and all other Security Council and certain General Assembly resolutions and other UN documents mentioned in this survey are available at <http://www.un.org/documents>.

10 SC Res. 662 of 9 Aug. 1990.

11 SC Res. 670 of 29 Sept. 1990; and SC Res. 674 of 29 Oct. 1990

12 Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn. (*supra* note 2), p. 171.

applying Israeli law to them. The overwhelming tendency of states and international bodies has been not to recognise these purported annexations, but rather to view the law on occupation as remaining applicable to the situation. The general prohibition on annexation, in other words, continues to be seen as a key principle, even if it is under pressure.

Important as the problem of annexation is, it is by no means the only way in which fundamental and lasting change may be brought about in a territory. One of the common ways in which occupying forces change the political order in occupied territory is when they attempt, not an act of annexation, but other changes: for example, in the composition of the government; and in the constitutional or legal system. Such changes may be aimed at achieving what is in effect the opposite of annexation: the full resumption of sovereignty by the territory concerned. There is nothing new about such practices. As Sharon Korman has written in her study of *The Right of Conquest*, the French revolutionaries post-1789 believed that they had replaced the old-fashioned right of conquest with a new principle – the right of peoples to determine freely their political affiliations:

> Thus, in accordance with the principle of 'no conquests' which it had proclaimed in 1790, revolutionary France declined to invoke the right of conquest in the countries to which its arms were supposedly bringing liberty. But if it no longer substituted its own sovereignty *directly* in the occupied territories, it did so in an *indirect* manner. Judging that the people were the sole sovereign, it overthrew the ancient sovereignty of 'usurper' kings, only to establish in their place popular authorities which it placed under the 'revolutionary guidance' of France.[13]

This episode serves as a useful reminder that transformative occupations have a long history. They are, arguably, an outgrowth of the disapproval of annexations, but they are not in all respects their opposites. Indeed, in many cases, from the French Revolution down to Germany, Japan, and twenty-first century Iraq, transformative occupation may be considered to have emerged as a more honourable, but still deeply controversial, successor to the discredited notion of annexation.

B The Occupant's Structure of Authority

The occupant, including such occupying forces or officers as are mentioned in the conventions, usually exercises authority by virtue of its effective factual control,

13 Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Oxford University Press, 1996), p. 122. For a historical perspective on transformative occupations see also Nehal Bhuta, 'The Antinomies of Transformative Occupation', *European Journal of International Law*, vol. 16, no. 4 (September 2005), pp. 721–40.

rather than by virtue of any legal entitlement. That factual authority is accorded a degree of recognition in the conventions, which reflect the assumption that the occupant has a structure of authority and extensive responsibilities in the occupied territory. Transformation, which necessarily involves handing over power to authorities coming from within the territory, threatens this assumption.

What is an occupation administration supposed to look like? The 1907 Hague Regulations refer variously to 'the hostile army', 'the occupant', 'a commander-in-chief', 'the commander in the locality occupied', 'an army of occupation', and 'the occupying State' as the entities exercising authority in occupied territory.[14] There is a clear implication of a well ordered chain of military command and legal responsibility coming down from the government of the occupying state: and indeed most occupation administrations have had such a character.

The 1949 Geneva Convention IV refers throughout to the 'Occupying Power' as the body with authority in occupied territory.[15] This term applies essentially to the central government of the state whose forces have carried out the invasion and occupation. Nothing is said in this Convention about the precise administrative form of the occupation regime. The 1977 Additional Protocol I also uses the term 'Occupying Power' without defining it or suggesting the administrative forms it might assume.[16] Thus the Geneva stream of law establishes that the government of the occupying state bears responsibility for the action taken in occupied territory, but it does not elaborate on the brief references in the Hague Regulations as to who exerts this authority on the spot.

Many writers, properly stressing the idea of temporary trusteeship which is at the heart of much occupation law, have indicated that there are limits to the constitutional changes which an occupying power may bring about. Pictet, commenting on 1949 Geneva Convention IV, Article 47, has expressed this view:

> During the Second World War Occupying Powers intervened in the occupied countries on numerous occasions and in a great variety of ways, depending on the political aim pursued; examples are changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities.
>
> International law prohibits such actions, which are based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State. Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which

14 1899 and 1907 Hague Regs., Arts. 42, 43, 48, 49, 51, 52, 53, and 55.

15 In 1949 Geneva Conv. IV the term 'Occupying Power' appears in Arts. 4–6, 30, 47–61, 63–8, 70–75, 78 and 143. A continuing role for the authorities of the occupied territories is implicitly envisaged in Arts. 6 and 47.

16 In 1977 Additional Prot. I, the term 'Occupying Power' appears in Arts. 14, 15, 63, 64, 69, and 85. The same term is used in the 1954 Cultural Property Conv., Art. 5.

> were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power. Such practices were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a *de facto* administrator.[17]

Pictet's underlying idea, that the occupying power normally has the role of *de facto* administrator, is indeed justified. However, in the sweeping form in which it is presented, his condemnation of political interventions by occupying powers is open to challenge. Occupants often attempt to disguise or limit their own role by operating indirectly: by setting up some kind of quasi-independent puppet regime; by operating through the existing system of government, which remains in post within occupied territory; by establishing an international administration of the territory; or by introducing a new constitutional system. Sometimes they may seek to justify such actions as steps towards creating a new democratic system of government in the occupied territory. There can be particularly strong reasons for doing so if a war is concluded and there is no prospect of the territory simply reverting to its former rulers.[18]

Although many of the wide variety of governmental arrangements imposed by occupying powers undoubtedly differ from what is envisaged in the Hague Regulations and Geneva Convention IV, states have been reluctant to conclude that in every case such practices are unlawful. There is particular reluctance to condemn in principle the introduction of constitutional democracy in the occupied territory. However, the emergence of a legitimate government inevitably modifies the responsibilities and structure of authority of the occupant.

C Existing Legislation of the Occupied Territory

What are the rules under occupation law that govern the nature and extent of changes that can be introduced within occupied territory? On the face of it, they are straightforward. Their basics are enshrined in the much-quoted words of the 1907 Hague Regulations:

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17 Jean Pictet, *Commentary on Geneva Convention IV* (Geneva: ICRC, 1958), p. 273. Available at <http://www.icrc.org/ihl>.

18 Thus in regard to Israel's role in the West Bank, the term 'trustee occupation' was proposed by Allan Gerson in 1973. He suggested that since this occupation had certain special features, not all the provisions of the law on occupations need necessarily apply. He himself conceded that Israel had not in the end assumed the role of 'trustee occupant'. Allan Gerson, *Israel, The West Bank and International Law* (London: Frank Cass, 1978), pp. 76-82.

> *Article 43*
> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. [19]

This article presents some problems. The assumption that the previous ruler of a territory was a 'legitimate power' is not easy to square with U.S. or indeed many other views of Adolf Hitler or Saddam Hussein. The article's implication that the 'laws in force in the country' were basically satisfactory has often been called into question by events. The let-out clause, 'unless absolutely prevented', has provided a basis for introducing certain changes to the laws of occupied territories.

The basic requirement to respect the existing legal framework of a territory has long been under pressure, for a variety of reasons. This apparently straightforward rule needs interpretation in light of the particular facts of a situation, and the particular nature of certain laws. In practice, certain types of law (e.g. laws relating to military conscription, or to national elections) are often suspended during occupations.[20] Moreover, in occupations of countries that had been under dictatorial or extremist rule, numerous other laws may be suspended. In the Allied occupation of parts of Italy and Germany towards the end of the Second World War, the Allies abolished Fascist laws. They did so right from the start, during the belligerent occupation phase before the Italian armistice and the German surrender. This might have appeared to transgress the letter of Article 43. However, many writers indicated that the nature of the Axis regimes and their laws was such as to 'absolutely prevent' the Allies from accepting their continuation.[21]

Against this background, in the negotiations leading to the 1949 Geneva Civilians Convention there was naturally discussion about the extent to which an

19 1899 and 1907 Hague Regs., Art. 43. See also 1907 Regs., Art. 23(h). For a useful discussion of Article 43 and its flexibility in practice see Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupiers', *European Journal of International Law*, vol. 16, no. 4 (September 2005), pp. 661–94.

20 United States, Department of the Army, *The Law of Land Warfare*, Field Manual No. 27–10 (Washington DC: 18 July 1956), p. 143; United Kingdom, War Office, *Manual of Military Law*, Part III, *The Law of War on Land* (London: HMSO, 1958), p. 145. Its successor, the UK tri-service manual published in 2004, states that the occupant may suspend or amend existing laws of the occupied territory in certain defined circumstances. UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), pp. 278–9 and 284.

21 C.R.S. Harris, *Allied Military Administration of Italy 1943–1945* (London: HMSO, 1957), p. 14; F.S.V. Donnison, *Civil Affairs and Military Government: North-West Europe 1944–46* (London: HMSO, 1961), pp. 381–2 and 477–8; and L. Oppenheim, *International Law: A Treatise*, vol. 2, *Disputes, War and Neutrality*, 7th edn., ed. H. Lauterpacht (London: Longmans Green, 1952), pp. 446–7; UK, *Manual of Military Law*: *Law of War on Land*, p. 143.

occupying power can legitimately alter the laws in force in occupied territory. The states concerned eventually agreed on a modest modification of Article 43 of the Hague Regulations, allowing a little more scope for changes to the existing local laws. This is Article 64 of the Civilians Convention:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[22]

The negotiation in 1949 that preceded this text included a number of proposals that would have acknowledged more explicitly the right of the occupying power to change the laws. The US delegate, Mr Ginnane, proposed replacing the draft of what became the above-quoted Article 64 with a much shorter, simpler and (for the occupying power) more permissive text:

> Until changed by the Occupying Power the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offences covered by the said laws.[23]

The Soviet delegate, Mr Morosov, spotted the obvious problem with this proposal, 'that it gave the Occupying Power an absolute right to modify the penal legislation of the occupied territory. Such a right greatly exceeded the limited right laid

22 1949 Geneva Conv. IV, Art. 64. In the 1958 UK Manual it was implied that an occupant may also repeal or suspend laws if in the occupied territory there is no 'adequate legal system in conformity with generally recognized principles of law'. UK, *Manual of Military Law: Law of War on Land*, p. 145. In similar spirit, its 2004 successor states: 'The occupying power should make no more changes to the law than are absolutely necessary, particularly where the occupied territory already has an adequate legal system.' UK, *Manual of the Law of Armed Conflict*, p. 284.

23 *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne: Federal Political Department, n.d.), vol. IIA, p. 670 and vol. III, p. 139, Amendment 294. The draft text of Art. 55 that the U.S. sought to replace is in vol. IIA, p. 858. A useful report on Art. 55 appears on p. 833. These negotiations on the text of the Civilians Convention were conducted in the conference's Committee III.

down in the Hague Regulations …'.[24] Less powerful but no less perceptive, the distinguished French international lawyer Mr. de Geouffre de la Pradelle, representing Monaco, suggested that, in the particular case of occupied Germany after the Second World War, U.S. modification of the laws of the country was acceptable, but such modification did not provide the basis for a general rule:

> What would be the position in the opposite case, that of an invader other than a democratic Power, who exercised that right? Under the United States amendment the invader could change the penal legislation of the occupied territory. The Committee should think very carefully before amending the wording of the Convention in the way suggested.[25]

In the discussion that followed, Mexico suggested 'the adoption of a wording to the effect that the Occupying Power could only modify the legislation of an occupied territory if the legislation in question violated the principles of the "Universal Declaration of the Rights of Man"'.[26] This solitary reference to a human rights benchmark was not followed up at the conference.[27] Yet in the long run, the issue of human rights was to have a profound effect on the rules governing occupations. It was to provide one basis for altering the laws of the occupied territory.

Overall, the rule that the laws in force in the country should be respected continues to provide an important benchmark for occupants. However, there have been many cases in which occupants, for a wide variety of reasons, have changed laws in the occupied territory without incurring international criticism. Transformative occupations increase the pressure for changing those laws. As a result, if Article 64 of 1949 Geneva Convention IV were being rewritten today there would be pressure to provide for laws of the occupied territory to be repealed or suspended in two additional types of circumstance – where they are an obstacle to the exercise by the inhabitants of fundamental human rights, and to the implementation of transformative purposes approved by the UN Security Council.

In the Civilians Convention, one other provision might at first sight seem relevant to transformative occupations, but actually illustrates a failure to get to grips with them. In Article 6, which addresses occupations that continue for more than a year after the end of a war, and envisages an occupant progressively handing over the functions of government, it is stated:

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24 *Final Record*, vol. IIA, p. 670.

25 *Final Record*, vol. IIA, p. 671.

26 *Final Record*, vol. IIA, p. 671.

27 See the further discussion, *Final Record*, vol. IIA, p. 672, and the report back from the Drafting Committee, p. 771. In the index of contents of the four volumes of the *Final Record* there is no entry for 'human rights' or for 'Universal Declaration'.

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.[28]

This indicates that if the occupant is still in charge one year after a war, Article 64 with its moderate conservationist thrust is among the many that would still apply. However, Article 6 provides no other guidance on the extent to which an occupant pursuing long-term transformative goals may make changes to existing legislation. In any case the 'one year after' rule is widely seen as of little or no relevance to actual occupations, and it has been effectively rescinded by a provision of 1977 Additional Protocol I, as between states parties to the latter.[29] Despite its limitations, Article 6 is a reminder of the old and important fact that not all occupations can be subject to exactly the same rules.

II The International Law of Human Rights

Traditionally, the laws of war rules have been seen as the main – even the only – branch of international law applicable to occupations. However, there is no *a priori* reason why multilateral conventions on other matters should not be applicable to occupied territories. There is increasing evidence that one other body of law may be especially relevant: human rights law. Setting out as it does to spell out certain fundamental human rights, it is not specifically tailored to the situation considered here – military occupation. Like the law on crimes against humanity, its scope of application is wider than the laws of war: it applies in peacetime, and it applies within states, affecting for example the relations between governments and their own subjects.

Human rights law developed from custom over a long period. A key document in its codification was the 1948 Universal Declaration of Human Rights. Adopted by the UN General Assembly, this did not take the form of a legally binding instrument, and there is not the normal machinery whereby states can become parties to it. Rather, it has the status of an authoritative guide to the relevant parts of the UN Charter. Whatever its precise status, it was followed by the conclusion of a large number of human rights treaties, four leading examples of which are:

- 1950 European Convention on Human Rights
- 1966 International Covenant on Civil and Political Rights
- 1966 International Covenant on Economic, Social and Cultural Rights
- 1984 UN Convention on Torture.

28 1949 Geneva Conv. IV, Article 6(3).

29 1977 Additional Prot. I, Article 3(b).

Some have viewed such instruments as the 1948 Universal Declaration and the two 1966 covenants as together constituting an 'International Bill of Human Rights' which is an authoritative interpretation of the UN Charter's human rights clauses and is hence binding on all states, establishing a human rights standard of universal applicability.[30] This view, as indicated below, is contested.

The application of international human rights law has been urged in respect of several occupations since the mid-1960s. However, experience has shown that there can be considerable problems regarding the application of international human rights law in this way. Before certain grounds for caution are addressed, the overall relationship between this branch of law and the laws of war needs to be examined.

A Relationship between Human Rights Law and the Laws of War

International human rights law is in some respects a new body of law, which has been evolving quite rapidly since the end of the Second World War. It is therefore not surprising that the relationship of human rights law to armed conflict in general, or to occupations in particular, should be still in need of exploration.[31]

That there is indeed some connection between human rights law on the one hand, and the problem of war and military occupation on the other, is indicated by the origins of the modern movement for human rights law. It can be said to have begun with the international concern about the disregard for human rights shown in many occupied countries, as well as in the territory of Germany itself and that of its allies, during the Second World War. As William Bishop wrote:

> The greatest impetus for United Nations action for international protection of human rights grew out of the almost universal reaction against the German Nazi oppressions of persons in Germany and in the territories occupied by Germany during World War II.[32]

This concern not only contributed to the development of the human rights body of law, but also had its effect on international agreements on the laws of war. This is evident in the terms of the four 1949 Geneva Conventions. As Dietrich Schindler has written, with that tinge of optimism that occasionally marks his commentary on the conventions:

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30 Frank C. Newman, 'The International Bill of Human Rights: Does it Exist?', in Antonio Cassese (ed.), *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict* (Milan: Giuffrè, 1975), pp. 107–16.

31 Many works on human rights law make little or no reference to the problems of armed conflict and military occupation. See, e.g., Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Oxford University Press, 1985).

32 William W. Bishop Jr., *International Law: Cases and Materials,* 3rd edn. (Boston: Little Brown, 1971), p. 470.

> A tendency may be detected in the Geneva Conventions of 1949 for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of the protected persons.[33]

The 1977 Additional Protocol I on international armed conflict overlaps with human rights law much more directly than the 1949 Conventions that it supplements. Article 72 specifies that the provisions outlined in that particular section of the Protocol are additional not only to the rules in 1949 Geneva Convention IV, but also 'to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.' Moreover, Article 75 (on fundamental guarantees) is directly derived from the 1966 International Covenant on Civil and Political Rights. In the 1977 Additional Protocol II on non-international armed conflict, Article 6 (on penal prosecutions) is similarly derived from the same 1966 covenant. True, the various instruments of human rights law are not mentioned by name in 1977 Geneva Protocols I and II: but their presence is there nonetheless.

Further evidence of a connection between human rights law and the laws of war is the fact that it was a UN conference on human rights (held in 1968 in Tehran) which marked the first occasion when the UN showed real interest in the further development of the laws of war. This contributed to the diplomatic process which led, *inter alia*, to the conclusion of 1977 Geneva Protocols I and II.[34] UN committees and conferences have often discussed laws of war issues under the heading of 'respect for human rights in armed conflicts'.[35]

Writers on the law of armed conflict were not all equally alert to the possible significance of human rights law in occupied territories. True, in 1944 Ernst Fraenkel, in *Military Occupation and the Rule of Law*, did urge that an 'international bill of rights' should apply to an occupation regime 'at least after the purely military phase of the occupation has ended.'[36] However, in works published in the 1950s the whole question received only modest attention. There was no specific reference to human rights law in Gerhard von Glahn's *The Occupation of Enemy*

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33 Dietrich Schindler, 'The International Committee of the Red Cross and Human Rights', *International Review of the Red Cross*, no. 208, Jan.–Feb. 1979, p. 3, at p. 7.

34 On the various factors leading to the negotiations which were ultimately to result in 1977 Geneva Prots. I and II, see particularly Frits Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May – 12 June 1971', *Netherlands Yearbook of International Law 1971*, pp. 68–90.

35 See e.g. the two-volume survey prepared by the UN Secretariat, *Respect for Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, UN Doc.A/9215, 7 Nov. 1973.

36 Ernst Fraenkel, *Military Occupation and the Rule of Law* (New York: Oxford University Press, 1944), pp. 205–6.

Territory, published in 1957.[37] The British *Manual of Military Law*, published in 1958, referred to human rights only in very general terms.[38]

Gradually there was a change whereby writers came to recognize the potential applicability of human rights in occupied territories. Morris Greenspan, in his major work *The Modern Law of Land Warfare*, published in 1959, made some brief references to human rights accords – notably the 1948 Universal Declaration, and the 1950 European Convention – and evidently accepted their applicability.[39] Martin and Joan Kyre, in a study of US policy on military occupations published in 1968 noted the significance of the Universal Declaration of Human Rights for military occupations, but regretted 'a shift in mood within the United States away from internationalism' which had restricted the U.S. role in helping to develop the international law of human rights.[40]

The relation between human rights law and the laws of war began to attract international attention in the late 1960s and early 1970s. This was due in part to the adoption of the two international human rights covenants in 1966; to international concern over various wars of the period, including in Vietnam; and to the Israeli occupation of certain Arab territories in the 1967 war. Many writers indicated that there is a relationship between the two bodies of law, even if it is not a simple one. G.I.A.D. Draper wrote in 1971:

> Human Rights do not dissolve in time of war or public emergency affecting the life of the nation, but are subject to a controlled and limited derogation from specific Human Rights to be justified by the extent of that emergency.
>
> The precise relation between the law of war and the regimes of Human Rights has not yet been elaborated.[41]

Professor Draper also said, in an article published in 1971 in the *Israel Yearbook on Human Rights*:

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37 However, see von Glahn's article, 'The Protection of Human Rights in Time of Armed Conflicts', *Israel Yearbook on Human Rights 1971*, vol. 1, p. 208, at pp. 213–14, where he accepts the applicability, in time of armed conflicts, of fundamental human rights.

38 UK, *Manual of Military Law: Law Of War On Land,* p. 143. Its 2004 successor includes reference to the applicability of human rights law. *Manual of the Law of Armed Conflict*, p. 282.

39 Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), footnotes on pp. 161, 247, 250 and 504. See also Greenspan, 'The Protection of Human Rights in Time of Warfare', *Israel Yearbook on Human Rights 1971*, vol. 1, p. 228, at p. 229, where he states that human rights instruments 'apply in war as well as in peace.'

40 Martin and Joan Kyre, *Military Occupation and National Security* (Washington DC: Public Affairs Press, 1968), p. 97.

41 G.I.A.D. Draper, 'The Status of Combatants and the Question of Guerilla Warfare', *British Year Book of International Law 1971*, p. 173, at p. 218.

> The essential nexus between the law of war and the regime of human rights has been made in theory, viz., that the former is an essential part of the latter. The law of war is a derogation from the normal regime of human rights ...[42]

The idea that the law of war could be seen, in large measure, as one important body of rules and principles for safeguarding human rights in situations of armed conflict and occupation was supported by many other writers. Dinstein, in an article in 1978, also in the *Israel Yearbook*, entitled 'The International Law of Belligerent Occupation and Human Rights', actually wrote almost entirely about the rules laid down in the laws of war. This approach followed quite naturally from the fact that he was preoccupied with the problem of belligerent occupation, especially that of the Israeli-occupied territories, and not with transformative occupation, as the following passage indicates:

> The government of an occupied territory by the occupant is not the same as a State's ordinary government of its own territory: a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population. Most peacetime human rights are suspended in time of belligerent occupation.[43]

In a work published in 1980 exploring the relation of human rights law to the laws of war, Aristidis Calogeropoulos-Stratis stressed the applicability in time of armed conflict of certain human rights instruments.[44] In a 1993 study specifically devoted to military occupations, Eyal Benvenisti reached a more nuanced conclusion, which is of considerable relevance to cases of transformative occupations:

> In the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community. Thus, as hostilities subside, and security interests can permit, the occupant could be expected to

42 G.I.A.D. Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflicts', *Israel Yearbook on Human Rights 1971*, vol. 1, p. 191, at p. 206.

43 Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights', *Israel Yearbook on Human Rights 1978*, vol. 8, p. 104, at p. 116. See also Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law', in Theodor Meron (ed.), *Human Rights and International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), pp. 345–68.

44 Aristidis S. Calogeropoulos-Stratis, *Droit Humanitaire et Droits de l'Homme: La Protection de la Personne en Période de Conflit Armé* (Geneva: Institut Universitaire de Hautes Études Internationales, 1980).

> restore civil and political rights. Under such circumstances, the human rights documents may well serve as guidance for reestablishing civil and political rights in the occupied territory.[45]

In 2004 Kenneth Watkin suggested that, in general, the use of force in armed conflict is increasingly assessed through human rights law as well as international humanitarian law. In briefly considering the specific case of military occupation he indicated that both normative regimes may come into play; but that the use of force within occupied territory (for example against an insurgency) is not always amenable to a human rights framework.[46]

On specific issues, especially those relating to individual liberty and political freedoms, there is an element of tension between human rights law and the law on occupations. For example, the 1966 International Covenant on Civil and Political Rights, Article 9, prohibits arbitrary detention, and requires that 'anyone who is arrested shall be … promptly informed of any charges against him.' By contrast, the 1949 Geneva Convention IV, Article 78, paragraph 1, says: 'If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.' Even though such measures must be made 'according to a regular procedure', this is more draconian than the 1966 Covenant's provisions. The tension between these two approaches is mitigated by the fact that, in time of public emergency threatening the life of the nation, states may derogate from certain obligations under the 1966 Covenant, whereas the Geneva Convention IV has to be considered the *lex specialis* for occupations.

In many occupations one basis for asserting the applicability of human rights law may be its near-universal character, as a body of law subscribed to equally by the occupying state and by the occupied state. However, in a number of occupations the question has arisen as to whether certain specific obligations under human rights law of the occupying power extend to territories that it occupies. An example is the application of the 1950 European Convention on Human Rights (which offers not merely a statement of principles, but also an unusually strong legal procedure for obtaining redress) in territories outside those of states parties to the Convention.

The overall question of whether human rights treaties apply extra-territorially is still contested. Michael Dennis of the US State Department, in a general survey of the subject, goes so far as to conclude:

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45 Eyal Benvenisti, *The International Law of Occupation* (Princeton, New Jersey: Princeton University Press, 1993), p. 189.

46 Kenneth Watkin (Deputy Judge Advocate General/Operations, Canadian Forces), 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', *American Journal of International Law*, vol. 98, no. 1 (January 2004), p. 1, at pp. 1–2, 26–8.

> The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms.[47]

This conclusion is based on serious considerations, including a strict interpretation of Article 2(1) of the International Covenant on Civil and Political Rights, under which a state is obliged to ensure the Covenant's rights 'to all individuals within its territory and subject to its jurisdiction.' The core of Dennis's argument is that both these conditions must be met. Yet it remains unconvincing to argue that human rights law cannot apply at all to situations that arise in a military occupation. There is a need to draw a clearer distinction than Dennis does between armed conflict (where the application of human rights law is more problematic) and occupation; and also a further distinction between occupation in general, and the holding of certain specific persons by outside forces. In the latter situation the application of human rights law may be particularly appropriate. Such distinctions have not always been clearly drawn in addressing questions of extra-territorial application of human rights norms. Where a territory is indeed occupied – i.e. under the control of the occupying power – there is a stronger *prima facie* case that human rights law should apply than there is in situations of armed conflict. Where there are prisoners or internees under the direct control of the occupant, the case may be stronger still. To the extent that an occupying power exercises control, which it certainly should do in its own prisons, it has the kind of administrative apparatus that is necessary to make human rights protection effective.[48]

The implementation of human rights law may be advocated as a matter of legal obligation, or as a matter of choice irrespective of the question of whether, as a matter of law, the occupant is required to implement it. Such advocacy of implementation may come from interested parties from two different perspectives:

– The inhabitants, or outside bodies claiming to act on their behalf, may invoke human rights standards in order to bring pressure to bear on the occupant – e.g. to ensure the human rights of inhabitants, internees and others.

47 Michael J. Dennis (Office of the Legal Adviser, U.S. Department of State), 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, vol. 99, no. 1 (January 2005), p. 119, at p. 141. This article is part of 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory'.

48 See also the further discussion of Dennis' article as it relates to the Israeli-occupied territories and Iraq (*infra* text at notes 62 and 64).

– An occupant with a transformative project may view human rights norms as comprising part of the beneficient political order being introduced into the territory. As far as Iraq from 2003 onwards has been concerned, this has been the U.S. position in the UN Security Council, but it is not clear how far it has percolated through the US government.

The relation between human rights law and the laws of war is not just a simple confrontation between a *lex generalis* of human rights and a *lex specialis* of laws of war. In occupations, some practical issues can arise (such as discrimination in employment, discrimination in education, and the importation of educational materials), which are addressed in considerable detail in certain human rights agreements, and are not so addressed in the law on occupations. Or human rights law may offer procedures for individual complaint and redress that are not present in the laws of war. In respect of such issues, international human rights standards may not merely fill out gaps in the laws of war, but provide procedures for assisting in implementation of key provisions of those laws.

In short, the relation between the laws of war and human rights law under conditions of occupation is extraordinarily complex. More than any writings or theories, it was to be events that would reveal the complexity of the inter-relations, the different perspectives on them, and their importance in transformative occupations.

B Application of Human Rights Law to Particular Occupations

The general principle that human rights law can apply to military occupations is now widely, but by no means universally, accepted. Evidence for this proposition can be found in statements since the mid-1960s by international, and in some cases, national bodies of various types.

i United Nations Role

The United Nations has played a major part in urging the application of human rights rules to occupations. Of the various organs of the UN it has been the General Assembly that has played the most prominent (and often contentious) role in this regard. Starting in 1968, it has urged the importance of observing human rights law in armed conflicts and military occupations generally.[49] It has also done so, not always with perfect even-handedness, in respect of particular occupations. The occupation which has had most attention from the General Assembly, both in general and as regards the application of human rights, is

49 See e.g. GA Res. 2444 (XXIII) of 19 Dec. 1968 (adopted unanimously), Respect for Human Rights in Armed Conflicts.

Israel's of the territories taken over in 1967: the application of human rights law to the territories occupied by Israel has been urged in numerous UN resolutions.[50]

Although the UN Security Council has frequently urged respect for human rights in armed conflict generally, for a long time it did not address the more specific issue of human rights in occupations to the same extent as the General Assembly. This has begun to change. Where UN bodies established by the Security Council have had a major role in administering post-conflict territories, as in Kosovo and East Timor (situations in some ways comparable to occupations), these bodies have placed emphasis on human rights law, while keeping silent about the application of the laws of war.[51] Following the commencement of the US-led occupation of Iraq in 2003 the Security Council emphasized the importance of human rights law as well as the laws of war.[52]

ii Namibia: 1971 ICJ Advisory Opinion

Several occupied territories have been viewed by international tribunals as subject to human rights law. With respect to Namibia, it may have been partly with human rights law in mind (as well as the humanitarian laws of war) that the International Court of Justice, in its 1971 Advisory Opinion, pointed to the applicability of 'certain general conventions such as those of a humanitarian character'.[53]

iii Czechoslovakia after 1968: Charter 77

The range of circumstances in which human rights law may be relevant is extremely wide, but the classic situation to which such law applies is in the relations between the government of a state and its own citizens. This situation can arise in some occupations in which an indigenous government has been left in post or a new one has been put in place. In such instances which might be viewed by some as occupations, but where that status is strongly contested by some or all of the parties concerned, human rights law may be of special importance. For example, the indigenous government may reject the pejorative label of occupa-

50 UN General Assembly resolutions specifically urging the application of human rights in the Israeli-occupied territories include GA Res. 2443 (XXIII) of 19 Dec. 1968; GA Res. 2546 (XXIV) of 11 Dec. 1969; GA Res. 2727 of 15 Dec. 1970; and the subsequent annual resolutions entitled 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories'.

51 On the foundational regulations of the Kosovo and East Timor administrations, see *infra*, notes 107 and 108.

52 See *infra*, text at notes 63, 111 and 125.

53 Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, para. 122. Note also the references to human rights law in paras. 92 and 131.

tion, but it may accept the application of human rights standards. One such case was Czechoslovakia following the formal entry into force in 1976 of that country's ratification of the two 1966 UN human rights covenants. Both the communist government (grudgingly) and its critics accepted in principle that international human rights instruments were applicable. The idea of the 'Charter 77' movement was conceived on the day – 11 November 1976 – when an official ordinance was published in Prague relating to Czechoslovakia's accession to these two conventions. Vladimir Kusin records a conversation in a Czech home on that day:

> We stood in the kitchen door and she said 'Something ought to be done about it' and made three more steps and turned on the tap to make water run over our voices… The day was Thursday, 11 November 1976, when they began selling *Collection of Laws* No. 23 which contained among other things the Foreign Minister's ordinance of 10 May 1976, numbered 120 and bearing a title full of hope: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[54]

In the late 1970s and 1980s, human rights law provided one framework for dialogue both within eastern European states and between them and the West. The 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe (not a legally binding document as such), and the diplomatic procedures established under it played a part in this process. Those involved in resisting the occupation of Czechoslovakia and its consequences were left with no doubt about the significance of human rights principles.

iv Northern Cyprus since 1974: Role of the European Convention

Regarding the areas of northern Cyprus occupied by the armed forces of Turkey in 1974, the European Commission of Human Rights and the European Court of Human Rights have confirmed the general principle of the applicability of human rights law. In three decisions in 1975, 1978 and 1996 in cases brought by Cyprus against Turkey, the Commission ruled applications by the Government of Cyprus in respect of the Turkish occupation admissible.[55] The cases concerned

54 Vladimir Kusin, *From Dubcek to Charter 77: A Study of 'Normalisation' in Czechoslovakia 1968–78* (Edinburgh: Q Press, 1978), p. 304. On the role of human rights accords in the Charter 77 movement see also Vaclav Havel *et al.*, *The Power of the Powerless* (London: Hutchinson, 1985), pp. 69–78. The text of the original Charter 77 declaration, published at the beginning of January 1977, and referring extensively to international human rights agreements, is at pp. 217–21.

55 Eur. Comm. Human Rights, *Decisions and Reports*, vol. 2, p. 125 (Case No. 6780/74 and 6950/75, Decision of 26 May 1975); *Decisions and Reports*, vol. 13, p. 85 (Case No. 8007/77, Decision of 10 July 1978); and *Decisions and Reports*, vol. 86-A, p. 104 (Case No. 25781/94, Decision of 28 June 1996).

the application of the European Convention on Human Rights, Article 1 of which states that the High Contracting Parties shall secure certain rights and freedoms to everyone 'within their jurisdiction'. The Commission found (in the words of its decision in the second case): 'This term is not equivalent to or limited to "within the national territory" of the High Contracting Party concerned ... the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad.'[56] In the third of these cases arising from northern Cyprus, and the first of them to be referred to the European Court of Human Rights, the Court reaffirmed earlier decisions of the Commission, and indicated that Turkey has extensive responsibilities arising from the European Convention on Human Rights. This also confirmed the Court's earlier decisions in the *Loizidou v. Turkey* case.[57]

These conclusions did not mean that the law of armed conflict was supplanted by human rights law. On the contrary, when in the first of these cases a question arose concerning the detention of Greek military personnel in Turkey, the European Commission of Human Rights ruled that the specific law relating to prisoners of war, 1949 Geneva Convention III, was applicable, and therefore they did not need to 'examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.'[58]

v Israeli-occupied territories: 2004 ICJ Advisory Opinion in the 'Wall' case

The application of human rights norms to the Israeli-occupied territories is a much-contested matter. In a number of statements the Israeli authorities have denied that human rights law is formally applicable to the territories occupied since 1967. The question has been explored in depth in many writings, and in decisions of the Supreme Court of Israel.[59] This extensive body of experience of

56 Eur. Comm. Human Rights, *Decisions and Reports*, vol. 13, at p. 149. (Case No. 8007/77, Decision of 10 July 1978.).

57 Eur. Court Human Rights, *Reports of Judgments and Decisions*, 2001-IV, p. 1, at pp. 22–6. (Case No. 25781/94, Judgment of 10 May 2001.). On *Loizidou*, see *Reports of Judgments and Decisions*, 1995, Series A, no. 310, p. 1, at p. 23. (Case No. 40/1993/435/514, Judgment of 23 March 1995 on Preliminary Objections.). Also *Reports of Judgments and Decisions*, 1996-VI, p. 2216, at pp. 2234-5. (Judgment of 18 December 1996 on Merits.).

58 *Eur. Human Rights Reports*, vol. 4, 1982, p. 482, at pp. 533 and 559. (Eur. Comm. Human Rights, Applications 6780/74 and 6950/75, Opinion of 10 July 1976.).

59 See almost all issues of *Israel Yearbook on Human Rights*; Esther Cohen, *Human Rights in the Israeli-occupied Territories 1967–1982* (Manchester: Manchester University Press, 1985); and Adam Roberts, 'Prolonged Military Occupation: The Israeli-occupied

problems relating to the application of human rights norms in occupied territories is beyond the scope of this article.

However, the Advisory Opinion of the International Court of Justice in the *Wall* case in 2004 merits attention here because it is so definite, so wide-ranging in its scope, and so controversial. The ICJ concluded 'that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[60] In the occupied territories, therefore, Israel was deemed to be bound by its terms. This forthright conclusion, like other parts of this Advisory Opinion, appears to be weakened by some shaky legal reasoning.[61] Michael Dennis has criticized this part of the opinion on the grounds that the Court: *(a)* placed a questionable interpretation on the preparatory work for the International Covenant on Civil and Political Rights; *(b)* paid remarkably little attention to the role of the Palestinian Authority as a body that may have responsibilities to implement human rights law in the areas under its control; and *(c)* assumed too easily that the law of armed conflict had only limited application to the situation on account of the (highly contestable) argument that, under the 'one year after the general close of military operations' rule in Article 6 of the 1949 Geneva Civilians Convention, certain provisions of the convention no longer applied to the territories occupied in 1967.[62] These and other specific criticisms of the ICJ Advisory Opinion are serious, and suggest that the ICJ has done less than it may have thought to advance the view that human rights law does apply in at least some circumstances in occupied territories.

vi Iraq: UK Court of Appeal in 2005

The promotion of human rights was proclaimed as one purpose of the occupation of Iraq in two UN Security Council resolutions passed in May 2003 and June 2004 with the support of the US and UK.[63] Curiously, in some American discussion of the application of human rights law to the US-led coalition's occu-

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Territories Since 1967', *American Journal of International Law*, vol. 84, no. 1, January 1990, p. 44, esp. at pp. 70–74.

60 International Court of Justice, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 111. The Court focused particularly on the International Covenant on Civil and Political Rights, Art. 12, guaranteeing freedom of movement.

61 For a range of views on the ICJ Advisory Opinion on the security barrier, see the nine contributions in 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory', *American Journal of International Law*, vol. 99, no. 1 (January 2005), pp. 1–141.

62 Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially' (*supra* note 47), pp. 122–37.

63 UN Security Council Resolutions 1483 of 22 May 2003 and 1546 of 8 June 2004 (*infra* text at notes 111 and 125 respectively).

pation of Iraq, including the article by Michael Dennis cited above, this fact has been ignored.[64] Yet there have been important questions raised about whether the actions of US-led coalition forces could be governed by human rights law as well as by the laws of war.

The fact that a situation, or an individual, is within the control and authority of an outside power was a key consideration in a UK Court of Appeal decision in December 2005 arising from the presence of coalition forces in Iraq from 2003 onwards. The *Al-Skeini* case was brought on behalf of Iraqi families who claimed that six deceased relatives had been mistreated and killed by British troops in southern Iraq, and that such acts were violations of the European Convention on Human Rights and the national legislation based on that convention, namely the UK Human Rights Act 1998. Five of the relatives had died as a result of incidents resulting from the activities of British Army patrols. The sixth, Mr. Baha Mousa, died after having been taken into the custody of British forces. These incidents all happened between August and November 2003. The key issue in the case was the extent of applicability of British and European human rights norms. As Lord Justice Brooke stated in his leading judgment, the case:

> is about acts done by the soldiers of an army which, with others, has overthrown the government of a sovereign state and is temporarily in occupation of the territory of that state pending the establishment of a new national government. This is why it is being contended that the United Kingdom was obliged to secure to the citizens of that part of Iraq which its forces occupied the rights and freedoms defined in the ECHR because, it is said, those citizens were temporarily within this country's jurisdiction.[65]

He drew a distinction between the applicability of laws of war and human rights rules to the overall situation in southern Iraq, stating 'In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time.'[66] He continued:

> It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves. To build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR at the very time

64 Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially' (*supra* note 47), p. 120 and n. 13.

65 Case of *Al-Skeini and others*, Court of Appeal, Civil Division, decision of 21 Dec. 2005, para. 5, at <http://www.hmcourts-service.gov.uk/HMCSJudgments/Search.do>.

66 Ibid., para. 124.

> when the IGC had been formed, with CPA encouragement, as a step towards the formation by the people of Iraq of an internationally recognized representative Government …, would have run right against the grain of the Coalition's policies.[67]

The conclusion of the case was as follows: 'The UK did not possess Article l jurisdiction in relation to those killed in the first five incidents with which we are concerned, and that the appeals of the first five claimants must be dismissed.' The case of the sixth person, Baha Mousa, was different. The UK Government, after initially taking the opposite view, had conceded that it was exercising extra-territorial jurisdiction for European Convention on Human Rights purposes in the case of Baha Mousa. The Court therefore had only to consider whether the UK Human Rights Act applied to this case. It did so decide, and therefore concluded that the case on behalf of Mr. Mousa is justiciable in UK courts.[68] In the judgments on this case, including the separate opinions of Lord Justice Sedley and Lord Justice Richards, it was recognized that the issues were complex and would need further consideration by the House of Lords.[69] As far as the application of human rights law is concerned, the Court of Appeal has drawn a vital distinction between situations where an individual is plainly under the control of UK forces (e.g. because of being in custody) and those where, even if there is an occupation, individuals are not under such control.

C Human Rights Law: Criteria for Assessment

A range of experience in the years since 1945 leads to the conclusion that human rights law is widely, but not yet universally, seen as applicable in occupied territories; and that in many cases the responsibility for application of the law lies with the occupant. However, the precise relevance of human rights law in time of foreign military occupation needs to be carefully examined in any particular instance. What follows is a first attempt at criteria for assessment of the relevance and applicability of human rights law in circumstances of occupation.

Before considering criteria that might point to the relevance of human rights law it is necessary to lay out plainly certain grounds for caution. Five in particular stand out:

(a) There have been different views of whether the scope of application of human rights agreements – especially the 1966 International Covenants – encompasses occupied territories.[70]

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67 Ibid., para. 125.

68 Ibid., paras. 142, 143, 147.

69 Ibid., paras. 147 (Brooke), 206 (Sedley), 210 (Richards).

70 These differences of view, which are not new, re-surfaced over Iraq post-2003. The strongest critique of the proposition that human rights law is applicable in time

(b) Many human rights conventions permit parties to make derogations from some of their provisions, for example, in time of public emergency threatening the life of the nation. Some military occupations occur in circumstances (which may well include a continuing armed conflict) that could be viewed by at least one party as constituting such an emergency.

(c) More states are parties to the four 1949 Geneva Conventions (and with fewer declarations and reservations) than to the treaties in respect of human rights. No less than 193 states – virtually all – are parties to the four 1949 Geneva Conventions, and 165 to their 1977 Additional Protocol I.[71] By contrast, the two 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, have 156 and 153 parties respectively; and the 1984 Convention against Torture has 141.[72] This means that there is further scope for debate as to whether a particular human rights treaty is applicable in the event that either the occupying power is not a party to the treaty, or the power which previously held the territory is not – or at any rate was not when the occupation began. Debate on this is not likely to be entirely eliminated by claims that human rights law is binding on all states.

(d) Human rights agreements were not drawn up with the specific circumstances of armed conflict and occupation primarily in mind. The Universal Declaration of Human Rights does not specifically refer in any of its provisions to the question of human rights in armed conflict.[73] Indeed, some human rights agreements – for example the 1966 Covenant on Economic, Social and Cultural Rights – have more the character of a programme than a binding set of detailed rules. No human rights agreement draws distinctions between different categories of individuals in the way that the laws of war do.

(e) Over a wide range of issues, the laws of war rules regarding military occupations, as laid down in the Hague Regulations and the Geneva Conventions, may offer more extensive, detailed and relevant guidance than can the general human rights treaties; and their supervisory machinery, although allowing less room for legal redress than do some human rights treaties, may be more appropriate to the circumstances.

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of occupation is Dennis, 'Application of Human Rights Treaties Extraterritorially' (*supra* note 47), pp. 119–41.

71 Figures of states parties to Geneva Conventions from ICRC at <http://www.icrc.org> (visited 21 July 2006).

72 Figures of states parties to human rights treaties from UN at <http://untreaty.un.org/English/access.asp> (visited 29 May 2006).

73 Schindler, 'International Committee of the Red Cross and Human Rights', *International Review of The Red Cross*, Jan.–Feb. 1979 (*supra* note 33), p. 7.

Despite these considerations, human rights treaties can be important in some situations that either constitute occupations, or closely resemble occupations in certain key respects. They may impose formal obligations on parties; be important in political debate, as a basis for assessing the actions of external powers and local actors; provide legal procedures for taking action; or provide one basis for pursuing transformative goals. These treaties can be particularly relevant in the following instances:

1. It is claimed – for example on the basis of a status-of-forces agreement, a purported mandate to act as liberator, and the existence of an indigenous government – that there is no occupation at all. This could well be the case with some 'transformative' projects in the wake of military interventions. Whether or not such a denial of the existence of occupation is legally defensible in the circumstances, it may suggest that human rights law is the most useful set of standards to which to appeal.
2. Even if an occupation is deemed to continue in some form, an indigenous government is in post, and problems revolve around the relations between individual citizens and their own government. In such a case many issues concerning the relations between inhabitants and their own governmental authorities could properly be considered as human rights matters.
3. The provisions of a human rights instrument have been incorporated into the domestic law of the occupied territory and/or of the occupying power.
4. Some individuals or groups of people in occupied territory (e.g. certain terrorist suspects) are considered by the detaining power not to fall within the various broad categories of protected persons as laid down in, say, the four 1949 Geneva Conventions and the 1977 Protocols; but there may be human rights protections that relate to their situation.
5. Some human rights instruments deal with subject-matter that fills gaps in the laws of war provisions on occupations – e.g. importing of educational materials. Partly because of the broad subject-matter coverage, they may be cited particularly often in occupations which continue for a long time, even into something approximating to peacetime, and which present problems different from those addressed in the laws of war.
6. Human rights agreements contain procedures for dealing with an issue, for example enabling individuals to raise a matter directly with some outside institution. The role of the European Court of Human Rights in a number of situations involving the use of force is evidence of possibilities in this regard.
7. A specific issue arising in an occupation concerns violations of those parts of human rights law which are not derogable in time of crisis.[74] Or, alterna-

74 Non-derogable provisions include: 1950 European Conv. on Human Rights, Arts. 2, 3, 4(1) and 7; and 1966 International Covenant on Civil and Political Rights, Arts. 6, 7, 8(1) and (2), 11, 15, 16 and 18.

tively, the power against which a claim is made has not made a derogation in respect of the occupation.[75]

8. The occupant, and/or international bodies, may refer to human rights law as providing a legal basis for changing certain laws of the occupied territory, or even as setting goals for a transformative occupation. For example, the text of Article 1 of both of the 1966 international human rights covenants has possible implications for political arrangements under occupations: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status ...'

In such instances human rights conventions can reinforce the idea that there are some important basic rules to be applied, and principles to shape the conduct of the states and individuals involved. Each of the eight instances listed above could arise in a transformative occupation.

III Post-1945 Occupations with a Transformative Purpose

Many interventions and occupations since 1945 have been more than mere by-products of war: their basic purpose has often been to affect the political order in the territory concerned. Cases during the Cold War years include, for example, Czechoslovakia after 1968, northern Cyprus after 1974, Cambodia after 1978, and Grenada in 1983.

This part looks selectively at certain foreign military presences aiming at a fundamental democratic transformation, and considers their possible implications for the law on occupations. Put crudely, the traditional assumption of the laws of war is that bad (or potentially bad) occupants are occupying a good country (or at least one with a reasonable legal system that operates for the benefit of the inhabitants). In recent years, especially in some Western democratic states, there have been various schools of thought that have been based on the opposite idea, crudely summarized as good occupants occupying a bad country (or at least one with a bad system of government and laws).

Both of these crude views of occupations are questionable. The second view – of the occupant as the bringer of progress – can lead to a dangerous mix of crusading, self-righteousness, and self-delusion. Yet this view is the product of serious considerations based on actual events, including the post-Second World War occupations; the cases of intervention since the end of the Cold War; and Iraq. Each will be considered in turn.

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75 For example, the UK did not make a derogation in respect of the European Convention on Human Rights in connection with the occupation of Iraq from 2003 onwards. In general, it might be hard to argue that there was a 'threat to the life of the nation' arising from occupation of a distant country.

A Post-surrender Occupations at the End of the Second World War

The Allied occupations of Germany and Japan after the Second World War provide clear examples of post-surrender occupations, and also of reluctance to be formally bound by the Hague Regulations. Here, as well as elsewhere, the victors desired to exercise their power freely, and in particular to make drastic political and other changes in the defeated states. The basic character of these occupations raised issues to which relatively little attention had been paid by international lawyers. Previously, it had sometimes been assumed that the normal consequence of a state's surrender was its subjugation or possibly even annexation by the victor; but this did not happen in the bulk of German or Japanese territory at the end of the Second World War, nor in a number of other instances at that time of post-surrender occupations. What took place instead, especially in Germany and Japan, were occupations which went beyond the letter of the Hague Regulations, yet fell short of annexation or assumption of sovereignty.

With respect to the occupation of Germany which began in 1944–5, a legal memorandum to the UK Foreign Office in March 1945 set out the basic problem:

> The truth is that the Allies are dealing with a situation without previous parallel; they are proposing to exercise their authority with respect to Germany in order to expel the Nazi system and its manifestations completely and utterly, and to continue this process indefinitely until it has succeeded. These objects, far ranging as they are, do not necessarily amount to annexation and to the positive and complete transfer of sovereignty whether by cession or by conquest. But they do undoubtedly go far beyond the exercise of military occupation as limited by previous international law. … Looking, therefore, at the matter broadly, we cannot regard the international law which will apply to the case now in prospect as limiting the right of the Allies to those attaching to a mere military occupation unless there is a positive assumption of sovereignty as a whole.[76]

After the Germans accepted unconditional surrender on 7 May 1945, Germany was completely occupied by the Allies. What then was the position so far as the application of the Hague Regulations was concerned?[77] On this point R.Y.

76 'Opinion of the Lord Chancellor and the Law Officers of the Crown', March 1945, Public Record Office (now National Archives) FO 371/50759 (U 1949). On the British discussion about the legal status of Germany, see F.S.V. Donnison, *Civil Affairs and Military Government: Central Organization and Planning* (London: HMSO, 1966), pp. 125–36.

77 The position before 7 May 1945 is widely viewed as one of normal belligerent occupation. However, as some anti-Nazi measures taken early in the belligerent phase show, there was not a completely sharp distinction between the two stages of the occupation of Germany.

Jennings, in an authoritative article in 1946, argued persuasively that the law of belligerent occupation had been designed to serve two purposes: first, to protect the sovereign rights of the legitimate government of the occupied territory, and secondly, to protect the inhabitants of the occupied territory from being exploited for the prosecution of the occupant's war. Neither of these purposes had much bearing on the situation the Allies faced:

> Thus the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism.[78]

Wolfgang Friedmann adopted a very similar position:

> Nor could even the widest interpretation of the rules of warfare bring the powers claimed and exercised by the allies in Germany within the scope of belligerent occupation ... Even the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.
> …
> It is not ... surprising that International Law – inadequate to cope with many problems of our days – should not be fully equipped to deal with an entirely unprecedented situation.[79]

A curious aspect of the legal arrangements for the post-Second World War occupations was Article 107 of the UN Charter. It stated, in full:

> Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

Article 107 can be seen as a way of keeping the Allied occupations of Germany and Japan outside the control of the UN Security Council. It was also a spiritual precursor of an approach which has sometimes surfaced in the thinking of the

78 R.Y. Jennings, 'Government in Commission', *British Year Book of International Law 1946*, p. 112, at p. 136.

79 Wolfgang Friedmann, *The Allied Military Government of Germany* (London: Stevens, 1947), pp. 65 and 67.

US government, which sees certain governments (and particularly that of the USA) as entitled to take action internationally with only a restricted role for the UN Security Council. Following the 2005 UN World Summit, Article 107 may be in process of being consigned to legal oblivion, but its unilateralist spirit is not entirely dead.[80]

After the entry into force of the 1949 Geneva Conventions, it became doubtful whether a claim could ever again be made that an occupation was outside the framework of the laws of war, or could completely ignore certain conservationist provisions. The scope of application of the Conventions, as outlined in common Article 2, was 'to all cases of partial or total occupation of the territory of a High Contracting Party'. Although the 1949 Civilians Convention, Article 6, did allow for the cessation of certain rules one year after the general close of military operations, the occupant (if still exercising governmental functions) would have remained bound by many conservationist rules.[81]

B International Military Actions since the End of the Cold War

Since the end of the Cold War, international circumstances have created strong pressures, and also opportunities, for military action to help bring about change in certain states. The international problems that have led to this tendency have included:

- Internal repression within states, in many cases leading to large numbers of internally displaced persons and refugees.
- Civil wars within states. These may cause concern on humanitarian grounds, because of their capacity to spread, and also because of their tendency to cause refugee flows.
- Toleration by certain states of terrorist activities aimed at targets abroad.

These problems are serious, and a complete refusal by the international community to tackle them is not an option. Of the many effects of international interventions since 1989, one of the most striking is the tendency to result in the return of refugees in large numbers. Another is the attempt made to bring about political change in the territory concerned – not always with success.

There has been a strong tendency in many post-Cold War military actions to avoid viewing them as occupations, or even thinking about the application of occupation law in these cases. A possible rationale for this approach is that in most cases in which there has been a foreign military presence with a transforma-

80 In the UN World Summit Outcome document of 16 Sept. 2005, para. 177, the UN's member states declared that 'we resolve to delete references to "enemy states" in Articles 53, 77 and 107 of the Charter.' UN doc. A/RES/60/1 of 24 Oct. 2005, p. 38.

81 1949 Geneva Conv. IV, Arts. 2 and 6. On the meaning and status of Art. 6, see *supra* text at notes 28 and 29.

tive purpose and some involvement in governmental functions, its presence in the country concerned has been with a degree of formal consent from the government of that country. Examples of such foreign presence with consent include:

1. Haiti (1994–2000 and from 2004 onwards)
2. Bosnia and Herzegovina (from December 1995 onwards)
3. Albania (March–June 1997)
4. Kosovo (from June 1999 onwards)
5. East Timor (October 1999–May 2002)
6. Afghanistan (from December 2001 onwards)

Further factors in all these cases were that there was (although not always from the start) formal UN Security Council authorization for the foreign military presence in the territory concerned; that the foreign presence had a multi-national character; that the intervention was preceded by UN Security Council expressions of concern over the humanitarian situation in the territory; and that human rights were emphasized as one key concern of the intervening forces.

Neither the fact of formal consent of the government of the country, nor formal UN authorization, makes it impossible for the law on occupations to be considered applicable to these cases. When troops from abroad interact with the population of another country, there must always be a strong case for viewing the law on occupations as a necessary safety-net. However, it is evident that the law on occupations is not the only lens through which one can examine this wide range of interventionist activity.[82]

Of these six cases, the one most similar to Iraq post-2003 is the U.S.-led external involvement in Afghanistan. In Afghanistan the United States had a clear transformative purpose; there, as in Iraq, the major U.S.-led military action was explicitly to depose the ruling regime of the country; and the deposition did not end all armed opposition. A main difference is that in Afghanistan there was no necessity to establish a foreign military occupation regime. After the fall of the Taliban regime and the accession to power of the Afghan Interim Authority on 22 December 2001, the coalition's role was essentially that of aiding the government.

C Iraq since 2003

There was a precedent, of sorts, in Iraq: the 'safe haven' established in northern Iraq in 1991. The US-led military intervention that began on 17 April 1991, resulting in the establishment of the zone, did not have specific authorization of the UN Security Council, nor, initially, the consent of the Iraqi government, whose forces had only a few months before been repulsed from Kuwait. After

82 A useful study of cases of international administration since 1995 is Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005).

the initial phase, northern Iraq was protected from Iraqi government incursions almost entirely through the establishment of a US-initiated air exclusion zone. The history of this protected zone illustrates certain transformative possibilities of foreign military involvement. However, the zone never assumed the character of anything approaching a full occupation regime. Initiated to enable large numbers of refugees from the region to return home, it resulted in the application of enough coalition military pressure to keep Saddam Hussein's forces out of northern Iraq, thereby enabling the Iraqi Kurds to develop their own administrative structures in the region. Here indeed was a transformation facilitated by a foreign military role: but that role assumed the form of a short-term military presence on the ground, followed by a more remote one in the air that could not be viewed as an occupation.

i Transformation as One Basis of the Decision to Use Force in Iraq

The military operations which were launched in Iraq on 19–20 March 2003 raised numerous issues relating to the *jus ad bellum.* These are not reviewed here, partly because of the familiar principle that the laws of war apply irrespective of the legality or otherwise of an original resort to force. However, one question must be briefly addressed. Is transformation a legitimate reason for resorting to force? This is distinct from the question as to whether transformation is a legitimate goal once force has (for whatever reason) been used.

The case of Iraq confirms that there may be a complex mixture of political motives for intervening, and a no less complicated mixture of legal and other justifications. The U.S.-led invasion followed a prolonged and confused legal-cum-political debate, in which the stated purposes of intervention varied not just over time, but also within and between different US agencies and participating states.

On 20 March 2003 the United States made a statement to the UN seeking to justify the military operations that had just commenced. The purpose of the military action was specified very precisely: 'These operations are necessary in view of Iraq's continued material breaches of its disarmament obligations under relevant Security Council resolutions, including Resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations.' As to the basis of authority to use force, the statement made a claim of continuing or revived authority on the basis of earlier resolutions: 'The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991).'[83] There was no mention at all of a politically transformative purpose, nor of the prevention of terrorism.

83 Letter dated 20 March 2003 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council. UN doc. S/2003/351 of 21 March 2003.

In reality, the idea of political transformation had long been one significant element in US debates about Iraq. As early as 1998, the joint houses of the U.S. Congress, in passing the Iraq Liberation Act, had called for the US 'to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.' However, this clarion call for transformation did not exist in a vacuum, since it was based on complaints about Iraq's conduct, including violations of international rules. The Act cited Iraq's conduct in the war against Iran 1980–88, its invasion and occupation of Kuwait 1990–91, its orchestration of a failed plot to assassinate President George H. W. Bush in 1993, its repression of the Kurds, its violation of the disarmament conditions of the 1991 ceasefire, and its denial of democracy.[84] In subsequent U.S. debates and decision-making, regime change featured not simply as a likely consequence of intervention, but a principal purpose of it. It was claimed that enforced regime change would lead to substantial beneficial consequences both within Iraq and in the region generally.

In Britain there was no significant body of opinion that supported the idea that transformation – however desirable in principle it might be – was in itself a justification for going to war in Iraq. In April 2002, when he met with President Bush at Crawford, Texas, Prime Minister Blair said 'that the UK would support military action to bring about regime change, provided that certain conditions were met: efforts had been made to construct a coalition/shape public opinion, the Israel/Palestine Crisis was quiescent, and the options for action to eliminate Iraq's WMD through the UN weapons inspectors had been exhausted.' The memorandum of 21 July 2002 which recorded this also stated: 'US views of international law vary from that of the UK and the international community. Regime change *per se* is not a proper basis for military action under international law. But regime change could result from action that is otherwise lawful.'[85] Tony Blair subsequently stated that regime change and weapons of mass destruction 'were linked in the sense that it was the regime that was producing the WMD'.[86] In the House of Commons debate just before the war he stated: 'I have never put the justification for action as regime change. We have to act within the terms set out in Resolution 1441 – that is our legal base. But it is the reason why I say frankly

84 Resolution of the two houses of the U.S. Congress (H.R. 4655), passed by the House of Representatives on 5 Oct. 1998 and the Senate on 7 Oct. 1998.

85 'Conditions for Military Action', Secret Cabinet Office paper, 21 July 2002. Partially leaked in *Sunday Times*, London, 1 May 2005, and published in full in the *Sunday Times*, London, 12 June 2005. Available at <http://www.downingstreetmemo.com/cabinetofficetext.html>.

86 Secret Downing Street memo of the Prime Minister's meeting, 23 July 2002, ref. S 195/02. Published in the *Sunday Times*, London, 1 May 2005. Available at <http://www.informationclearinghouse.info/article8709.htm>.

that if we do act, we should do so with a clear conscience and a strong heart.'[87] The main thrust of public presentations of government policy was about alleged Iraqi non-compliance with disarmament obligations. In a secret memorandum to the Prime Minister on the legality of military action against Iraq, dated 7 March 2003, the Attorney General, Lord Goldsmith, developed the argument that 'a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the cease-fire can revive the authorisation to use force in resolution 678.' The final paragraph of the memorandum expressed nervousness about political transformation as a rationale for the use of force. It did so in the context of a discussion of proportionality – which, famously, is a matter that constitutes a link between *jus ad bellum* and *jus in bello*. The paragraph reads:

> **Proportionality**
> 36. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):
> – must have as its objective the enforcement [of] the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;
> – be limited to what is necessary to achieve that objective; and
> – must be a proportionate response to that objective, i.e. securing compliance with Iraq's disarmament obligations.
> That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign.[88]

Dinstein developed a justification for the use of force against Iraq that was similar to that of Lord Goldsmith, but with certain differences. Deploring the confusion in rationales for the Iraq action, and noting that the political considerations resulting in intervention were broader than the legal ones, Dinstein sought to reduce the chaos of arguments about the legal basis of the 2003 action against Iraq to some kind of order. He argued that the original 1991 coalition use of force over Kuwait had been lawful not only because it had been authorised in

87 Tony Blair, statement opening the debate on Iraq, *Hansard*, House of Commons, 18 March 2003, col. 772. Available at <http://www.parliament.uk/hansard/hansard.cfm>.

88 Lord Goldsmith, Attorney General, 'Iraq: Resolution 1441', Secret Memorandum to the Prime Minister, 7 March 2003. Released on 28 April 2005, paras. 7 and 36, at <http://www.number-10.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>.

Security Council Resolution 678 of 29 November 1990, but also because it was a lawful exercise of collective self-defence following the attack on Kuwait. He then went on to suggest that 'the legal basis of the 2003 hostilities was a revival of the Coalition's right to use force against Iraq consequent upon the Iraqi material breach of the cease-fire' that had been concluded between Iraq and the coalition in 1991.[89] He did not devote attention to the US emphasis on regime change as a reason for use of force, but was critical of US notions of preventive self-defence. Compared with Goldsmith's argument, this analysis was less dependent on Security Council resolutions, and put more emphasis on a continuing right of self-defence as a basis for responding to violations of the 1991 ceasefire terms.

The legal justifications of the 2003 Iraq intervention advanced by Goldsmith and Dinstein are stronger than most. However, like all views of the Iraq intervention, they are by no means free of problems. Both of these justifications relied heavily on the propositions that Iraq had engaged in major violations of the cease-fire terms, and that these had become very serious by 2003; and that the crisis was so severe as to justify the fateful step of invasion and regime change, as distinct from continuing and adapting the policy of containment.

There were, and are, many grounds for reservations over the Coalition governments' assessments in 2002–3 of evidence of Iraqi breaches of the cease-fire terms. It is true that these assessments were largely shared by other governments and their intelligence services. Yet it was not, and is not, obvious that there was a crisis over Iraqi weapons in March 2003 of such gravity as to justify withdrawing the inspectors and resorting to full-scale invasion. Hans Blix, charged with the task of inspecting in Iraq, had doubts about the assessments made about Iraq in Washington and London in March 2003.[90]

The debate about Iraq in the years before the outbreak of war in March 2003 revealed a difference of view between the UK and the US about whether the political transformation of Iraq, or of the region more broadly, could be a reason for intervention. The UK had a stronger sense that, on its own, regime change was an insufficient reason in international law. The project of political transformation of Iraq, and of the Arab world more generally, was particularly strong in the USA for years before 2003 to the point where it constituted a significant part of the rationale for intervention – perhaps more important in the minds of some policy-makers than the disarmament issue. To many advocates of transformative intervention, there was something artificial about a situation in which the law is such that a real reason for intervention – turning a dictatorship into a democracy – could play at best a minimal part in the debate about the legal justification of military action.

89 Yoram Dinstein, 'The Gulf War, 1990–2004 (and Still Counting)', *Israel Yearbook on Human Rights 2005*, vol. 35, p. 1, at p. 5.

90 Hans Blix, *Disarming Iraq: The Search for Weapons of Mass Destruction* (London: Bloomsbury, 2004).

ii Transformative Occupation of Iraq from April 2003

Since the initial US-led invasion and subsequent military presence was obviously without the agreement of the government of Saddam Hussein, and involved direct responsibility for running the country, the resulting situation was much closer to a military occupation than in most cases of foreign military presence in countries since the end of the Cold War. Naturally, a wide range of laws of war issues arose, in light of which the policies of the coalition authorities were the subject of extensive justification and critical scrutiny.[91]

The occupation of Iraq was not well planned. As early as July 2002 a UK government memorandum had noted: 'There was little discussion in Washington of the aftermath after military action.'[92] Some senior officers in the Pentagon with legal expertise were told not to bother themselves with plans for the occupation, and a State Department study preparatory to the occupation was ignored. There was also conceptual confusion, especially in the United States. In the public debate on the matter in Washington DC in the first few months of 2003, some policy-makers made the basic error of asserting that, because this was a liberation of Iraq, it was not an occupation at all. A typical comment was that by Mr Paul Wolfowitz, Deputy US Secretary of Defense and a leading advocate of the intervention. In February 2003, shortly before the military action, he said: 'We're not talking about the occupation of Iraq. We're talking about the liberation of Iraq ... Therefore, when that regime is removed, we will find the [Iraqi population] basically welcoming us as liberators.'[93] There were countless similar statements from US officials.

This view was accompanied by a US tendency – not confined to the government – to ignore or down-play certain laws of war rules.[94] This led to some corrective statements from international lawyers. Dinstein wrote:

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91 Two assessments of the Iraq occupation in relation to the laws of war, which address many issues not tackled here, are Michael N. Schmitt and Charles H.B. Garraway, 'Occupation Policy in Iraq and International Law', in *International Peacekeeping: The Yearbook of International Peace Operations*, vol. 9, *2004* (Leiden: Nijhoff, 2005), pp. 27–61; and Thürer and MacLaren, '"Ius Post Bellum" in Iraq' (*supra* note 5).

92 Secret Downing Street memo of the Prime Minister's meeting, 23 July 2002 (*supra* note 86).

93 Paul Wolfowitz, National Public Radio, 19 Feb. 2003, at <http://www.defenselink.mil/transcripts/2003/t02202003_t0219npr.html>. Sixteen months later, this interview was cited critically by Senator Hillary Rodham Clinton when Wolfowitz gave testimony to U.S. Senate Armed Services Committee on the Transition in Iraq, Washington DC, 25 June 2004. Available at the Pentagon website: <http://www.defenselink.mil/speeches/2004/sp20040625-depsecdef0541.html>.

94 There was no reference at all to the laws of war rules on occupation in an otherwise thoughtful study of Iraq by two US non-governmental institutions in which international lawyers were strongly represented. See *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, prepared by the Public

> The Coalition was very eager to present its forces in Iraq as an army of liberation. But notwithstanding the fact that the overthrow of the Saddam Hussein regime brought liberation to the Iraqi people, it must be appreciated that – pursuant to international law – the legal status of the Coalition forces in Iraq is not that of liberators but that of belligerent occupants.[95]

It was understandable that, in the Middle East where concern about the Israeli-occupied territories is widespread, the US should wish to avoid the odium accompanying the term 'occupation'. However, it was a legal and political mistake to counterpose 'liberation' and 'occupation' as opposites, and thereby to imply that the law governing occupations was of little relevance. It would have been legally sounder, and have elicited less political scorn, to have stated from the start that the United States, while its intention was to liberate Iraq, accepted that one main body of international rules that should govern the conduct of their forces was that pertaining to occupations. Eventually, after the main combat phase in Iraq was over, the United States and its coalition partners did adopt this position. UN Security Council Resolution 1483 of 22 May 2003, mentioned further below, marked their acceptance that occupation law applied to their presence in Iraq, while at the same time reflecting their intention to achieve a fundamental transformation of the constitution and laws of the country.

While the intervention was still in its major combat operations phase, there were concerns in some parts of the coalition governments that the transformative project for Iraq might violate the legal norms governing occupations. On 26 March 2003, in a detailed memorandum spelling out his advice to the British Cabinet on the same day, Lord Goldsmith, the UK Attorney General, stated:

> In short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, the UK (and U.S.) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations.

The Attorney General went on to note in particular that 'the imposition of major structural economic reforms would not be authorised by international law.' On a separate point, he stated that 'a further complicating factor for the United Kingdom is the extent to which the ECHR [European Convention on Human Rights] and other international human rights instruments are likely to apply to

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International Law & Policy Group, and the Century Foundation, May 2003, 68 pp. Available at <http://www.pilpg.org>.

95 Yoram Dinstein, '*Jus in Bello* Issues Arising in the Hostilities in Iraq in 2003', *Israel Yearbook on Human Rights 2004*, vol. 34, p. 1, at p. 12.

any territory of which the UK is the Occupying Power. I am advising the Ministry of Defence separately on the extent of our ECHR obligations in Iraq.'[96]

Following this memorandum, the UK government did publicly emphasise the framework of Hague and Geneva law. In a statement in the House of Commons on 14 April 2003 outlining plans for Iraq's reconstruction, Prime Minister Blair said: 'In the first phase, the coalition and the Office of Reconstruction and Humanitarian Assistance will have responsibility under the Geneva and Hague conventions for ensuring that Iraq's immediate security and humanitarian needs are met.' He also stressed that the UN would have a 'vital role'. He did not use the term 'occupation': instead, he said, optimistically: 'Iraq is a nation with a creative people, potentially wealthy, with a dynamic and prosperous future ahead of it. They do not need to be run from the outside by the US, the UK or the UN, and they will not be.'[97]

The occupation had already begun during the course of the fighting, when progressively more areas of Iraq came under coalition control. Although in particular places and phases it could be difficult to determine exactly when occupation began, there appears to have been no dispute in principle about the status of these areas as 'occupied territory'. The use of this term in a Security Council resolution of 28 March confirmed this.[98]

The country-wide occupation administration is described in some official documents as having begun on 16 April 2003. This was one day after a meeting of various Iraqi factions, held at a makeshift US air base near Ur, which agreed a 13-point plan (including as Point 10 the dissolution of the Ba'ath Party) for steering Iraq to a democratic future.[99] This was seen by the US and coalition partners as providing some kind of mandate for embarking on drastic change. The next day General Tommy Franks, Commander of the Coalition Forces, issued a 'Freedom Message to the Iraqi People'. While not using the word 'occupation', he announced: 'I am creating the Coalition Provisional Authority to exercise powers of government temporarily'. In this message he also announced a range of transformative policy measures, including the disestablishment of the Ba'ath Party. Oddly, this manifesto for the transformation of an entire country – a document

96 Lord Goldsmith, 'Iraq: Authorisation for an Interim Administration', Memorandum of 26 March 2003; published in *New Statesman*, London, 22 May 2003.

97 Tony Blair, Statement on Iraq, House of Commons, 14 April 2003. See *Hansard*, House of Commons, 14 April 2003, cols. 616–7.

98 SC Res. 1472 of 28 March 2003 on Iraq stated in the preamble: '*Noting* that under the provisions of Article 55 of the Fourth Geneva Convention … to 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; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate'. The word 'humanitarian' features 14 times in this resolution.

99 Text of the 13-point plan of 15 April 2003 available at <http://www.guardian.co.uk/Iraq/Story/0,2763,937856,00.html>.

later briefly claimed by the CPA to be foundational in character – was little noted at the time and has been hard to locate subsequently.[100] The same day, 16 April, was also the date of a message issued by General Franks, 'Instructions to the Citizens of Iraq', containing down-to-earth advice aimed at ensuring the safety of the population and the coalition forces, which was also little noted.[101]

There was some early confusion about which person, and indeed organization, was in charge. The occupation was initially perceived as being under General Jay Garner, Director of the Office of Reconstruction and Humanitarian Assistance (ORHA), which had been set up within the Department of Defense in January to meet the challenges of reconstructing Iraq. He had been present at the meeting near Ur on 15 April, and arrived in Baghdad on 20 April. Within less than three weeks he was sidelined. On 6 May, in a statement that made no reference to the Coalition Provisional Authority, President Bush appointed Ambassador L. Paul Bremer as U.S. Presidential Envoy to Iraq, stating that as 'the senior Coalition official in Iraq', he would be responsible for overseeing reconstruction and institution-building efforts, while General Franks would retain command of Coalition military personnel in the area.[102] On 9 May President Bush gave Bremer the formal letter of appointment as Presidential Envoy 'with full authority over all U.S. government personnel, activities and funds there'. Shortly thereafter Rumsfeld designated him as Administrator of the CPA.[103] On 12 May Bremer arrived in Baghdad, and for the following 13 months he was effectively in charge, but under an arrangement whereby power was divided between the

100 General Tommy R. Franks, 'Freedom Message to the Iraqi People', dated 16 April 2003. There is a question regarding its status. It was referred to as an important foundational document in certain later statements, including in CPA Order No. 2 of 23 May 2003 (*infra*, text at note 119). An Arabic text of the 'Freedom Message' was probably delivered by air over Iraq. However, the message does not appear to have been mentioned in the main daily press conferences given by the U.S. military at that time, nor in the English-language international press. Its text is hard to locate on the internet: it was not on the CPA, Pentagon, State Department or related websites when searched in March–May 2006. It was not noted at all in a study of the basic CPA framework, L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (Washington DC: Congressional Research Service, updated 6 June 2005). Nor is its existence noted in many later books about the 2003 Iraq War. However, it can be found (in English), reference no. IZ C148, on the Aerial Propaganda Leaflet Database of the website of the PsyWar Society, at <http://www.psywar.org/apdsearchform.php>.

101 General Tommy R. Franks, 'Instructions to the Citizens of Iraq: Coalition Provisional Authority Directive', dated 16 April 2003. An English-language text, reference no. IZ C149, can be found on the website mentioned in the preceding footnote.

102 Statement by the White House Press Secretary, 6 May 2003. Available at <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>.

103 L. Paul Bremer with Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (New York: Simon and Schuster, 2006), pp. 12–13.

Administrator and CPA on the one hand, and the military chain of command on the other, both reporting to the Secretary of Defense.[104]

The term 'Coalition Provisional Authority' only came into prominence from 8 May onwards. On that day, without mentioning the word 'occupation', the U.S. and UK informed the President of the UN Security Council: 'The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.' They stated that they had created the 'Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.'[105]

In the first Regulation of the CPA, which he signed on 16 May 2003, Paul Bremer outlined its basis of authority and goals in its opening words:

> Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,
> I hereby promulgate the following:
> **Section 1: The Coalition Provisional Authority**
> 1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.
> 2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.[106]

104 For an intelligent and historically informed account of the structure and role of the CPA by a constitutional adviser to it, see Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation-building* (Princeton: Princeton University Press, 2004).

105 Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, UN doc. S/2003/538.

106 CPA Regulation No. 1, 16 May 2003.

In its reference to a key UN Security Council resolution, and in the encompassing of executive, legislative and judicial authority, this is virtually identical to the equivalent Regulation No. 1 in two cases of international administration that were not considered to be occupations: those issued by the UN Administration in Kosovo in 1999;[107] and by the Transitional Administration in East Timor in the same year.[108] A notable difference is that, whereas these Regulations for Kosovo and East Timor had referred to 'internationally recognized human rights standards', the CPA Regulation refers to 'the laws and usages of war'. This reflects the view that Kosovo and East Timor were not occupations, whereas Iraq was.

The process by which the CPA had emerged was more obscure than in these two earlier cases: it has given rise to three basic questions.

(1) When was the CPA established? The simple answer would be 16 April 2003, the date of General Franks's 'Freedom Message' and his CPA Directive. However, there is little evidence of the existence of the CPA as an actual administrative body in April. As noted, the letter of 8 May refers to it as an already existing body. It appears to have gradually come into existence, and to have assumed a form distinct from the military chain of command in Iraq, in the first half of May.

(2) What was the CPA's status in US law? This was not entirely clear. While it had close connections with the Department of Defense, it may not have been a federal agency.[109] It was a mainly but not exclusively American entity, constituting the administrative arm of a US-led multi-national coalition, but its exact status in US law remains unclear.

(3) Did the UN Security Council provide a legal framework for the CPA's work? The CPA's first Regulation, issued on 16 May, twice referred to Security Council Resolution 1483 as providing a guiding framework, even perhaps a degree of legal authorization. However, Resolution 1483 was actually passed by the Security Council only on 22 May – six days after the Regulation that invoked its name. This is odd. However, the principal terms of Resolution 1483 had been on the table two weeks in advance, when the UK and Spain submitted a draft text.[110]

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107 'On the Authority of the Interim Administration in Kosovo', UNMIK/Reg/1999/1 of 25 July 1999, Section 1. Available at <http://www.unmikonline.org/regulations/index.htm>.

108 'On the Authority of the Transitional Administration in East Timor', UNTAET/Reg/1999/1 of 27 November 1999, Section 1. Available at <http://www.un.org/peace/etimor/etimor.htm>.

109 Halchin, *Coalition Provisional Authority* (*supra* note 100), pp. 8–42 *passim*.

110 Already by the morning of 9 May 2003 the BBC and news agencies had a draft text of what was to become, thirteen days later and after further amendment, SC Res. 1483. Full text on file with author.

As eventually passed on 22 May, Resolution 1483 noted the above-mentioned letter of 8 May from the USA and UK, and then used the term 'occupying powers' when it referred to the 'specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command ("The Authority")'. Immediately thereafter, it noted that 'other States that are not occupying powers are working now or in the future may work under the Authority': this raised the interesting possibility that, in an occupation with transformative purposes, some countries involved may collaborate with the occupying powers without themselves being so labelled. However, this does not imply a complete escape from the law on occupation. The resolution went on to state that the Council:

> 5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

Resolution 1483 also proclaimed certain objectives for the occupation. These are mainly to be found in the preamble, and in paragraph 8 which is about the role of the UN Special Representative for Iraq. The Special Representative was mandated, in co-ordination with the CPA, to assist the people of Iraq through:

> 8 (c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;
> …
> 8 (g) promoting the protection of human rights;
> …
> 8 (i) encouraging international efforts to promote legal and judicial reform;[111]

Taken as a whole, the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and Geneva Convention IV. Yet the resolution did not explain the relation between the transformative purposes of this occupation and the more conservative purposes of the existing body of law on occupations. These two things were set out separately. Subsequent resolutions, reaffirming the transformative purposes of the occupation, did not address this disjunction between occupation law and transformative purpose.[112]

111 SC Res. 1483 of 22 May 2003, passed by a vote of 14 to 0. Syria was absent from the meeting.

112 See e.g. SC Res. 1511 of 16 October 2003.

In late 2003 David Scheffer, noting the significance of Resolution 1483, observed that it 'rested uncomfortably within occupation law' and that the latter 'was never designed for such transforming exercises.' Concerned about the emerging confusion in Iraq, he suggested: 'The legal environment in Iraq would be better rationalized with a fresh UN mandate setting forth the responsibilities and mission objectives of the military powers operating in Iraq and by establishing UN civilian administrative functions that would assume powers held by the Authority under Resolution 1483.'[113]

Some have argued that, from the start of the occupation of Iraq, the US should have sought an even more central role for the UN. Gregory Fox, who is sceptical about the transformative project, and shows respect for the conservationist principle, suggests that a stronger and clearer Security Council mandate would have been needed to buttress a drastic series of reforms such as that attempted in Iraq. Such a mandate 'would have superseded the conservationist principle by invoking a superior international obligation and could have provided an opportunity to make clear that a consensus within the United Nations supported reform in Iraq.'[114]

Such arguments for a more central UN Security Council role in the transformation of Iraq are not persuasive. After the bitter divisions in the Council on the use of force in the months leading up to the outbreak of war, it is hardly imaginable that the Council could have given more extensive support for the reform effort in Iraq than it actually did; and the extent of that mandate, as indicated above, was impressive. There is no previous case in which the Council was so closely involved in setting the framework for an occupation at all – let alone by explicitly backing some of the occupant's transformative projects.

The actual conduct of the occupation was, from the start, seriously flawed.[115] It had begun badly in April with the conspicuous failures to carry out a basic duty of occupying forces: the prevention of looting. Since there was still some fighting going on, prevention of looting may not have been the top priority of the coalition forces, but the episode was an early indication of a lack of prepared-

113 David Scheffer, 'Beyond Occupation Law', *American Journal of International Law*, vol. 97, no. 4 (Oct. 2003), p. 842, at pp. 845, 849 and 859. His excellent discussion of the relation between transformative and conservationist objectives in Iraq is part of 'Agora: Future Implications of the Iraq Conflict'.

114 Gregory H. Fox, 'The Occupation of Iraq', *Georgetown Journal of International Law*, vol. 36, no. 2 (Winter 2005), p. 195, at p. 296.

115 Useful accounts of the Iraq events drawing attention to the limitations of the plans and activities of ORHA and CPA include Anthony H. Cordesman, *The Iraq War: Strategy, Tactics, and Military Lessons* (Westport, CT: Praeger, 2003), esp. at pp. 493–516; David L. Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Boulder, CO: Westview Press, 2005), esp. at pp. 121–68; and Michael Gordon and Bernard Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (London: Atlantic Books, 2006), esp. at pp. 152–63.

ness. It indicated that, whereas it had proved possible to do 'invasion-lite' in Iraq, 'occupation-lite' was not an option. Troops were needed on the ground for public order and guard duties, and they were not available. Astonishingly, even nuclear facilities were left unprotected.[116]

Subsequently there were cases involving a pattern of maltreatment of prisoners in coalition hands – a problem which led to numerous reports and a number of trials. In addition, the understandable US emphasis on force protection had the inevitable consequence that the lives of Iraqi citizens were sometimes taken if there was even a possibility that they, or their locations, posed a threat to the occupation forces. The result of such factors was that what was intended as a liberation looked very different to many Iraqis.

In the occupation of Iraq, the inevitable legal interplay between the contending imperatives of conservation and reform played out mainly in favour of drastic change. Some change was necessary and effective, such as the introduction of a new currency. However, some policies of the CPA caused considerable controversy. Three much-criticized CPA Orders illustrate the point.[117] All could be seen as in tension with the conservationist assumptions of the law of the Hague Regulations and Geneva Convention IV. They also raised a question about the prudence of the ambitious transformative policy of the CPA, and in particular about the wisdom of a decision-making procedure which (paradoxically for a body supposedly imposing liberal values) allowed little room for serious internal discussion or consultation with allies.

The first such example is CPA Order No. 1, on the De-Ba'athification of Iraqi Society, issued on 16 May 2003. Implementing the announcement in the 'Freedom Message' of 16 April that had 'disestablished the Ba'ath Party of Iraq', it went on to specify that four categories of senior party members were banned from future employment in the public sector.[118] This major decision was not the product of consultations, and took no account of the more subtle approach to Ba'ath Party members that had been taken in the years since 1991 in the Kurdish-run areas of northern Iraq.

The second such example is CPA Order No. 2, on Dissolution of Entities, issued on 23 May 2003. Reconfirming the 'Freedom Message' of 16 April, it announced the abolition, as of 16 April, of: Ministry of Defence; Ministry of Information; Ministry of State for Military Affairs; Iraqi Intelligence Service; National Security Bureau; Directorate of National Security; Special Security Organization; Saddam Hussein's bodyguards; Army; Air Force; Navy; Air

116 Ian Traynor, 'Nuclear Looting Alarms UN Watchdog', *The Guardian*, London, 14 May 2003, p. 16.

117 These three CPA Orders were downloaded from the CPA website at <http://www.cpa-iraq.org/#>. After the end of the CPA's role on 28 June 2004 the website remained open for historical purposes.

118 CPA Order No. 1, 16 May 2003.

Defence Force, and twelve other regular military, para-military and other organizations. Paul Bremer has sought to justify the abolition of the army on the grounds that many units had disbanded in the wake of the invasion anyway, and to have recalled them would have been to end up with a largely Sunni force.[119] Yet this was a drastic step, leaving a vast cadre of unemployed and embittered military personnel.

The third such example is CPA Order No. 39, on Foreign Investment, issued on 19 September 2003 with (in theory) immediate effect. This allowed foreign investors to own Iraqi companies fully with no requirements for reinvesting profits back into the country, something that had previously been restricted by the Iraqi constitution to citizens of Arab countries. In the following months this did not have the intended effect of opening Iraq up to foreign investment, mainly because the insurgency, which the Order can have done nothing to check, made outsiders cautious. The Order's sweeping terms raised concerns – within the CPA, and inside and outside Iraq – that the transformation being imposed was more extensive than the law permitted and the situation warranted. This dramatic act of economic transformation, unlike the political changes, had no convincing mandate either in human rights law or in Security Council resolutions.

Within three months of the end of major combat operations, announced by President Bush on USS *Abraham Lincoln* on 1 May 2003, a major insurgency developed. Some evidence suggests that the insurgency was pre-planned by the Iraqi authorities, well before the US-led invasion of March 2003 – as Paul Bremer has asserted.[120] The presence of a foreign military force in a region where there are long memories of colonialism, war and foreign occupation was always likely to cause tension. The emergence of resistance illustrates a potential hazard, and vulnerability, of transformative occupations. Any attempt at a major restructuring of a society was likely to provoke opposition, especially when a large segment of society – in this case the Sunni Muslim population – saw reforms as threatening a long-established pattern of political and economic dominance. The speedy dismissal of huge numbers of officials and the wholesale disbanding of the Iraqi Army added to the risks. The insurgency was mainly centred in three of Iraq's eighteen provinces but had effects throughout the country. Using tactics that were a nightmare inversion of the notions of combat enshrined in the laws of war, the insurgency made the achievement of transformation very much more difficult. By attacking a wide range of outsiders – soldiers, UN officials, ICRC personnel, civilians, and aid workers – the insurgents discouraged the outside world from sending troops or other personnel to Iraq. The UN Special Representative for Iraq, Sergio Vieira de Mello, was assassinated in an attack in Baghdad on 19 August 2003 which destroyed much

119 CPA Order No. 2, 23 May 2003; and Bremer, *My Year in Iraq*, pp. 54–9.

120 Bremer, *My Year in Iraq,* pp. 126–7.

of the UN headquarters there.[121] This was a clear sign that the insurgents in Iraq were aiming at vulnerable targets, and sought to stop international assistance for the transformation project. By using suicide bombers who were indistinguishable in appearance from civilians, the insurgents increased the tension between coalition personnel and ordinary Iraqis, any of whom might pose a hidden threat.

The U.S. Administration, with its self-generated illusions about liberation and transformation, had not anticipated such a sustained insurgency. President Bush, when asked in December 2005 whether he now acknowledged that the mission had not gone as originally planned, and in particular that the U.S. forces had not been welcomed as liberators, gave this characteristic reply, which will merit inclusion in a lexicon of Bushisms: 'I think we are welcomed. But it was not a peaceful welcome.'[122] US public support for the intervention in Iraq declined sharply between March 2003 and summer 2005 for two reasons: first, the change of objective from restraining Iraq's weapons capability to participation in an internal political struggle; and second, the high human cost and halting progress of the occupation.[123]

Granted the circumstances of insurgency, it is remarkable that a significant degree of political transformation was achieved in Iraq. The movement toward Iraqi self-rule, though facing difficult problems and subject to constant criticism, was brisk. The Governing Council of Iraq, established under the wing of the CPA, held its first meeting on 13 July 2003. There was a notably high voter turn-out in the elections for the Transitional National Assembly in January 2005, in the referendum on the new Constitution in October 2005, and in the elections for the National Assembly in December 2005. This was evidence that the transformative project, flawed as it may have been, struck a chord with Iraqis. Finally, on 21 May 2006, after many delays, the National Assembly approved a new national unity government. Meanwhile, the huge refugee flows out of Iraq (mainly to Syria and Jordan) confirmed the limits of what had been achieved.

The process by which the Iraq occupation had formally ended on 28 June 2004 illustrates a problem of transformative occupations.[124] While all such occu-

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121 The attack on the UN headquarters in Baghdad was five days after SC Res. 1500 of 14 Aug. 2003, establishing the UN Assistance Mission for Iraq. (The vote was 14 in favour, with Syria abstaining.) After the bombing, UNAMI was unable to function as planned in Iraq. SC Res. 1546 of 8 June 2004 cautiously provided for the resumption of its activities 'as circumstances permit'.

122 President George W. Bush, interview on NBC with Brian Williams, 12 Dec. 2005. Available at <http://www.msnbc.msn.com>.

123 This is the conclusion of the most thorough assessment of the subject, Richard C. Eichenberg, 'Victory Has Many Friends: U.S. Public Opinion and the Use of Military Force, 1981–2005', *International Security*, vol. 30, no. 1 (summer 2005), p. 140, at p. 176.

124 For a fuller exposition, completed at the time of the transfer of authority in June 2004, see Adam Roberts, 'The End of Occupation: Iraq 2004', *International and*

pations aim to establish a political order based on the principle of self-government, it is genuinely difficult to determine at what point one can say that the transformation has been achieved, and the government of the occupied territory is in a position to exercise the powers of sovereignty. This question is much easier to answer when a more conventional occupation ends in a more traditional way, either as a result of re-conquest of the territory by its original ruler, or as part of the terms of a peace agreement. Where what is involved is a gradual transfer of powers to the indigenous authorities as their capacity is built up, there is bound to be an arbitrary element in fixing on a single date as the symbolic ending of occupation. In this case there was political controversy as well, with critics viewing the formal ending as concealing what was seen as continued US dominance of a puppet government.

At the UN, the ending of the occupation, within a framework laid down by the US government, was provided for in Security Council Resolution 1546 of 8 June 2004. This began:

> *Welcoming* the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004.[125]

The resolution reaffirmed 'the right of the Iraqi people freely to determine their own political future and control their own natural resources'. It laid down a detailed road map for Iraq's future political development, including the holding, before 31 January 2005 at latest, of democratic elections to the Transitional National Assembly. (These were in fact held on 30 January 2005.) The resolution welcomed the fact that Iraqi security forces are 'responsible to appropriate Iraqi ministers', and that there is to be 'full partnership between Iraqi security forces and the multinational force'. It contained extensive provisions on the roles of the multinational force and of the Iraqi government, both of which were envisaged as taking a wide range of security measures. It referred three times to the promotion of human rights in Iraq as a key goal.

The new situation after 28 June 2004 was not just an occupation by another name. There were real differences, including the fact that the Interim Government

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Comparative Law Quarterly, London, vol. 54, no. 1 (Jan. 2005), pp. 27–48.

125 SC Res. 1546 of 8 June 2004, passed unanimously. This was a substantially revised version of earlier drafts, the first of which had been presented at the UN on 24 May 2004. See also the detailed listing of the broad range of tasks of the MNF (including even internment), and the assurance about continued fulfilment of obligations under the law of armed conflict, contained in the letter of 5 June 2004 from the US Secretary of State to the President of the Security Council. This is annexed to the resolution.

had an explicitly recognized right to demand withdrawal of the US-led forces in Iraq. As the Security Council put it in the same resolution:

> the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution … and [the Council] declares that it will terminate this mandate earlier if requested by the Government of Iraq.'[126]

Yet the prospect that there would be continuing significant similarities with an occupation found reflection in certain provisions of the resolution about the application of international rules. The resolution contained a preambular clause, inserted fairly late in the long negotiations over its text, that recognized the continued application of international humanitarian law:

> *Noting* the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations.[127]

The inclusion of this clause can be interpreted as one way of conceding that, even if the occupation was theoretically over, there were still likely to be uses of force, perhaps even exercises of administrative authority, that closely resembled a situation of occupation. This of course has been played out, repeatedly, in the two years since the occupation notionally ended. Indeed, many continued to use the term 'occupation' in respect of Iraq and will no doubt do so as long as there are coalition forces present and exercising significant influence in the management of the country.

In addition, the first operative paragraph of Resolution 1546 confirmed the incomplete nature of the transfer of sovereignty for which the resolution provided. It stated that the Security Council:

> 1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an

126 SC Res. 1546 of 8 June 2004, operative paragraphs 9 and 12. See also the text of letters (both dated 5 June 2004) from the Prime Minister of the Interim Government of Iraq and the US Secretary of State to the President of the Security Council. These letters are annexed to the resolution.

127 There had been no equivalent clause in the draft of SC Res. 1546 presented at the UN by the US and UK on 24 May 2004. The revised draft presented on 1 June had included the clause in a shorter version than the final one. Only the final text, which was first circulated on 7 June, contained the phrase 'including obligations under international humanitarian law'.

> elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

This important constraint on 'taking any actions affecting Iraq's destiny beyond the limited interim period' was reportedly the result of pressure from a number of Iraqi groups, anxious that the position of Kurds, Shiites or others might be undermined irrevocably by actions taken by the 'sovereign' Interim Government. This constraint meant that the Interim Government was, paradoxically, in a position analogous to that of an occupying power. The CPA interpreted this constraint as limiting the Interim Government's power to conclude treaties. The constraint has obvious similarities to the obligations on occupying powers to refrain from making fundamental changes to the legal system of the occupied territory, and to behave generally in a trustee-like manner. The fact that the term 'caretaker government' was often used with reference to the Interim Government confirmed this. Thus, ironically, a transformative occupation challenging the very foundations of the law of the Hague Regulations and Geneva Convention IV had the effect of leading to a reassertion of the conservative principles that underlie occupation law – even at the moment when the occupation was deemed to be at an end.

IV Conclusions: The Relevance of the Laws of War and of Human Rights

The idea of achieving the transformation of a society through a military intervention is far from new. It was a key element in much European colonialism and in France's wars after the revolution of 1789. The United States, with its long-held vision of itself as reformer of a corrupt international system, has been particularly attracted by the idea, but has devoted surprisingly little attention both to the chequered history of transformative interventions and to the prescriptive question of how they should be conducted.[128]

The need for foreign military presences with transformative political purposes is not going to disappear. The US Government belatedly recognized this (and implicitly recognized that mistakes had been made in Iraq), when in 2004–5 it established an Office of the Coordinator for Reconstruction and Stabilization. Based in the State Department, this was established to lead US Government civilian capacity 'to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they

128 One post-2003 US attempt to look at the matter, which it does from a policy rather than a legal perspective, is David M. Edelstein, 'Occupational Hazards: Why Military Occupations Succeed or Fail', *International Security*, vol. 29, no. 1 (summer 2004), pp. 49–91.

can reach a sustainable path toward peace, democracy and a market economy.'[129] Similarly, in December 2005 the UN established a Peacebuilding Commission, an advisory body to assist in post-conflict peacebuilding and recovery.[130]

Transformative military presences may be attempted by states, coalitions, and international bodies, including the UN. While the management of such projects is largely a matter of the prudent and informed conduct of policy, the laws of war and of human rights continue to regulate the conduct of those engaged in them. In the light of the experiences of transformative military presences, the following conclusions can be offered about the law relating to these enterprises.

A Jus Post Bellum

Underlying all consideration of transformative occupation is the fact that the situation is not one of temporary wartime occupation, liable to be ended by the fortunes of war or by a peace agreement. Rather, it is typically a situation that arises *after* a war – whether civil or international – and/or after a foreign military intervention; and it is likely to end in a different way, as stable government emerges in the territory itself. In such circumstances the *jus in bello* is unlikely to be a perfect fit. It might even be tempting to invoke an emerging or future *jus post bellum* as a better basis for handling such situations.

The idea of military intervention with a transformative purpose is in tension with the existing system of international law as it applies to states. Under the *jus ad bellum* a transformative goal is not a valid basis for resorting to force. As for the *jus in bello*, at least some aspects of the laws of war as they address occupations are in conflict with the transformative intentions of outside powers. Sobering evidence of this conflict is that two of the most successful transformative occupations of the twentieth century – those of Germany and Japan from 1945 onwards – were explicitly conducted outside the framework of the Hague Regulations, with their assumption that the occupant has a largely conservationist role.

B *'Occupation' Not a Completely Distinct Category*

In the post-Cold War international system, democratic transformation has been a declared goal of many foreign military and administrative presences of theoretically distinct types. These include some (such as those in Kosovo and East Timor

129 Presidential Directive establishing the Department of State, Office of the Coordinator for Reconstruction and Stabilization, issued 7 December 2005. Available at <http://www.state.gov/s/crs/>.

130 The establishment of the Peacebuilding Commission was recommended in the September 2005 World Summit Outcome document (*supra* note 80), paras. 97–105; and implemented on 20 December 2005 in concurrent resolutions of the General Assembly and the Security Council – GA Res. 60/180, SC. Res. 1645 and SC Res. 1646.

in 1999) that have not been considered to be occupations – partly, it would appear, because there was a degree of consent from the state concerned and/or from the population of the area where the troops and administrations were deployed; and perhaps also because the administrations were UN-led rather than U.S.-led. While the foreign military presence in Iraq from May 2003 onwards was similar in its powers and declared purposes to some of these other cases, it was explicitly viewed as an occupation for the good reason that it was plainly without consent of the government of the state concerned. Yet even after the resumption of Iraqi sovereignty on 28 June 2004 the situation continued to have certain features comparable to those of an occupation. In general, the similarity of different situations – some viewed as occupations, some not – raises a question about the extent to which military occupation is a distinct category, and points to the conclusion that the law governing occupations may have application to certain situations not specifically called occupations. In addition, human rights law can apply to occupations as well as to a range of comparable situations.

These conclusions suggest that in all military interventions, however labelled, there is a case for developing a common legal approach involving a proper balance between the laws of war and human rights law. Steven Ratner has argued that the case for achieving such a balance is particularly strong in transformative occupations.[131]

C Human Rights Law

Human rights norms are increasingly recognized as applicable in military occupations, and also in situations that resemble military occupations in a number of ways yet are distinct from the classic case of occupation. Their application, by no means free of difficulty, offers some important opportunities – especially in cases where the inhabitants are within the power of the outside forces. These opportunities include:

- individuals can press cases in certain regional international courts (specifically the European Court of Human Rights and Inter-American Court of Human Rights) in ways that do not exist in the laws of war.
- occupying powers can justify certain transformative policies on the basis that these are the best way to meet certain goals and principles enshrined in international human rights law, including the right of self-determination.

131 Steven R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', *European Journal of International Law*, vol. 16, no. 4 (September 2005), pp. 695–719.

D Illusions of Welcome as Liberators

Two propositions have contributed to the view that the laws of war are of limited relevance to transformative occupations. The first is that 'liberation' and 'occupation' are in some way opposites – when in reality liberators, to be effective, may need to observe rules of restraint that apply to occupying forces. The second is that a transformative project imposed by outsiders is likely to be, and to remain, universally welcomed by the inhabitants – when in reality trouble is likely to result when the outsiders are of a different religion and culture, and are intervening in a society that is already deeply fractured, in a part of the world with extended experience of foreign domination and occupation. An appreciation of the limits of these propositions points to the continued relevance of the laws of war.

E Compatibility between Existing Law and Transformative Purposes

The seriousness and extent of any faultline between the conservationist thrust of the law and the transformative nature of some occupations should not be exaggerated. The requirement in the Hague Regulations that the occupant respect the laws in force in the territory 'unless absolutely prevented' does not create a rigid strait-jacket. It was modified slightly in 1949 – though much less than the USA had naively sought. Under the Hague rule, thus modified, certain occupants – and not only those with a generally transformative purpose – have been able to give cogent reasons why they were indeed 'absolutely prevented' from maintaining each and every part of the existing legal system. For example, in the Israeli-occupied territories there were some significant changes to laws, including the abolition of the death penalty.

In addition, experience suggests that even overtly transformative occupants would be wise to recognise the strength and continuing validity of the law on occupations in general and the conservationist principle in particular. Numerous errors in the occupation of Iraq that started in 2003 arose from a failure to recognize that the laws of war can play a valuable role in focusing attention on certain perennial problems of armed conflicts and occupations – such as looting and the management of economic life – and do so in a sensible and constructive way. Ironically, in Security Council Resolution 1546 of 8 June 2004 the US had to accept a conservationist role for the new sovereign Interim Government of Iraq, which was obliged to refrain 'from taking any actions affecting Iraq's destiny'.

Where, after an occupation has commenced, there are clashes between the conservationist principle and a perceived need for transformation, the occupant could seek specific authorization from international bodies. The UN Security Council has played such a role in Iraq, as well as supporting transformative projects in certain post-conflict situations that are, in some respects at least, analogous to occupations. In some instances it may be impossible to reach agreement

in the Security Council, in which case the question of whether other global or regional bodies can provide a substitute will remain a matter of contention.

F Distinguishing between Particular Transformative Projects

The fact of having a transformative purpose does not mean that it is sensible to transform numerous aspects of a society at the same time. The Iraqi case induces caution about proposals for sudden and large-scale transformations. It suggests that on a wide range of matters, including the economic structuring of society, fundamental decisions should be made by the sovereign institutions of a state after a system of representative government is in place, and cannot be imposed in a hurry by *diktat* from outside. An occupant, even one with transformative aims, needs to give priority to getting the basic infrastructure of society to work. On such matters, the demands of the conservative element in the laws of war, and of their humanitarian provisions, may coincide with the dictates of prudence.

Of all the elements of a transformative project, the ones likely to have the strongest appeal include the introduction of an honest electoral system as part of a multi-party democracy. It is true that in Iraq the introduction of democracy necessarily involved contentious constitutional change on such fundamental matters as whether the structure of the state was to be federal in character, and if so on what model; and the imposition of such change may have contributed to the strength of the insurgency. The circumstances in which such change is imposable from outside are rare. Yet there is a serious case for such an approach – reflecting as it does the sense that democracy and self-determination, for all the difficulties of defining and applying them, are not only an important part of the human rights package, but also an acceptable means of hastening the end of an occupation. To the extent that a new and effective government emerges through such a process, an occupation may fade away progressively, rather than disappearing suddenly at a set date.

The fact that democratic transformation has strong appeal does not mean that it is a universal panacea, or that occupants have a general entitlement to facilitate it. If an occupant invades part of a country to 'liberate', say, an ethnic group inhabiting that area, the fact that the inhabitants are offered a democratic path will not assuage the scepticism of states about such projects; nor will it dispel suspicions that power-political as well as idealistic motives may have informed the action. In other cases, there may be fears that the sudden imposition of democracy may result in chaos, civil war or dictatorship.

A further hazard of any general advocacy of transformative occupation is that democracy is far from being the only transformative project on offer in the international market-place of ideas. In the post-Cold War era, the predominant transformative projects have been based on liberal and democratic ideas, but other possible candidates exist.

G Two Possible Legal Approaches to Transformation

Many developments in practice, and in decisions of international bodies, suggest that there has been a significant evolution of custom in respect of the law on occupations. However, this evolution does not amount to a general recognition of the validity of transformative policies on the part of occupants. A more modest conclusion follows – that any expansion of the purposes of occupations beyond the confines of existing occupation law could in principle be addressed by either of two legal approaches.

The *first approach* is essentially *ad hoc*, and follows some (but by no means all) aspects of practice over Iraq. It is to secure a variation in the application of the law by obtaining a resolution from the UN Security Council (or other major international body) setting out the goals of the occupation. Such authorization can perform an important function. By giving at least some measure of legitimacy to certain actions and goals, and by stressing the application of human rights law as well as humanitarian law, it can give law an important element of flexibility in response to exceptional situations; and it can reduce the intensity of international criticism of the occupant's actions. This raises the question of the extent to which the Security Council has a free hand to vary the application of even quite fundamental rules of international law – including, in this case, both *jus ad bellum* and *jus in bello*. In light of the powers vested in the Council, it is hard to deny that it has the capacity to act in such a way – especially in a case where what is at issue is reconciling divergent principles of international law on a specific and limited matter relating to the maintenance of peace and security. This is very different from waiving the rules in some more general way.

The *second approach* would be to attempt to secure a formal modification of the Hague regulations and Geneva Convention IV to make allowances for transformative occupations, especially in the light of human rights law. The case for attempting to devise new law in this way is weak. The heart of occupation law remains a sensible and essentially conservationist set of rules to cover a type of emergency situation that frequently arises in war. Where there is a transformative intent, there should be time to seek authorization from international bodies. A further reason for caution about making an allowance in general terms for transformative occupation is that there are grounds for scepticism about the extent to which foreign armed forces, arriving suddenly in a society with deep-seated problems, are really capable of bringing about fundamental change in that society. This has to be an exceptional situation rather than a norm. Military occupation remains a contentious issue on which it is inevitable that there will be differences of perspective and opinion, including on the extent to which transformative goals are legitimate. The status of any given occupation *vis-à-vis* the principle of non-use of force, and the right of self-determination, is necessarily problematical. An attempt to revise the laws of war provisions on occupations to accommodate the special and important case of transformative occupations would be open to criti-

cism and likely to fail. It is simply not worth going down that road when other remedies for any claimed defects of the law on occupations are at hand in the form of human rights law, UN Security Council authorizations, and evolving custom about how the international community can properly assist transformation in damaged societies.

Chapter 18

The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model for Adjustment?

Rüdiger Wolfrum

I Introduction

Although belligerent occupation is not an isolated phenomenon, only rarely has the general question of whether the existing rules of international laws governing belligerent occupation are still adequate been raised.[1] Belligerent occupation places *de facto* ruling authority in the hands of the occupant.[2] Traditionally, international law rules on belligerent occupation are understood to cover a transitional period only, i.e., until the government of the occupied state has reorganized itself.[3] *De jure* sovereignty rests with the respective state whose territory has been occupied. During this transitional period, rules issued by the occupant are meant to strike a balance between the security interests of the occupying power and the presumed interests of the occupied state's population by preserving the *status quo ante* with regard to the unity of the respective state and maintenance of its existing legal order. International law, in principle, does not legitimize the introduc-

1 Yoram Dinstein touches on this question in Legislation under article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding, Occasional Paper Series No 1, Fall 2004, Program on Humanitarian Policy and Conflict Research, Harvard University. See also E. Benvenisti, The International Law of Occupation, 1993, 212 et seq.

2 See The Manual of the Law of Armed Conflict, UK Ministry of Defence, 2004, 274 et seq.; A. Roberts, "What is a Military Occupation?", BYIL 55 (1984), 249 et seq.; C. McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", Journal of Conflict & Security Law 10 (2005), 43 et seq. (45). On belligerent occupation, see in general E. Benvenisti, The Security Council and the Law on Occupation: Resolution 1483 on Israel in Historical Perspective, Israel Defense Forces Law Review 1 (2003), 19 et seq.

3 This point is emphasized by Yoram Dinstein. See Jus in bello issues arising in the hostilities in Iraq 2003, Israel Yearbook on Human Rights, 34, 1-14 at 13. He also emphasizes that the coalition forces are bound by the rules of occupation even if they claim to be liberators.

M.N. Schmitt and J. Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines
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tion of fundamental political changes going beyond this period.[4] Such changes in respect of the occupied State are reserved to a future government representing the respective population. Yoram Dinstein, to whom this contribution is dedicated, has pointed out that in cases of prolonged occupation it may be necessary to reconsider the functions to be exercised by the occupant.[5]

Questions about the current adequacy of international law rules on belligerent occupation derive from this limitation on the occupant's power to actively restructure the occupied State. Is it, considering the significance of the preservation of peace under international law, still appropriate to deny the occupying power the right to modify the political system of a State if that system was one of the root causes of the war?[6] The same question may be raised from a human rights perspective. Is it appropriate that an occupying power be obliged to respect a domestic legal order that is in flagrant violation of international human rights standards?[7]

II Belligerent Occupation

A Applicable Law

The international law governing belligerent occupation is codified in Articles 42-56 of the 1907 Hague Regulations,[8] the Fourth Geneva Convention, particularly

4 Dinstein, (note 3) at 12-13, rightly points out that in the case of Germany after the Second World War, the Geneva Convention had not yet been produced.

5 Note 1 at 8.

6 It should be that with regard to Iraq, the Coalition Provisional Authority had defined its task: "The ultimate goal for Iraq is a durable peace for unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy." Coalition Provisional Authority, An Historic Review of CPA Accomplishments, 4, at http://www.cpa-iraq.org (availability ended in June 2005).

7 These questions have been raised in particular by Gregory H. Fox, The Occupation of Iraq, 36 Georgetown Journal of International Law (2005), 195 et seq.

8 Annex to the Convention Respecting the Laws and Customs of War on Land of 18 October 1907 (authentic text French), reprinted in: D. Schindler/J. Toman, The Laws of Armed Conflicts, 1988, 63 et seq. The International Military Tribunal of Nuremberg stated that the Hague Regulations constituted customary international law, cf. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Vol. XXII, 497.

Articles 27-34 and 47-78,[9] and Additional Protocol I.[10] It is also found in customary international law.[11] The respective rules of international humanitarian law apply whenever a belligerent State occupies the adversary's territory, or a part thereof.[12] The applicability of international humanitarian law does not depend upon whether the military occupation was in conformity with international law (as, for example, in the case of self-defense) or not. In addition to international humanitarian law, international human rights standards also apply during an occupation.

According to Article 42 of the Hague Regulations, a territory is considered occupied when it "is actually placed under the authority of the hostile army".[13] No proclamation of occupation is required. Rather, the decisive criterion is that the former government has been rendered incapable of publicly exercising its authority in the respective area and the occupying power is in a position to substitute its own authority. The formerly disputed issue whether the rules of military occupation apply only during the course of actual warfare has been resolved by Article 6 of the Fourth Geneva Convention, according to which certain Convention obli-

9 Article 154 Fourth Geneva Convention states that it complements the Hague Regulations. This is underlined by M. Greenspan, The Modern Law of Land Warfare, 1959, (213), whereas H.P. Gasser, in D. Fleck (ed.), Handbook of Humanitarian Law in Armed Conflict, 1995, states that the dominant law is the Fourth Geneva Convention (241). For a comparison of the provisions of the Fourth Geneva Convention and the Hague Regulations, see J. Pictet, Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, 1958, 614.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, ILM 16 (1977), 1391 et seq.

11 Under the Fourth Geneva Convention, the meaning of the notion of "occupation" is wider than under the Hague Regulations. According to article 42 of the Hague Regulations, it is essential that an occupied territory is "… actually placed under the authority of the hostile army", whereas under article 2 (2) of the Fourth Geneva Convention, the rules of belligerent occupation also apply in cases where the occupation meets no armed resistance. The broadened ambit of belligerent occupation means no intermediate period between what might be referred to as the invasion phase and the inauguration of a stable military occupation exists. Situations in which the occupation is not in fact the outcome of a military confrontation are also covered.

12 C. Greenwood, "The Administration of Occupied Territories in International Law", in: E. Playfair (ed.), International Law and the Administration of Occupied Territories, 1992, 241 et seq. (243).

13 See article 42 of the Hague Regulations. This provision is supplemented by article 27 of the Fourth Geneva Convention. A. Roberts, The End of Occupation: Iraq 2004, ICLQ 54 (2005), 27 et seq. (30-31), indicates that in the political statements made by the U.S. and the U.K. governments the word "occupation" was avoided, whereas it was used in S/RES/1483 (2003) of 22 May 2003.

gations continue to apply to the occupied territory despite the general close of military operations in a conflict.[14]

B Obligations of the Belligerent Occupant

Article 43 of the Hague Regulations provides "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[15] Yoram Dinstein suggests that Article 43 of the Hague Regulations distinguishes between obligations to be performed by the executive (to restore and ensure, as far as possible, public order and safety in the occupied territory) and those to be implemented by the legislative power (to respect the laws in force in the occupied territory, unless absolutely prevented).[16] Although it is necessary to identify the focus of each of the two parts of the article, it is doubtful whether such a clear cut division is sustainable. For instance, under a legal system based upon the rule of law, restoring and ensuring public order requires both legislative and executive action. Moreover, both branches of government must respect the existing law. Thus, the two components of Article 43 should be read together.

Articles 27 and 64 of the Fourth Geneva Convention supplement and amplify Article 43. Article 27 states that the occupying power may take such measures of control and security as are necessary as a result of the war. No further specifications are provided, thereby leaving it to the discretion of the occupying power to determine which measures to adopt. However, Article 27 does contain certain restrictions implementing the general obligation of humane treatment. Additional restrictions, concerning the treatment of internees, are set forth in Articles 41 to 43, 78 and 79 to 135 of the Convention.

The belligerent occupant's main obligation is restoring and maintaining, as far as possible, public order and safety, a point made clear in the US Army's Field Manual 27-10.[17] This responsibility entails police functions designed to protect, for example, museums, hospitals, the public infrastructure, public buildings,

14 Rüdiger Wolfrum, Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference, Max Plank UNYB 9 (2005) 1-45 at 6.

15 The authentic French text reads differently: "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendant de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays."

16 Note 1 at 3.

17 The UK Manual of the Law of Armed Conflict (note 2) does not refer to this very basic principle.

and diplomatic facilities against looting or destruction.[18] The occupant, on the other hand, is not responsible for the effects of terrorist attacks, as long as adequate precautionary measures were taken. In that respect, one may argue that law enforcement measures – which differ from those applicable to fighting pockets of resistance (where the laws of armed conflict apply) – should be guided by the 1979 UN Code of Conduct for Law Enforcement Officials and the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[19]

As indicated, a belligerent occupant must – as a matter of principle – refrain from interfering in the legal order or governmental structure of the occupied territory, unless its security interests demand otherwise.[20] The key provision governing this issue is Article 64 of the Fourth Geneva Convention. It contains two parts, the first dealing with penal law, the second with the legal order in general. The underlying rationale of Article 64 is not totally clear.

As far as penal law is concerned, the article stipulates that the occupied territory's penal laws shall remain in force, thus giving expression to the general principle of the law of occupation referred to above. It sets forth two exceptions. Penal laws may be repealed or suspended by the occupying power in cases where they threaten its security or constitute obstacles to the application of the Convention. While the first exception is self-explanatory and straightforward, the second heralds a general principle. It enables the occupying power to abrogate any law not in conformity with the human rights standards enshrined in the Fourth Geneva Convention[21] or to which it alludes, namely rules that adversely affect racial or religious minorities (Article 27), or are incompatible with the requirement of humane treatment. It is a principle further amplified in the Hague Regulations, as well as elsewhere in the Geneva Conventions. A few examples are useful to more fully illustrate this point.

According to Article 23 (h) of Hague Regulations, the right of inhabitants of an occupied territory to take legal action in the local courts must be preserved. The occupied territory's courts retain jurisdiction over cases that are neither military in nature nor affect the security of the occupying forces. The latter are to

18 Regulations issued by the occupying power falling under this category include amongst others regulations concerning child welfare, labor, food, hygiene and public health; cf. Pictet (note 9), 337.

19 The fact that belligerent occupation does not result in a transfer of sovereignty was highlighted by the Security Council in respect to Iraq when it referred to the territorial integrity and sovereignty of Iraq. S/RES/1472 (2003) of 28 March 2003; 1500 (2003) of 14 August 2003; 1511 (2003) of 16 October 2003.

20 See Pictet (note 9), who differs obviously from Benvenisti (note 2), 30. He bases his argument predominantly on the fact that the French text of article 43 of the Hague Regulations ("L'ordre et la vie public") is broader than "public order and safety". In no case, though, would the French wording cover far-reaching re-organizational measures which determine the future of the occupied state.

21 Emphasized in the UK Manual of the Law of Armed Conflict (note 2), 283-284.

be dealt with by the occupying forces.[22] The Hague Regulations also ban collective punishment.[23] Article 49 of the Fourth Geneva Convention prohibits the occupying power from transferring civilians in the occupied territory to another country. Article 147 of the same convention lists unlawful deportation or transfer or unlawful confinement of protected persons as a grave breach.[24] Each of these examples, all of which reflect customary international law, may, *de facto*, limit the occupying force's means for suppressing internal resistance.

The occupying power is further responsible for ensuring hygiene and public health,[25] as well as food and medical supply.[26] In that respect, it has to cooperate with local and national authorities. If such authorities either collapsed or have been dissolved by the occupying power, their responsibilities devolve upon the occupant. Quite simply, the more an occupying power interferes with the administration of an occupied territory, the greater its responsibilities for the well-being of the population.

The second paragraph of Article 64 of the Fourth Geneva Convention – which is linked to the first by the caveat "however" – allows the occupant to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligation under the [Fourth Geneva] Convention" and "to maintain the orderly government of the territory." The phrase "subject the population" indicates that the occupant may take legislative actions to achieve these objectives. In cases of prolonged occupation, such legislative activities will necessarily expand (regardless of the legitimacy, or lack thereof, of the occupation). This text must be read in conjunction with Article 43 of the Hague Regulations, which obliges occupants to restore and ensure, as far as possible, 'l'ordre et la vie publics'. Such tasks clearly require both executive and legislative actions.

Legislative measures adopted by the occupant may be justified, according to Yoram Dinstein,[27] by the latter's security interests, to implement its obligations under the Geneva Conventions, or to comply with its responsibility to

22 UK Manual of the Law of Armed Conflict (note 2), 284.

23 See article 50 of the Hague Regulations of 1907 (note 8), which provides: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

24 Y. Dinstein (note 1) at 233 emphasizes that one has to distinguish between the transfer of the population from the occupied territory into another country, which according to article 147 of the Fourth Geneva constitutes a grave breach, and the transfer of population by the occupying power into the occupied territories. The latter has become a grave breach only through article 85, paragraph 4 of Additional Protocol I, which was subsequently strengthened by article 8, paragraph 2, of the ICC Statute.

25 Article 56 Fourth Geneva Convention.

26 Article 55 Fourth Geneva Convention.

27 Note 1 at 6 et seq.

ensure the orderly government of the occupied territories. However, the occupant's powers are not unlimited, particularly with regard to the third justification. Yoram Dinstein has crafted two tests designed to establish whether the occupant has acted appropriately.[28] I would add a third.

– Has the occupant shown similar concerns for its own population and has it reacted in a comparable manner.
– Do the changes introduced to the political infrastructure or the legal regime reach beyond the period of occupation.[29]
– Is it possible – de facto – to repeal such changes?

The viability of these tests can be illustrated with regard to the occupation of Iraq.

C The Role of the Coalition in the Political Restructuring of Iraq

The occupying powers have introduced significant changes in the Iraqi system,[30] changes which go far beyond what is anticipated in international humanitarian law. Under the headline "De-Ba'athification," the Coalition Provisional Authority (CPA) restructured the country's entire political infrastructure,[31] including the judiciary. For instance, the CPA disbanded the Iraqi military, creating in its stead new armed forces with a new command structure. A new Code of Military Discipline was also promulgated. Further, two security services were established. Even more far-reaching were economic reforms. The banking and taxation systems were revised, and the formerly state-controlled economy was transformed into a market-oriented one. Foreign investment acquired remarkable influence.[32]

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28 Note 1 at 9-10.

29 This should not be understood to mean that an affirmative answer proves the legitimacy of the legislative action in question. On this issue, see T. Meron, Applicability of Multilateral Conventions to Occupied Territories, AJIL 72 (1978), 542 at 549 et seq. It should further not be understood to insinuate that the occupant may legislate in the occupied territories as it does in its own. Article 64 Fourth Geneva Convention makes it clear that the powers of the occupant are limited in this respect (as a literal interpretation of this provision clearly establishes). The latter paragraph of article 64 Fourth Geneva Convention is phrased as an exception to the first; such rules are only meant to maintain the orderly government during the period of occupation.

30 It should be noted that the U.S. Iraq Liberation Act of 1998 (Public Law 105-338-Oct. 31, 1998), in Section 3, already provided: "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime."

31 Coalition Provisional Order No. 1 CPA/ORD/16 May 2003/01, 16 May 2003.

32 For details see Fox (note 7), 210 et seq.

Apart from revisions in the human rights system in accordance with Article 64 of the Fourth Geneva Convention, it is more than doubtful whether such steps meet the three-prong test. They clearly extend beyond the period of occupation and it is unlikely they can be repealed *de facto*. It is even unclear whether the Iraqis would otherwise tolerate such a dominant influence by foreign investors, especially in areas vital to the national economy. Equally dramatic are the institutional changes. Although it is a truism to say that Article 47 of the Fourth Geneva Convention protects humans and not institutions,[33] this does not diminish the fact that under the principle of self-determination, a principle also protected under international humanitarian law, it is for the population itself to decide on its institutional and legal framework.

The introduction of such far-reaching modifications has been the topic of substantial scholarly reflection. Different proposals have been proffered to justify broadening the mandate of the occupying power. Morris Greenspan argues that where wars are fought to achieve a change of a particular political regime, as was the case in World War II, the military occupant cannot be under an obligation to retain the regime against which it fought. This is, in his view, particularly true where a change of regime offers the only effective means to secure peace. On that basis, a wider interpretation of Article 43 of the Hague Regulations has been suggested.[34] Such an interpretation, however, would deprive Article 43 of its meaning, making it dependent upon the objectives pursued by the occupant upon entering the war. As much as it may have been legitimate to overthrow the totalitarian government of Germany and introduce the rule of law and democracy, there are now definite limits in international humanitarian law which preclude the occupant from freely and unilaterally changing the occupied state's structure and political system. Those limits are specified in the Fourth Geneva Convention.[35]

More recently, several suggestions have been made to bring international humanitarian law in line with the goal of making possible sustainable peace by changing the political structure of a state. They range from characterizing international humanitarian law as obsolete, to reinterpreting the rules of belligerent

33 ICRC Commentary, IV Geneva Convention, at 274.

34 Greenspan (note 9) 217.

35 J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", Suffolk Transnational Law Review 17 (2003), 1 (16 et seq.). See also H.H. Perritt, Jr., "Structures and Standards for Political Trusteeship", University of California International Law and Foreign Affairs 8 (2003), 385 et seq. (393 et seq.), who argues that the Allied Occupation of Germany and of Japan was based on a political trusteeship equivalent to the mandate or the trusteeship system of the League of Nations and the United Nation, respectively. However, this is not the place to deal with the military administration of Germany and Japan.

occupation on the basis of necessity[36] or human rights.[37] It would go beyond the objective of this contribution to deal with these approaches in depth.[38] But, generally speaking, they tend to suffer the same deficiency, an attempt to design a fixed legal regime to cover all belligerent occupations, when a more flexible regime tailored to the particular case at hand might prove more efficient. One option is to use existing international humanitarian law, with all its inherent restrictions taken literally, as an appropriate starting point which the Security Council may modify as the situation demands. This necessitates acceptance of the premise that the Security Council has legislative power, a premise some have rejected.[39]

D Security Council Resolution 1483 and Its Impact on the Role of the Coalition Forces as Belligerent Occupants

It has been argued that the Security Council has no legislative power and cannot, therefore, modify existing or prescribe international law. Reality indicates otherwise. The Security Council has on several occasions assumed legislative functions to which States, including the United States, have consented.[40] Prime examples include the Security Council Resolutions against terrorism and the proliferation of weapons of mass destruction.[41]

Security Council Resolution 1483 is the product of efforts by the United States and the United Kingdom to acquire international legitimization for their interim administration of Iraq, a point apparent in the 8 May 2003 letter of the two countries to the Security Council.[42] Beyond seeking legitimacy for their belligerent occupation of Iraq, they sought to secure the authority to govern and administer Iraq for an extended period of time, reconstruct it politically and economically, lift the economic sanctions, and terminate the Oil for Food Program.

The two governments achieved some, perhaps most, but not all of these objectives. Other members of the Security Council were particularly careful to avoid providing for an *ex post* legitimization of the invasion. They also refrained

36 Memorandum from the Right Hon. Lord Goldsmith, QC, to the Prime Minister, reprinted in John Kampfner, Blair Told It Would Be Illegal to Occupy Iraq, New Statesman, May 26, 2003, 16-17.

37 This seems to be the dominant argument advanced by Fox (note 7) at 242 et seq.

38 Equally, the contribution will not deal with the question whether the Iraqi Interim Government consented to the introduced changes; see on this Fox (note 7) at 247 et seq.

39 Zimmermann/Elberling, Grenzen der Legislativbefugnisse des Sicherheitsrates, VN 2004, 71 et seq.

40 For details, see Rüdiger Wolfrum, Der Kampf gegen eine Verbreitung von Massen vernichtungswaffen: Eine neue Rolle für den Sicherheitsrat, Liber Amicorum Jost Delbrück, 2005, 865 et seq.

41 S/RES/1540 (2004), 28 April 2004.

42 Doc. S/2003/538.

from giving the Coalition a totally free hand in the reorganization of Iraq. Resolution 1483, above all, leaves room for interpretation.

The resolution gives the Coalition the mandate to administer Iraq and work towards its political and economic reorganization.[43] This mandate goes beyond the powers enjoyed by a belligerent occupant under international humanitarian law. This is particularly true in respect of political reorganization. The Security Council's broadening of the Coalition's mandate may have been based on its frequent accusations that Iraq had violated Security Council resolutions and thus was in breach of international law.[44] Apart from that, in Resolution 1441 (2002) the Security Council had referred to Resolution 688 (1991). The latter stated that oppression of the Iraqi people constituted one of the major threats posed by Saddam Hussein's regime. On that basis, the mandate for a political reorganization represents a contribution towards restoration and preservation of peace in the region. This mandate extends to dissolution of the Ba'ath party and the eradication of its influence in Iraqi society. It further addresses dissolution and replacement of the armed forces and restructuring of the government, including the judiciary. Finally, the mandate endorses the strengthening of Iraqi federalism. Each of these steps would have otherwise exceeded the powers of a belligerent occupant under international humanitarian law.

Although the powers of the Coalition were expanded, Resolution 1483 also establishes some limits, the exact scope of which can only be established indirectly. Operative paragraph 5 calls on "all concerned" to comply with their obligations under international law, including the Geneva Conventions and Hague Regulations. This indicates that the resolution was not meant to override international humanitarian law completely, but rather must be interpreted in the context of the law. In particular the resolution reaffirms the right of the Iraqi people to self-determination,[45] thereby emphasizing that the process of restructuring must ultimately lead to a truly representative and democratically elected govern-

43 Para. 4 of S/RES/1483 (2003) of 22 May 2003 reads: "Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." For a more restrictive interpretation see T. Marauhn, "Konfliktbewältigung statt Legalisierung", Vereinte Nationen 51 (2003), 113 et seq. (117); T. Bruha, "Irak-Krieg und Vereinte Nationen", AVR 41 (2003), 295 et seq. (311); H.H. Perritt, Jr., "Iraq and the Future of United States Foreign Policy: Failures of Legitimacy", Syracuse Journal of International Law and Commerce 31 (2004), 149 (152), speaks of a political trusteeship; different Fox (note 7) at 259-60.

44 As to the interpretation of Security Council resolutions in general, see M.C. Wood, "The Interpretation of Security Council Resolutions", Max Planck UNYB 2 (1998), 73 et seq.

45 Preamble.

ment.[46] This is further accentuated by the fact that the Coalition is called upon to assist the Iraqi people,[47] a clear signal that the Iraqis are to play a leading role. To put it differently, the Coalition must not impose its vision of a reorganized Iraq on the respective Iraqi institutions, nor impose prejudgments that might limit the freedom of Iraqi organs in the shaping a new legal order. Thus, the Security Council granted the Coalition leeway to build a truly representative government, but without compromising on the ultimate objective.

In particular, the reference to the integrity of the state of Iraq excludes any attempt to section the country. This rules out promoting, or preparing for, secession by the predominantly Kurdish populated areas. It does not, however, exclude the establishment of a federal system vesting the Kurdish region with autonomy, even autonomy exceeding that which had previously existed, at least in theory.

Further, Resolution 1483 does not compromise on the temporary nature of the Coalition's administrative powers. Although the Security Council did not set a time frame in which governmental powers were to be transferred back to Iraqi organs, paragraph 9 expresses its support for the creation of a transitional Iraqi administration. This, at least, indicates that the Security Council expected a procedure to be set into motion that would provide for a step-by-step return of governmental authority to an Iraqi administration.[48] Although not the same as a clear-cut time-line for the full return of governmental power, it indicates that the belligerent occupation has to be transitional.

The Coalition's declared intent to restructure and, in particular, reestablish the Iraqi security forces conforms to the basic principles of international humanitarian law, namely that it is for the population of the territory under occupation to reorganize itself and establish the necessary institutions for the preservation of internal peace and security. The Security Council unqualifiedly endorsed the Coalition's efforts in this regard.

Finally, paragraph 8 lit. (c) of Security Council Resolution 1483 provides that the UN Special Representative for Iraq should work intensively with the Coalition and the Iraqi people to restore and establish national and local institutions of representative governance. This principle has not been fully implemented, for the influence of the UN Special Representative regarding the composition of the Interim Governing Council and the subsequent Interim Iraqi Government was, in fact, limited.

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46 S/RES/1483 (2003) of 22 May 2003, see operative paras 4, 8 lit. (c), 9; this concurs with the approach advocated in the presentation by F.L. Kirgis, "Security Council Resolution 1483 on the Rebuilding of Iraq", ASIL Insights (2003), available at <www.asil.org/insights.htm>.

47 S/RES/1483 (2003) of 22 May 2003, operative paras 1 and 4.

48 For a highly critical comment on paragraph 9, see M. Hmoud "The Use of Force against Iraq: Occupation and Security Council Resolution 1483", Cornell Int'l L. J. 36 (2004), 443 and seq. Hmoud interprets it as giving the Coalition unlimited power for an unlimited period of time. This interpretation has been overtaken by events.

All changes introduced in the economic sector by the belligerent occupant of Iraq contradict international law. They clearly exceed the mandate of the belligerent occupant under article 43 Hague Regulations and article 64 Fourth Geneva Convention and they are not covered by the mandate of Security Council Resolution 1483.[49]

III Conclusion

Security Council Resolution 1483 modified the international humanitarian law on belligerent occupation applicable in Iraq by legalizing the Coalition's efforts to restructure Iraq politically. Doing so is in accordance with Article 103 of the UN Charter.[50] The Council's authority to modify international humanitarian law derives from its powers under Chapter VII of the Charter.

Apart from the importance of the modification of international humanitarian law in this particular case, it would appear that the Security Council has now produced a model for future belligerent occupations. It is a main feature of this model to entrust particular states with post-conflict management responsibilities. Thus, in principle, it adopts the "coalition of the willing" system used during the 1991 war against Iraq that was mandated by Security Council Resolution 678 of 29 November 1990.[51]

This model appears quite promising as an attempt to redefine the existing rules of international humanitarian law. It should not be ignored that these rules are meant to protect the respective population against an occupying power that might act in its own national interest while claiming to act in the interest of internationally endorsed principles, such as the protection of human rights, democracy or the liberalization of trade. The involvement of the Security Council or a regional international organization is more effective in preventing the abuse of such powers than a watered-down international humanitarian law that merely expands the discretionary powers of a belligerent occupant.

49 For details see Wolfrum (note 14), at 22.

50 See D.J. Scheffer, "Beyond Occupation Law", AJIL 97 (2003), 842 (843 et seq.). Article 103 of the UN Charter constitutes a conflict of laws rule rather than a hierarchy. See R. Bernhardt, "Art. 103", margin note 6, in: B. Simma (ed.), The Charter of the United Nations, 2nd edition, 2002.

51 Operative para. 2 refers to "Member-States co-operating with the Government of Kuwait."

Chapter 19

The Separation Fence in the International Court of Justice and the High Court of Justice: Commonalities, Differences and Specifics

Fania Domb

Introduction

The legality of the separation fence (also called "barrier" and "wall"[1]) constructed by Israel on the West Bank as a means of preventing terrorist acts committed by the Palestinians has been examined by two different Courts. Three different decisions have been delivered in regard to it:

a) the Advisory Opinion delivered by the International Court of Justice (ICJ) on July 9, 2004, at the request of the UN General Assembly,[2] on the question of "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem" (hereinafter: *ICJ*);[3]
b) the decision in the *Beit Surik Case*, delivered on June 30, 2004, by the Supreme Court of Israel sitting as the High Court of Justice (HCJ) (hereinafter: *Beit Surik)*;[4]
c) the decision in the *Alfei Menashe Case,* also delivered by the HCJ, on September 15, 2005 (hereinafter: *Alfei Menashe*).[5]

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1 The structure is called "fence" by the Supreme Court of Israel; it is called "barrier" by the UN Secretary-General; and "wall" by the UN General Assembly as well as by the ICJ. As observed by the ICJ, neither of these terms is accurate in terms of the structure (*infra* note 3, para. 67). On the relevant terminology *see* N. Strapatsas, "Case Note on the ICJ Advisory Opinion on the Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory", 35 *Isr. Y.B. Hum. Rts*. 251, n. 2 (2005).

2 On the background for the request for the Advisory Opinion, *see ibid.,* 251-252.

3 International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), 43 *I.L.M.* 1009 (2004); http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.

4 H.C. (High Court) 2056/04, Beit Sourik Case, 58(5) *Piskei Din* (Reports of the Israel Supreme Court, hereinafter: *P.D.*) 807; summary in English in 35 *Isr. Y.B. Hum. Rts*. 340 (2005).

5 H.C. 7957/04, Mara'abe Case, (not yet published), summary in 36 *Isr. Y.B. Hum. Rts*. (2006, forthcoming).

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All three decisions differ in their conclusions. The ICJ concluded that the whole separation fence, insofar as it was constructed on the occupied territory of the West Bank, violated international humanitarian and human rights law. In contrast, the HCJ ruled in *Beit Surik* – where one segment of the fence passing northwest to Jerusalem was discussed – that the construction of the fence was legitimate based on military-security grounds, but invalidated most of its route on the grounds of the disproportionate harm caused to the Palestinian inhabitants of the area. In *Alfei Menashe,* the HCJ confirmed its previous ruling on the legality of the construction of the fence, but ordered an alteration of its route around the Israeli settlement of Alfei Menashe (located on the West Bank, near the town of Qalqiliya), so as to leave the five petitioning Palestinian villages (or part of them) outside the fence, on the grounds that the enclave created by the fence caused them extensive injury.

In *Alfei Menashe*, the HCJ also responded to the ICJ's Advisory Opinion on several points, determining that although it will grant full weight to the rules of international law as stated by the ICJ, the Advisory Opinion is not *res judicata* and does not obligate the HCJ to rule that all segments of the fence violate international law. The HCJ opined that the differences in the conclusions reached by it and the ICJ stemmed mainly from the different factual bases laid before either Court: while the ICJ was mainly provided with information regarding the injury that the fence caused to the Palestinian residents of the area in dispute (following Israel's refusal to participate in the Advisory Opinion proceedings[6]), the HCJ also had before it factual data on Israel's security-military needs that it used in its conclusions.

Yet, the HCJ pointed out in *Alfei Menashe* that despite the different outcomes of the ICJ's Advisory Opinion and the *Beit Sourik Case,* the "basic normative foundation upon which the ICJ and the Supreme Court in *Beit Sourik* based their decisions was a common one" on a number of issues, including: the status of the West Bank; annexation of an occupied territory; application of the 1907 Hague Regulations[7] and the 1949 Fourth Geneva Convention;[8] application of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention; application of human rights conventions to the occupied territory; infringement of the Palestinian residents' rights by the construction of the fence, and application of the exceptions of military necessity, national security requirements, or public order (para. 57). Nevertheless, some commentators have asserted

6 Written Statement of the Government of Israel on Jurisdiction and Propriety, 30 Jan. 2004: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.

7 Hague Regulations Annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, in *The Laws of Armed Conflicts* 63 (D. Schindler & J. Toman, 3rd ed., 1988).

8 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287.

that "the differences between the opinions [expressed by the ICJ and the HCJ] outweigh the similarities".[9]

The purpose of this article to is examine the commonalities, differences and specifics involved in these three decisions. This will be done by reference first to the common issues discussed by both Courts (with emphasis on the commonalities and differences), and later by reference to the specific issues discussed.

I Common Issues Discussed by Both Courts

A Legal Status of the West Bank – Belligerent Occupation

According to the HCJ in *Alfei Menashe*, both Courts ruled that the status of the territory under discussion, namely, the "occupied Palestinian territory" in the ICJ's terminology, and the "West Bank" (or "Judea and Samaria") in the HCJ's terminology, is one of "belligerent occupation" (para. 57).

The ICJ formulated this conclusion as follows:

> The territories situated between the Green Line[10] … and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. (para. 78).

The ICJ added that subsequent events in these territories (including the adoption by Israel in 1980 of the *Basic Law: Jerusalem, Capital of Israel*; the signing in 1994 of the Peace Treaty between Israel and Jordan; and the agreements signed since 1993 between Israel and the Palestine Liberation Organization (PLO)), discussed below, have done nothing to alter this situation. Thus, "all these territories (including East Jerusalem) remain occupied territories". In the same general spirit, the HCJ stated in *Beit Sourik* that "the point of departure of all parties – which is also our point of departure – is that Israel holds the Area [of Judea and Samaria] in belligerent occupation (*occupatio bellica*)" and that "in the Areas relevant to the petition, a military administration, headed by the military commander, continues to apply" (para. 23).

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9 R. Watson, "The 'Wall' Decision in Legal and Political Context", 99 *A.J.I.L.* 6, 24 (2005).

10 The armistice demarcation line established by the 1949 Rhodes Armistice Agreement between Israel and Jordan, 656 *U.N.T.S.* 304. For an explanation, *see* R. Sabel, "The International Court of Justice Decision on the Separation Barrier and the Green Line", 38 *Isr. L. R.* 316, 322 *et seq.* (2005).

i The Status of Jerusalem

The consensus of both Courts on the West Bank's status as being under Israel's belligerent occupation seems inapplicable to East Jerusalem. While the ICJ expressly includes East Jerusalem in territory under belligerent occupation, the HCJ does not refer to East Jerusalem. This silence cannot be interpreted as including East Jerusalem in the Judea and Samaria Region, because Israel has expressly raised sovereignty claims over East Jerusalem since 1967[11] and treated it differently from the rest of the West Bank. In 1967, Israel applied Israeli law, jurisdiction and administration[12] to East Jerusalem, and in 1980 it enacted the *Basic Law: Jerusalem, Capital of Israel*,[13] which proclaims in its first Section that "Jerusalem, complete and united, is the capital of Israel" (as quoted by the ICJ in para. 75). Following the adoption of the Basic Law, Professor Dinstein noted that "unlike the rest of the West Bank, East Jerusalem is treated by Israel as if it were a part of its own domain."[14] Roberts characterized the Law as "formal annexation" of East Jerusalem.[15]

The status of East Jerusalem was discussed by the HCJ in the *Rabah Case*,[16] where the petitioners claimed that application of Israeli law to East Jerusalem was illegal under international law. The Court ruled that the law, jurisdiction and administration of the State were lawfully applied to East Jerusalem according to internal Israeli law and that if internal Israeli legislation was incompatible with customary international law, then Israeli domestic law prevailed. [17] It follows that

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11 M. Hirsch, "The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier", 38 *Isr. L R.* 298, 299-300 (2005). *See also* on Israeli claims of sovereignty over Jerusalem the official site of the Israel Ministry of Foreign Affairs: http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/3/The%20Status%20of%20.

12 On the legislative process involved in this application, *see* Y. Dinstein, *International Law and the State* 125 (Hebrew, 1971).

13 34 *Laws of the State of Israel* 209 (1980).

14 Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families", 18 *Isr. Y.B. Hum. Rts.* 173 (1988).

15 A. Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", 84 *A.J.I.L.* 44, 59 (1990). For a similar view on the annexation of East Jerusalem in the context of the fence, *see* N. Lubell, "The ICJ Advisory Opinion and the Separation Barrier: A Troublesome Route", 35 *Isr. Y.B. Hum. Rts.* 287, 288 (2005).

16 H.C. 256/01, 56(2) *P.D.* 930, summary in 32 *Isr. Y.B. Hum. Rts.* 356 (2002).

17 The Court relied on a treatise of Professor Dinstein in which he stated that rules of customary international law automatically became part of Israeli law, provided that they do not contradict any provision of statutory law. If that was the case, then the domestic law would take precedence over a rule of customary international law. *Supra* note 12, at 145-146.

East Jerusalem is not considered by the HCJ as being under belligerent occupation. This contrasts with the position take by the ICJ.

ii Peculiarity of the Common Ruling

The common ruling on the West Bank as being under belligerent occupation is peculiar because it actually recognizes that such occupation may exist in the absence of a state of belligerency between the occupying and occupied States. Belligerency between Israel and Jordan ended in 1994 pursuant to the conclusion of the Peace Treaty between them. Yet, according to the 1978 Camp David Framework Agreement[18] and the Oslo peace process[19] – which were intended to establish an autonomous regime for the Palestinian people in the West Bank (and the Gaza Strip) – the Peace Treaty provided in Article 3(2) that the international boundary between both States established therein was "without prejudice to the status of any territory that came under Israeli military government control in 1967".

As already mentioned, the ICJ expressly stated that conclusion of the Peace Treaty between Israel and Jordan had not altered the status of the territory as subject to belligerent occupation. Professor Dinstein expressed a different opinion on this issue in 1998.

> [Israel] is not belligerent and it cannot be belligerent, in light of the combined effect of the Egyptian-Israeli Treaty of Peace of 1979, the Jordanian-Israeli Treaty of Peace of 1994, and the series of agreements with the Palestinians. There is simply no room for belligerent occupation in the absence of belligerence, namely, war.[20]

After rejecting the possibility of the status of "pacific occupation" (applying in cases of takeover of a territory in circumstances where the occupant is not at war with the legitimate sovereign), Professor Dinstein opined that the best term for the new situation created in the West Bank after the Israeli-Jordan Peace Treaty and the agreements with the Palestinians is "post-belligerent occupation".[21]

Also peculiar is the normative ground upon which the ICJ based its conclusion that Palestine is under Israeli occupation. As quoted above, the ICJ relied

18 A Framework for Peace in the Middle East, 1978, 17 *I.L.M.* 1466 (1978); for comments *see* M. Gabay, "Legal Aspects of the Camp David Framework for Peace in Relation to the Autonomy Proposal", in *Models of Autonomy* 255, 256 (Y. Dinstein & M. Tabory eds., 1981).

19 On the connection between the 1978 Camp David Framework and the Oslo peace process, *see* Y.Z. Blum, "From Camp David to Oslo", 28 *Isr. L. Rev.* 211, 215 (1994).

20 Y. Dinstein, "The International Legal Status of the West Bank and the Gaza Strip – 1988", 28 *Isr. Y.B. Hum. Rts.* 37, at 41-42 (1998).

21 *Ibid.*, 42.

on "customary international law" (as reflected in Article 42 of the 1907 Hague Regulations),[22] according to which a territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised (para. 78). This criterion does not apply to all of the West Bank because Israel had transferred "powers and responsibilities" over large parts of it to the Palestinian Council under the 1995 Israeli-Palestinian Interim Agreement.[23] As pointed out by Professor Dinstein, "in Areas A and B – where the Palestinian Council has acquired territorial jurisdiction – the Israeli post-belligerent occupation must be deemed terminated".[24] In the same vein, Sabel opines that "the areas under the control of the Palestinian Authority are no longer under the control of the Israel Military Administration", which is the situation, for example, in Jericho, where there are no Israeli courts, military legislation, police, prisons or taxes.[25] The only ground on which the continued status of belligerent occupation of the entire West Bank can be based is the 1995 Interim Agreement, according to which Israel retains responsibility for "defence against external threats … as well as the responsibility for overall security of Israelis and Settlements".[26] But this ground is substantively different from the criterion of "effective control" provided for in Article 42 of the 1907 Hague Regulations on which the ICJ based its conclusion regarding the West Bank's status.

B Illegality of Annexation

The HCJ stated in *Alfei Menashe* that both Courts expressed a common position according to which "an occupying State is not permitted to annex the occupied territory" (para. 57). Although this indeed was the position of both Courts, each expressed it in a different context and based it on entirely different grounds.

i The ICJ

The ICJ linked the issue of annexation, raised by the PLO against the legality of the construction of the fence, to two international principles which it found relevant to the legality of the fence: (1) the inadmissibility of the acquisition of territory by war, and (2) the principle of self-determination.

22 *Supra* note 7.

23 Israel-PLO, Interim Agreement on the West Bank and the Gaza Strip, 1995, 36 *I.L.M.* 557; hereinafter: the 1995 Interim Agreement.

24 Dinstein, *supra* note 20, at 45.

25 Sabel, *supra* note 10, at 321-322.

26 *Supra* note 24, Article XII(1).

As for the first, the ICJ recalled Article 2(4) of the UN Charter, providing for the prohibition of the threat or use of force in international relations,[27] as well as the Friendly Relations Declaration adopted by the UN General Assembly in 1970,[28] which emphasizes that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal". Subsequently, the ICJ cited its judgment in the *Nicaragua Case*,[29] according to which "the principles as to the use of force incorporated in the Charter reflect customary international law", and ruled that "the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force" (para. 87).

With regard to the principle of self-determination of peoples, the Court pointed out that it has been enshrined in the UN Charter, reaffirmed by the General Assembly in the Friendly Relations Declaration, and set forth in Article 1 common to the International Covenant on Economic, Social and Cultural Rights[30] ("ICESCR") and the International Covenant on Civil and Political Rights[31] ("ICCPR"), which oblige States parties to promote the realization of that right and to respect it, in conformity with the provisions of the UN Charter. The Court concluded by stating that the right of peoples to self-determination is today *erga omnes* (para. 88).

Applying both principles to the issue of the construction of the fence, the ICJ recalled that both the General Assembly and Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war", affirmed in Security Council Resolution 242 of 1967 (para. 117). As regards the principle of the right of peoples to self-determination, the Court observed that the existence of a "Palestinian people" has been recognized by Israel, along with that people's "legitimate rights",[32] which include

27 Article 2(4) of the UN Charter stipulates as follows:

> 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.

28 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970, G.A. Res. 2625 (XXV), 9 *I.L.M.* 1292 (1970); hereinafter: Friendly Relations Declaration.

29 Case Concerning Military and Paramilitary Activities in and Against Nicaragua, [1986] *I.C.J. Rep.*, paras. 187-190; hereinafter: *Nicaragua Case*.

30 International Covenant on Economic, Social and Cultural Rights, 1966, 993 *U.N.T.S.* 3; hereinafter: ICESCR.

31 International Covenant on Civil and Political Rights, 1966, 999 *U.N.T.S.* 171; hereinafter: ICCPR.

32 The ICJ relies in this matter on the exchange of letters of 9 September 1993 between Mr. Arafat and Mr. Rabin and on the 1995 Interim Agreement (*supra* note 23) – while Israel had already recognized the "legitimate rights of the Palestinian people" in the 1978 Camp David Framework (Article A(1)(c)), *supra* note 19. On this recognition, *see* Y. Dinstein, "Autonomy", in *Models of Autonomy*, *supra* note 19, at 291, 294.

the right to self-determination (para. 118). The ICJ concluded its examination of the issue of annexation by stating:

> Whilst taking note of the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature, the Court nevertheless considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation (para. 121).

Although the ICJ did not rule that the wall amounts to annexation, it concluded that it "severely impedes the exercise by the Palestinian people of its right to self-determination" (para. 122), and is therefore a breach of Israel's obligation to respect that right.

ii The HCJ

In *Beit Sourik,* the HCJ discussed the petitioners' argument that the fence created a *de facto* annexation in the context of the authority of a military commander in an occupied territory, ruling that:

> … the military commander cannot order the construction of the separation fence if his reasons are political. The separation fence cannot be motivated by a desire to "annex" territories to the state of Israel. The purpose of the separation fence cannot be to draw a political border (para. 21).

The HCJ referred to its decisions in the *Elon Moreh case,*[33] where it held that the seizure of land in the Judea and Samaria Area for the purpose of building a Jewish town, and not for the security of the Area, was illegal and that a military commander is not permitted to take the national, economic, or social interests of his country into account. The Court also referred to its decision in the *Cooperative Society case,*[34] where it ruled that the military administration is not permitted to plan and execute a system of roads in an area under belligerent occupation if the objective is only to construct a "service road" for its own country, rather than for military reasons or for the welfare of the local population. The Court reasoned that the military commander's authority is inherently temporary, as is belligerent occupation, and therefore permanent arrangements are not within his purview.

It follows that, indeed, both Courts ultimately ruled the annexation of an area under belligerent occupation to be illegal.

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33 H.C. 390/79, Dweikat (Elon Moreh) Case, 34(1) *P.D.* 1, summary in 9 *Isr. Y.B. Hum. Rts.* 345 (1979).

34 H.C. 393/82, 37(4) *P.D.* 785, summary in 14 *Isr. Y.B. Hum. Rts.* 301 (1984).

iii Comments on the Common Ruling on Illegality of Annexation

The common position of both Courts regarding annexation is in line with well-established international law rules (that emerged before the prohibition of war and apply regardless of which State is the aggressor) under which "belligerent occupation, by itself, cannot produce a transfer of title over territory to the occupying State", and "no territory under belligerent occupation can be validly annexed by the occupying power acting unilaterally".[35] According to general international law, annexation can only take place by conclusion of a peace treaty which provides for the cession of an occupied territory to the occupying State, or as a result of *debellatio*[36] , i.e. the disintegration of an enemy State.[37]

In contrast to the rule on the illegality of unilateral annexation, the rule on the inadmissibility of acquisition of territory by means of war, invoked by the ICJ, emerged in the wake of the prohibition of the threat or use of force in international relations as formulated in Article 2(4) of the UN Charter. It was based on the principle "*ex injuria jus non oritur*", meaning that he who acts contrary to the law cannot acquire rights as a result of his transgression.[38] In the context of acquisition of territory through war, this principle requires a distinction between the aggressor State (acting contrary to the law) and the State which was the victim of aggression. While the first may not acquire territory as the result of its violation of the law, the second may do so because it was engaged in a lawful war of response to aggression. This distinction, favored by scholars, [39] was adopted by the 1969 Vienna Convention on the Law of Treaties,[40] through the combined effect of Article 52 (invalidating treaties imposed by an aggressor State) and 75 (preserving the validity of a treaty in favor of the victim State).[41] However, beginning with the notorious Security Council Resolution 242 adopted in 1967 in response to the Six Day War, the UN has completely rejected the admissibility of acquisition of

35 Y. Dinstein, *War, Aggression and Self-Defence* 168-169 (4th ed., 2005).

36 On the three basic parameters of *debellatio*, *see ibid*., 48-49.

37 R.L. Bindschedler, "Annexation", 1 *Encyclopedia of Public International Law* 168, 170 (R. Bindschendler ed., 1992).

38 *See* Q. Wright, "The Outlawry of War and the Law of War", 47 *A.J.I.L.* 365, 370-371 (1953).

39 *See* E. Lauterpacht, *Jerusalem and the Holy Places* 52 (1968); S.M. Schwebel, "What Weight to Conquest", 64 *A.J.I.L.* 346 (1970).

40 Vienna Convention on the Law of Treaties, 1969, 1155 *U.N.T.S*. 331.

41 Art. 52 of the Vienna Convention (*ibid*.) stipulates as follows:

> Art. 75 stipulates that:
>
> The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

On the effect of both Articles, *see* Dinstein, *supra* note 35, at 37-38.

territory by war, without differentiating between the aggressor and the victim. This position later found expression in the 1970 Friendly Relations Declaration (relied on by the ICJ, as noted above). Stone criticized this approach as absurd because it guarantees that an aggressor State will ultimately regain territory it loses through its own aggression.[42]

Contrariwise, the ICJ was on firm customary international law ground when it asserted that the principle of self-determination precluded the possibility of annexation of an occupied territory. The customary character of the right of self-determination of peoples had been recognized by the 1970s.[43] Professor Dinstein noted its implication for annexation of occupied territory in 2001, when he opined that "if the local people is truly at liberty to determine its political status, a post-*debellatio* annexation by the victorious State must clearly be precluded".[44] As the "legitimate rights of the Palestinian people" were recognized by Israel in the 1978 Camp David Framework,[45] their right to self-determination is no longer an issue, a fact that precludes the possibility of unilateral annexation of the West Bank by Israel.

C Application of the Law of Belligerent Occupation

According to the HCJ in *Alfei Menashe,* both Courts agreed that "in an occupied territory the occupying State must act according to the Hague Regulations and the Fourth Geneva Convention" (para. 57).

The ICJ refers to both instruments in the context of "international humanitarian law", thereby confirming Professor Dinstein's position that no distinction should be drawn between "Hague Law" and "Geneva Law" (as the principal humanitarian law) because Hague Law does not ignore humanitarian considerations.[46]

Although both Courts refer solely to these two instruments as relevant to the issue under discussion, it should be mentioned that the Geneva Law was supplemented in 1977 by two Additional Protocols,[47] which are not referred to by either Court because Israel is not a contracting Party and their customary nature is not generally recognized. It should also be mentioned that there are additional

42 J. Stone, *Israel and Palestine, Assaults on the Law of Nations* 52 (1981).

43 Y. Dinstein, *Non-State International Law* 146 (Hebrew, 1979).

44 Dinstein, *supra* note 35, at 169.

45 *Supra* note 19.

46 Y. Dinstein, *The Laws of War* 22, 25 (1983).

47 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); texts in *The Laws of Armed Conflicts, supra* note 7, at 621, 689.

instruments of international law applicable to occupied territories,[48] such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[49] to which Israel is a contracting Party. Generally, the laws applying to occupied territories form part of the *jus in bello*, namely, the rules which apply in the course of war (as distinct from the *jus ad bellum*, including laws relating to the beginning of war, its cessation and termination).[50]

i The 1907 Hague Regulations

Both Courts conceded that the application of the Hague Regulations to the West Bank derives from their customary nature, as Israel is not a party to the Fourth Hague Convention of 1907, to which the Regulations are annexed.

Relying on the Judgment of the International Military Tribunal of Nuremberg delivered in 1946, the ICJ expressly ruled that "the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court" (para. 89).

The HCJ has fully recognized the declaratory nature of the Hague Regulations at least from 1977, when it ruled in the *Beit El Case*[51] that "it is accepted that the Hague Convention forms part of customary international law", relying on Professor Dinstein's article pointing to the customary nature of the Regulations according to the Nuremberg Judgment.[52] Being part of customary international law, the Regulations form part of the Israeli legal system, which automatically adopts customary international law.[53] The HCJ has since applied the Hague Regulations in dozens of petitions relating to the West Bank.[54]

It follows that both Courts are in complete agreement as to the applicability of the Hague Regulations to that belligerent occupation.

ii The 1949 Fourth Geneva Convention

From 1967, Israel has taken the position that it does not recognize the *de jure* applicability of the Fourth Geneva Convention to the West Bank (because it has

48 M. Bothe, "Occupation, Belligerent", 3 *Encyclopedia of Public International Law* 763 (1997).

49 249 *U.N.T.S.* 240.

50 Dinstein, *supra* note 46, at 18-19.

51 H.C. 606/78, 33(2) *P.D.* 113, summary in 9 *Isr. Y.B. Hum. Rts.* 337 (1979).

52 Y. Dinstein, "The Judgment in the Pithat Rafiah Case", 3 *Tel Aviv Univ. L. Rev.* 934, 938-939 (Hebrew, 1973-74).

53 As ruled by the HCJ in C.A. 7092/94, Edelson Case, 51(1) *P.D.* 625, 640, by reliance on Dinstein, *supra* note 12.

54 *See* the treatise of D. Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (2002).

never recognized the rights of Jordan to any part of Palestine[55]). However, Israel has officially declared that it will act *de facto* in accordance with the humanitarian provisions of the Convention.[56] This position has been criticized by the UN, the ICRC, States and scholars.[57]

The ICJ joined this general line of opposition to the Israeli position by unequivocally stating:

> … the Fourth Geneva Convention is applicable in the Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories (para. 101).

The Court reasoned that both Israel and Jordan had ratified the Fourth Geneva Convention and are contracting Parties thereto and that, according to the first paragraph of Article 2, the Convention applies when two conditions are fulfilled, namely that an armed conflict exists (whether or not a state of war has been recognized), and that the conflict has arisen between two contracting parties. The ICJ noted that this interpretation reflected the drafters' intention to protect civilians who find themselves, in whatever way, in the hands of an occupying Power, regardless of the status of the occupied territories; that the Convention's *travaux préparatoires* confirm it; and that it was approved by the States parties to the Fourth Geneva Convention at their Conference on 15 July 1999, as well as by the ICRC, the UN, General Assembly and Security Council.

The HCJ stated in *Alfei Menashe* that the question of the Fourth Geneva Convention's applicability did not arise in *Beit Sourik* due to the State's consent to *de facto* application of the humanitarian provisions of the Convention. Responding to the ICJ's conclusion on this issue, the HCJ noted:

> We are aware that the Advisory Opinion of the International Court of Justice determined that the Fourth Geneva Convention applies in the Judea and Samaria Area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, since the Government of Israel accepts that the humanitarian aspects of the Fourth

55 *See* E. Benvenisti, *The International Law of Occupation* 108-109 (1993).

56 For this declaration, made by the Attorney-General in 1971, at a Symposium on Human Rights held at Tel Aviv University, *see* M. Shamgar, "The Observance of International Law in the Administered Territories", 1 *Isr. Y.B. Hum. Rts.* 262, 266 (1971).

57 Benvenisti, *supra* note 56, at 109-110. Prof. Dinstein asserts that this position "is based on dubious legal grounds, considering that the Fourth Convention does not make its applicability conditional on recognition of titles"; Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", 8 *Isr. Y.B. Hum. Rts*. 104, 107 (1978).

> Geneva Convention apply in the area, we are not of the opinion that we must take a stand on that issue in the petition before us.

Professor Dinstein examined the application of the Fourth Geneva Convention to the West Bank in 1998, formulating fourteen points.[58] Apart from those already mentioned (that the Convention is fully binding on Israel because it is a contracting party and, although denying its *de jure* applicability, Israel has decided to act *de facto* in accordance with its humanitarian provisions), Professor Dinstein adds that:

> (iv) Since every provision of the Convention is by definition humanitarian (the entire Convention forming part of what is usually called "humanitarian law"[59]), Israel is supposed to apply every section of the Convention.

In the other points, Professor Dinstein noted that, as a rule, the Israeli military government in the occupied territories observed the Convention strictly and rigorously; that because the Knesset has not incorporated the Convention into Israeli law it was impossible to rely on it in petitions to the Supreme Court; and that the Supreme Court has been willing – at all times – to test the legality of the acts and legislation of the military government in the occupied territories against customary international law.[60]

Despite the formal position of Israel on the *de jure* non-applicability of the Fourth Geneva Convention to the West Bank, and pursuant to its consent to the Convention's *de facto* application, the HCJ has routinely applied the Convention to a wide range of issues. These have included, inter alia, seizure of land, reunification of families, applicability of the local law, freedom of movement, administrative arrests, demolition of houses, and deportations. [61] It follows that both Courts share common ground in their position regarding the applicability of the Fourth Geneva Convention to the West Bank.

iii Application of Specific Provisions

Although both Courts agree that the Hague Regulations and the Fourth Geneva Convention apply to the West Bank, they diverge over application of specific provisions of these instruments.

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58 *Supra* note 20, at 38-39.

59 On the meaning of this phrase, *see* Y. Dinstein, "International Humanitarian Law", in *International Human Rights Law: Theory and Practice* 203, 203-206 (I. Cotler & F.P. Eliadis eds., 1992).

60 *Supra* note 20, at 39.

61 *See* Kretzmer, *supra* note 54.

While the HCJ relied on Article 23(g) of the Hague Regulations[62] as a legal basis for seizure of land for construction of the fence (as well as on Article 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, discussed below), the ICJ ruled that Article 23(g) is not pertinent because only Section III of the Hague Regulations (dealing with military authority over the territory of the hostile State) is currently applicable to the West Bank (and not Section II, which is applicable during hostilities).

In *Alfei Menashe,* the HCJ responded by making the following points:

a) The ICJ's approach does not detract from the HCJ's view regarding the military commander's authority to take possession of land on which to construct the fence, as this authority is further anchored in Articles 43 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.
b) Alternatively, there is a view (supported by Pictet[63] and by Schwarzenberger[64]) that the scope of application of Article 23(g) can be extended, by way of analogy, to cover belligerent occupation as well.
c) The situation in the territory under belligerent occupation is often fluid. Periods of tranquility and calm transform into dynamic periods of combat. When combat activities are taking place in an area under belligerent occupation, the rules applicable to belligerent occupation, as well as the rules applicable to combat activities apply, including Article 23(g).

Notwithstanding these remarks, the HCJ stated that it would discuss this issue in depth at a later opportunity.

Examining the legality of the fence in light of the Hague Regulations, especially Article 46, the ICJ concluded that "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention" (para.132). Article 46 provides that private property must be "respected" and cannot be "confiscated".[65]

Responding to the ICJ, in *Alfei Menashe* the HCJ stressed that the construction of the fence is not based on expropriation or confiscation of land, "as they are prohibited by Regulation 46". It also noted that construction of the fence does not involve transfer of ownership over the land upon which it is built. Construction occurs by taking temporary possession of land, followed by payment of com-

62 *Supra* note 7. Article 23 provides that it is especially forbidden:

> (g) To destroy or to seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; … .

63 ICRC, *Commentary, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 301 (J.S. Pictet ed., 1958).

64 G. Schwarzenberger, *International Law As Applied by International Courts and Tribunals: The Law of Armed Conflict* 314 (1968).

65 *Supra* note 7.

pensation for damage caused (para. 16). This characterization made Article 46 – invoked by the ICJ – irrelevant to the issue of construction of the fence.

As the HCJ stated in *Alfei Menashe*, "both Courts agreed that the legality of the fence shall be determined, *inter alia*, by Article 46 and 52 of the Hague Regulations and Article 53 of the Geneva Convention" (para. 57).

Article 52 authorizes, within certain limits, requisitions in kind and services "for the needs of the army of occupation",[66] while Article 53 prohibits destruction of property, individual or real, except where such destruction is rendered absolutely necessary by military operations.[67]

As already mentioned, the ICJ concluded that the construction of the wall led to the destruction or requisition of property contrary to Article 52 and Article 53. It added that the requisition and destruction were illegal because they were not justified by military needs and not "absolutely necessary by military operations". However, by referring to Article 52 in the context of land requisition, the ICJ actually agreed with the HCJ that it applies to seizure of immovable property, despite the fact that Article 52 does not mention immovables. The HCJ relied on Article 52 by endorsing Schwarzenberger's interpretation that "the emphasis in seizure and requisition is on movables but, in the case of requisition, the wording of Article 52 is sufficiently wide to include immovables".[68]

Contrary to the ICJ, the HCJ relied in *Beit Sourik* on Hague Article 52 and Geneva Article 53 as legal bases for lawful seizure of private land for construction of the fence, after qualifying it as falling within "the needs of the army". The HCJ ruled that, based on Article 52, the military commander is authorized to take possession of land for military purposes, provided compensation is paid for the use of the land. It recalled that Article 52 of the Hague Regulations and Article 53 of the Geneva Convention provided a legal basis for the legality of taking possession of land and structures for various military needs: constructing military facilities, paving of detour roads, building fences around outposts, temporarily housing soldiers, ensuring of unimpaired traffic on the roads of the area, constructing civilian administration offices, or seizing buildings for the deployment of military force. The HCJ stressed that the military commander must also consider the needs of the local population. However, if this condition is met, he may take possession of land in areas under his control. The HCJ held that the

66 *Supra* note 7. The first paragraph of Article 52 reads as follows:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.

67 *Supra* note 8. Article 53 provides as follows:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

68 Schwarzenberger, *supra* note 64, at 253, 269.

separation fence falls within this legal framework because military necessity justified replacing military operations with physically blocking terrorist infiltration into Israeli population centers (para. 32).

It follows that both Courts found Article 52 of the Hague Regulations and Article 53 of the Geneva Convention relevant to the question of the fence's legality. But while the HCJ ruled that its construction was justified by the army's needs, the ICJ concluded that the requisition and destruction of the property involved could not be justified by military exigencies.

Examining the legality of the fence in light of the Fourth Geneva Convention, the ICJ distinguished between provisions applying during military operations leading to occupation and those that remained applicable throughout the entire period of occupation. Relying on Article 6 of the Convention[69] (providing the "one-year rule" according to which the application of the Convention shall cease one year after the general close of military operations), the ICJ ruled that:

> Since the military operations *leading to the occupation of the West Bank in 1967* ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3 remain applicable in that occupied territory. (e.a.)

The decision to limit the application of the Fourth Geneva Convention to the obligations enumerated in Article 6 by restricting the condition of "general close of military operations" to military operations "leading to the occupation of the West Bank in 1967" has been widely criticized as "erroneous in terms of both law and its underlying policy".[70] It has even been called "absurd",[71] for it results in a partial application of the Convention (thus reducing the responsibilities of the occupying State) despite the military activities that are taking place. The commonly agreed correct interpretation of Article 6 is that "even if military opera-

69 *Supra* note 8. Article 6(3) of the Fourth Geneva Convention provides as follows:

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, *to the extent that such Power exercises the functions of government in such territory*, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143 (e.a.).

70 O. Ben-Naftali, "*A la Recherche du Temps Perdu*': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion", 38 *Isr. L. Rev.* 211, 212 *et seq.* (2005).

71 A. Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion", 99 *A.J.I.L.* 102, 107 (2005).

tions are once deemed closed, they may reopen at a later date – thus triggering the renewed operation of Geneva Convention IV *in toto*".[72]

Since the HCJ did not invoke the "one-year rule" of Article 6 in *Beit Sourik* or in any case since 1970,[73] it apparently takes the position that in view of the on-going military activities on the West Bank there is no room for curtailing Israel's responsibilities as an occupying State under the Convention. However, attention should also be paid to the condition in Article 6 which provides that the Occupying Power shall be bound, for the duration of the occupation, by the Articles enumerated therein only "to the extent that such Power exercises the functions of government in such territory". Therefore, insofar as Israel transferred the functions of government in certain areas to the Palestinian Authority under the 1995 Interim Agreement, Israel is no longer bound by the remaining Articles of the Geneva Convention listed in Article 6(3).[74]

D Application of Human Rights Conventions

In *Alfei Menashe* the HCJ stated as follows:

> The International Court of Justice decided that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. This question did not arise in the Beit Sourik Case. For the purposes of this case, we assume that these conventions indeed apply.

The result is that both Courts agreed that human rights conventions are applicable to the West Bank (in addition to the Hague Regulations and the Fourth Geneva Convention).

i The ICJ

The ICJ held that the human rights conventions to which Israel is a party – namely, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1989 Convention on the Rights of the Child (ICROC)[75] – are applicable to the West Bank (paras. 111-113). However, the ICJ's reasoning with regard to application of these instruments is problematic.

As for the ICCPR, the ICJ held that it is applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", basing its

72 Dinstein, *supra* note 20, at 44.

73 D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", 99 *A.J.I.L.* 88, 91, n. 23 (2005).

74 Dinstein, *supra* note 20, at 45.

75 28 *I.L.M.* 1457 (1989).

conclusion on Article 2(1) of the ICCPR, according to which each State Party undertakes to respect and to ensure to all individuals "within its territory and subject to its jurisdiction" the rights recognized in the Covenant. Although the ordinary meaning of Article 2(1) indicates, *prima facie*, that a State Party is required to ensure the rights of the Covenant only to individuals who are both within its territory and subject to its jurisdiction, the ICJ relied on the interpretation of this Article adopted by the Human Rights Committee in cases involving arrests carried out by Uruguayan agents in Brazil or Argentina[76] and confiscation of a passport by an Uruguayan consulate in Germany.[77] These cases held that the Covenant is applicable where the State exercises its jurisdiction on foreign territory. The ICJ also held that the *travaux préparatoires* confirm the Committee's interpretation, which actually creates a "disjunctive conjunction" between the two conditions of Article 2(1).

This reasoning may easily be contradicted.[78] The cases cited by the ICJ involved exceptional circumstances where Uruguayan State agents actually abducted Uruguayan citizens living abroad to bring them back to Uruguay and confiscated a passport from a citizen. Since the Committee's decisions were intended to ensure the enjoyment of the Covenant's rights by a State's citizens abroad, they are thus irrelevant to belligerent occupation.

The ICCPR's *travaux préparatoires* actually conflict with the ICJ's position. The draft of Article 2 as formulated in 1950 included only the requirement of being "within its jurisdiction" for enjoyment of Covenant rights. The addition of the condition "within its territory" was made upon the request of the United States to preclude an obligation to ensure Covenant rights to citizens of countries under United States occupation. Moreover, in the decisions rendered by the Human Rights Committee, Committee member Tomuschat expressly cited occupation of foreign territory as a situation which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory.[79]

As for the ICESCR, the ICJ held that in the exercise of the powers of an occupying State, Israel is bound by its provisions and "under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities" (para. 112).

Given that the ICESCR contains no provision on the scope of its application, this issue must be resolved by recourse to customary law as reflected in Article 29 of the Vienna Convention on the Law of Treaties: "unless a different

76 Case No. 52/79, López Burgos v. Uruguay; Case No. 56/79, Celiberti de Casariego v. Uruguay.

77 Case No. 106/81, Montero v. Uruguay.

78 *See* M.J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *A.J.I.L.* 119, 122-127 (2005).

79 *Ibid*., 124-125.

intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". However, the ICJ concluded that the Covenant applies extraterritorially to the West Bank by relying on Article 14, which provides for transitional measures in cases where a State, when "becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge". Yet, it follows from the *travaux préparatoires* that this Article was intended to ensure application of the Covenant to dependent territories over which the contracting States exercised sovereignty[80] – and obviously not to areas under military occupation, over which the occupying State does not possess even one "atom of sovereignty".[81]

In its conclusion, on application of the ICROC to the Occupied Palestinian Territory, the ICJ relied only on Article 2, which obligates States Parties to respect and ensure the rights set forth in the Convention to each child "within their jurisdiction". However, Article 38 of the ICROC[82] obligates States to ensure the application of rules of international humanitarian law which are relevant to the child "in accordance with their obligations under international humanitarian law to protect the civilian population in armed conflict." Thus, the ICROC obviously applies to the civilian population in the territory of the State Party.[83]

ii The HCJ

As mentioned, in *Alfei Menashe* the HCJ agreed with the ICJ on the applicability of human rights conventions to the West Bank (in addition to the Hague Regulations and the Fourth Geneva Convention). Later, the HCJ held that it did not need to take a position on the issue of applicability of these conventions in the Area (nor on the issue of the relationship between international humanitarian and human rights law) to respond to the petition before it. All it stated on this issue was that the military commander's authority to "ensure the public order and safety" must be exercised taking into account considerations of State security, security of the army, and the personal security of those who are present in the Area on the one hand, and the human rights of the local Arab population, on the other (para. 27).

It follows that while the ICJ concluded that human rights conventions to which Israel is a party are applicable to the West Bank, the HCJ is prepared to apply them only as part of the law of belligerent occupation, not as an independent body of international law. Such an approach makes the application of the

80 *Ibid.,* 128.

81 As stated by Oppenheim, quoted in Dinstein, *supra* note 20, at 106.

82 On Article 38, *see* J. Frowein, "The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation", 28 *Isr. Y.B. Hum. Rts*. 1, 7, n. 13 (1998).

83 Dennis, *supra* note 78, at 129.

human rights recognized therein subject to the restriction of military necessity, to which most humanitarian norms are subject.[84] However, in the 2000 *Ktziot*[85] and *Mar'ab cases*[86] the HCJ examined the lawfulness of the conditions and periods of administrative detention of Palestinians during Operation Defensive Shield in light of Articles 10, 9 and 14 of the ICCPR, in addition to international humanitarian law.

iii Comments

It seems that the ICJ's conclusion on the applicability of the Covenants and ICROC to Israeli conduct in the West Bank is primarily based on the unusual circumstances of Israel's prolonged occupation, as the ICJ itself observed that "the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power" (para. 112). Indeed, application of human rights conventions to the territories occupied by Israel had previously been suggested by Benvenisti,[87] Meron[88] and Roberts.[89] However, these assertions were raised before the Oslo process, during which Israel transferred most of its powers and responsibilities to the Palestinian Authority.[90] In all matters which came under the control of the Palestinian Authority, it is the Authority which bears responsibility for observance of international human rights, although obviously only those recognized under customary international law.[91]

E Violation of Specific Rights of the Palestinians

The HCJ noted in *Alfei Menashe* that both Courts found that construction of the fence resulted in the infringement of a number of rights of the Palestinian inhabitants (para. 57). However, while the ICJ invoked specific rights under international humanitarian law and the human rights conventions, the HCJ did not specify which rights had been violated.

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84 Y. Dinstein, "Military Necessity", 3 *Encyclopedia of Public International Law* 395 (R. Bernhardt ed., 1997).

85 H.C. 5591/02, 57(1) *P.D.* 403, summary in 34 *Isr. Y.B. Hum. Rts.* 300 (2004).

86 H.C. 3239/02, 57(2) *P.D.* 349, summary *ibid.*, 307.

87 E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories", 26 *Isr. L. Rev.* 24, 35 (1992).

88 T. Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition", 9 *Isr. Y.B. Hum. Rts.* 106, 113 (1979).

89 Roberts, *supra* note 15, at 72–73.

90 *See* Dinstein, *supra* note 20, at 45 *et seq.*

91 F. Domb, "The Gaza and Jericho Autonomy and Human Rights", 25 *Isr. Y.B. Hum. Rts.* 21, 29 *et seq.* (1995).

i The ICJ

As discussed, the ICJ concluded that the fence's construction violated several specific provisions of international humanitarian law (mainly Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention).

Based on its finding regarding the applicability of human rights conventions to the West Bank, the ICJ specified the rights that had been violated by construction of the fence (in paras. 128-131, and 134):

1) ICCPR[92] – the right to privacy (Article 17(1)) and the right to freedom of movement (Article 12(1)).
2) ICESCR[93] – the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Article 11); the right to health (Article 12); and the right to education (Articles 13 and 14).
3) ICROC[94] – the provisions of Articles 16, 24, 27 and 28, corresponding to the aforementioned provisions in the ICESCR.

Following the methodology adopted with respect to international humanitarian law, the ICJ examined whether human rights violatons may be justified by permissible derogations or by other provisions qualifying or restricting the rights established in the human rights conventions. It answered this question in the negative. The Court concluded that:

> The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirement of national security or public order (para. 137).

Consequently, the ICJ held that construction of the fence breached various obligations under the applicable international humanitarian law and human rights instruments.

ii The HCJ

As mentioned, both in *Beit Sourik* and in *Alfei Menashe,* the HCJ ordered the alteration of the route of the fence on the grounds that it caused extensive injury

92 *Supra* note 31.
93 *Supra* note 30.
94 *Supra* note 75.

to the local Palestinian inhabitants disproportionate to the security advantage gained by Israel.

In *Beit Sourik,* the HCJ described the various forms of harm inflicted on Palestinian residents which led it to cancel land seizure orders relating to forty kilometers of the fence's route. It did so within the framework of its specific examination of each land seizure order relating to a particular segment of the fence. Referring primarily to the separation of local inhabitants from their agricultural lands and to the difficulties of access to land through special gates, the HCJ ruled that the fence's route severely impaired their rights under international humanitarian law.

In *Alfei Menashe*, the HCJ examined at length complaints regarding alleged injury caused by the fence to the daily life of the residents of the villages in the enclave in matters such as education, health, employment, movement and social ties. Concluding that the fence severely injured the entire fabric of life, the Court ordered the State to find an alternate route which could ensure security while removing the enclave villages from the "Israeli" side of the fence.

As already mentioned, in both cases the HCJ examined the injuries caused by the fence to local inhabitants in view of the principle of proportionality (discussed below), which requires a proper balance between security needs and humanitarian considerations.

II Specific Issues Discussed by Each Court

A Legality of Israeli Settlements

i The ICJ

Although the issue of Israeli settlements on the West Bank was not directly raised in the question submitted to the ICJ for an Advisory Opinion, the Court nevertheless stated its position in the context of the PLO's plea against Israel's *de facto* annexation of territories located west of the fence.[95]

The ICJ observed that the route of the fence included "the great majority of the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem)" (para. 119). As regards these settlements, the Court noted that Article 49 (6) of the Fourth Geneva Convention provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". The ICJ interpreted this provision as prohibiting not only

95 Prof. Lapidoth opines that as the ICJ ruled that all the segments of the fence situated on the territories occupied by Israel in 1967 are illegal, without making a distinction between those that protect Israel proper and those that protect the settlements, "the discussion of the legality of the settlements was not necessary, and thus is only an *obiter dictum*". *See* R. Lapidoth, "The Advisory Opinion and the Jewish Settlements", 38 *Isr. L. Rev*. 292, 293 (2005).

deportations or forced transfers of populations such as those carried out during the Second World War, but any measures taken by an occupying Power to organize or encourage transfers of parts of its own population into the occupied territory.[96] It then concluded that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law". The ICJ also noted that the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, and that the departure of Palestinians from the western areas of the fence, coupled with the establishment of Israeli settlements, tended to alter the demographic composition of the West Bank (paras. 122 and 133). The conclusion related to demographic changes is regarded by scholars as the main reason for the Court's opinion on the illegality of Israeli settlements.[97]

With this conclusion, the ICJ joined the position of certain international bodies, States parties to the 1949 Geneva Conventions and many academic writers on the illegality of Israeli settlements.[98]

ii Response of the HCJ

In *Alfei Menashe,* the HCJ responded to the ICJ's ruling on the illegality of Israeli settlements and the construction of the fence (insofar as they were aimed at protection of the settlers), by making the following points:

a) The military commander's authority "to ensure public order and safety" pursuant to Article 43 of the Hague Regulations is directed towards the protection of the life and safety of all persons in the area under belligerent occupation.
b) Therefore, the military commander is authorized to construct a separation fence in the area for the purpose of defending the life and safety of every person "created in God's image" (para. 19).
c) Even if a person's presence in the area is illegal, he is not outlawed. Therefore, it is unnecessary to examine whether Israeli settlements are legal or illegal under international law.
d) Even if the military commander acted contrary to the law of belligerent occupation when he agreed to the establishment of the settlements (an issue which is not before the Court and on which it expresses no opinion), the commander is not released from his duty under the law of belligerent occupation to preserve the life, safety, and dignity of every Israeli settler.

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96 For a criticism of this interpretation, as contrary to the whole spirit of Article 49, dealing with deportations and transfer within the meaning of "non-voluntary movement of people", *see* Lapidoth, *ibid*., 294-296.

97 *See* Lapidoth, *ibid*., 295; *see also* Kretzmer, *supra* note 73, at 93.

98 *Ibid*., 89.

e) Israelis living in the area are Israeli citizens, and the State of Israel has a duty to protect their lives, safety, and well being. The constitutional rights which the Israeli legal system grants every person in Israel are also enjoyed by Israelis living in a territory under Israeli belligerent occupation. This is especially true when many of those living in the area do so with the encouragement and blessing of the Israeli government.

The HCJ further observed that according to the 1995 Interim Agreement the question of the Israeli settlements in the Area will be discussed in final status negotiations and that, in the meantime, Israel bears responsibility for the overall security of Israelis and of the settlements.[99] It follows from this remark that the HCJ considers it improper for the ICJ to have ruled on the legality of the Israeli settlements.[100]

B Self-Defense According to Article 51 of the UN Charter

i The ICJ

After concluding that the wall's construction violated various international legal obligations, the ICJ referred to Israel's contention (asserted by Israel's Permanent Representative to the United Nations), that it was a measure taken in the exercise of self-defense as enshrined in Article 51 of the Charter. He had also said that because Security Council Resolutions 1368 (2001) and 1373 (2001)[101] recognized the right of States to use force in self-defense against terrorist attacks, this surely implied recognition of the right to use non-forcible measures in self-defense (para. 138).

In response, the ICJ cited Article 51,[102] and rejected the first contention:

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99 *Supra* note 23, Article XII (1).

100 The HCJ actually endorsed Professor Lapidoth's view, arguing that the issue of settlements was irrelevant for the ICJ 's Advisory Opinion because according to the 1995 Interim Agreement the problem of the settlements should be solved during negotiations on the permanent status; s*ee* Lapidoth, *supra* note 95, at 293-294.

101 UN S.C. Res. 1368 (2001), 40 *I.L.M.* 1277; UN S.C. Res. 1373 (2001), *ibid.*, 1278. Both Resolutions had been adopted following the September 11 terrorist attack on the US, the first on Sept. 12 ((Res. 1368), and the second on Sept. 28 (Res. 1373). Res. 1368 recognized "the inherent right of individual or collective self-defence in accordance with the Charter"; and Res. 1373 (providing for a series of steps to be taken by States with a view to combating international terrorism) affirmed this right in its Preamble. On both Resolutions, *see* M. Schmitt, "Counter-Terrorism and the Use of Force in International Law", 32 *Isr. Y.B. Hum. Rts*. 53, 60-61 (2002).

102 Article 51 reads in its first part as follows:

> 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

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State (para. 139).

The ICJ also rejected the second contention, noting that "Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory" (para. 139). The ICJ concluded that because the situation differs from that contemplated by Security Council Resolutions 1368 (2001) and 1373 (2001), Israel could not invoke those resolutions in support of its claim to be exercising self-defense. The ICJ opined that "Article 51 of the Charter has no relevance in this case" (para. 139).

ii Response of the HCJ

The HCJ did not refer to Article 51 of the Charter in *Beit Sourik,* for it ruled on the legality of the fence and its route in light of the military commander's authority under the law of belligerent occupation and the principle of proportionality (see below). Yet, in *Alfei Menashe,* the Court responded to the ICJ's ruling on Article 51 by stating:

> The approach of the International Court of Justice [on the self-defense issue] is hard for us. It is not required by the language of Article 51 of the Charter of the United Nations. It is doubtful whether it fits the needs of democracy in its struggle against terrorism. From the point of view of a State's right to self-defense, what difference does it make if a terrorist attack against it comes from another country or from a territory which is under belligerent occupation? And what will be the position of international terrorism which penetrates into a territory under belligerent occupation, while being launched from that territory by international terrorism's local agents?

The HCJ did not express its own stance on the self-defense issue. It left it "for a future opportunity" on the grounds that Article 43 of the Hague Regulations already authorizes the military commander to take all necessary action to preserve security and that "acts which self defense permits are surely included within such action".

United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

iii Comments on the ICJ's Conclusion Regarding Article 51

The ICJ's conclusion on the irrelevance of Article 51 and its reasoning appears to be controversial. It has been criticized by Judge Higgins[103] and Judge Kooijmans[104] who were in the majority, and by Judge Buergenthal,[105] who was not. All expressed concern that the Court's requirement that the "armed attack" must originate from another State is absent in the wording of Article 51. The issue is also controversial in legal literature, with some scholars criticizing and others favoring it. Among the critics are Wedgwood,[106] Murphy,[107] and Pomerance,[108] while Scobbie[109] and Imseis[110] supported it.

Addressing the ICJ's conclusion that Article 51 is irrelevant, Wedgwood noted that foreign State funding and sponsorship of Palestinian terrorist organizations has been widely reported (especially Iranian support for Hamas and Saddam Hussein's policy of awarding compensation to the families of suicide bombers); that "the Charter's language does not link the right to self-defense to the particular legal personality of the attacker" (because in a different age one might not have imagined that non-state actors could mimic the force available to nation-States); and that "the originating locus of the attack [launched from a territory under Israeli control] does not diminish a right of self-defense". Wedgwood concluded that "it would indeed be peculiar if States were legally unable to protect their civilians against repeated acts of terrorism, when they can use force against conventional armies attacking conventional targets".[111]

Murphy contended that the ICJ's position on Article 51 "conflicts with the language of the UN Charter, its *travaux preparatoires*, the practice of States and international organizations, and common sense". He pointed out that the ICJ itself recognized in the *Nicaragua Case* that Article 51 preserved an inherent right of self-defense which existed in customary international law prior to 1945 (as expressed in the 1837 *Caroline* incident); that prior to the adoption of the UN Charter governments invoked the right of self-defense against the acts of indi-

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103 Separate Opinion of Judge Higgins, *supra* note 3.

104 Separate Opinion of Judge Kooijmans, *supra* note 3.

105 Declaration of Judge Buergenthal, *supra* note 3, para. 6.

106 R. Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense", 99 *A.J.I.L.* 52 (2005).

107 S.D. Murphy, "Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?", 99 *A.J.I.L.* 62 (2005).

108 M. Pomerance, "The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial", 99 *A.J.I.L.* 26 (2005).

109 I. Scobbie, "Words My Mother Never Taught Me – 'In Defense of the International Court'", 99 *A.J.I.L.* 76, 77 (2005).

110 Imseis, *supra* note 71.

111 Wedgwood, *supra* note 106, at 58-59.

viduals, such as seizure of vessels engaged in smuggling; and that State practice supported the permissibility of responding in self-defense to an attack by a non-State actor, as demonstrated in the context of the September 11 terrorist attacks, which "originated" in territory under US control.[112]

On the other hand, Scobbie supported the ICJ's approach to Article 51 on the grounds that:

> A state's right to take measures to protect its citizens from terrorist attacks is neither legally equivalent nor identical to the right to resort to self-defense under Article 51 of the UN Charter.[113]

Scobbie's approach is the right one. While a State obviously has the right and duty to protect its citizens from terrorist attacks and an occupying State has the right and duty to maintain public order within occupied territory (as argued by Wedgwood), the legal source of these rights and duties stems from the laws of belligerent occupation, not from Article 51. The ICJ's position restricting Article 51 to inter-State use of force appears to follow the position taken by Professor Dinstein, who reads Article 51 in conjunction with Article 2(4). According to him:

> The provision of Article 51 has to be read in conjunction with Article 2(4) of the Charter. … Article 2(4) promulgates the general obligation to refrain from the use of inter-State force. Article 51 introduces an exception to this norm by allowing Member States to employ force in self-defence in the event of an armed attack.[114]

Therefore, Article 51 was as irrelevant to the issue as Article 2(4) of the Charter, which was invoked by the ICJ in the context of the principle of inadmissibility of acquisition of territory by war as a bar to annexation of conquered territory (see above). As soon as the ICJ (like the HCJ) held that the status of the West Bank was that of occupied territory, it engaged in the *jus in bello* relative to occupied territory and had to reject any argument based on the *jus ad bellum* of Article 51. As we shall see, the law of belligerent occupation does contain a legal basis for legitimate self-defense measures by an occupying State.

C Legality of the Fence in Light of the Laws of Belligerent Occupation

In the context of annexation, the HCJ ruled on the legality of construction of segments of the fence and their route in *Beit Sourik* and *Alfei Menashe* according

112 Murphy, *supra* note 107, at 62-70.

113 Scobbie, *supra* note 109, at 77.

114 Dinstein, *supra* note 35, at 177.

to the laws of belligerent occupation, coupled with the principle of proportionality.

In *Beit Sourik,* it stressed that the military commander is prohibited from constructing a separation fence for political reasons or out of a desire to "annex" territories. The HCJ noted that the belligerent occupation of the Area had gone on for many years and that this fact affected the scope of the military commander's authority. Nevertheless, the passage of time did not extend the military commander's authority so as to allow him to take into account factors that are beyond the proper administration of the Area.

Subsequently, the HCJ ruled that a military commander is authorized by the laws of belligerent occupation – namely, Articles 23(g) and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention – to take possession of land if necessary for the needs of the army. Of course, in execution of this authority, the military commander must consider the needs of the local population. But assuming that this condition is met, there is no doubt that the military commander may take possession of land in areas under his control.

The HCJ applied this legal framework to the separation fence, ruling that to the extent its construction was a military necessity, it was permitted by international law. Given that the fence is intended to replace combat operations by physically blocking terrorist infiltration into Israeli population centers, it is militarily necessary and, therefore, within the authority of the military commander (para. 32).

In *Alfei Menashe* the HCJ expressly stressed that a military commander possesses the authority under the law of belligerent occupation to construct a separation fence for security and military reasons, including:

a) Protection of the army in the territory under belligerent occupation;
b) Defense of the State of Israel itself;
c) Protection of the lives and safety of Israelis living in Israeli settlements in the Judea and Samaria Area (as discussed above);
d) Protection of every person present in the territory under belligerent occupation.

The HCJ rationale is based on Article 64(b) of the Fourth Geneva Convention, which deals with the penal legislation of an occupied territory and provides that the occupying State may subject the population to provisions which are essential to "ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".[115] All the other reasons are based on the military commander's general authority under Article 43 of the Hague

115 *See* commentary on Article 64 in ICRC, *Commentary, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 301 (J.S. Pictet ed., 1958); *see also* Dinstein, *supra* note 20, at 114; R.T. Yingling & R.W. Ginnane, "The Geneva

Regulations "to ensure public order and safety".[116] Commenting on this authority,[117] the HCJ opined that it is not restricted to situations of combat and applies as long as the belligerent occupation continues. Moreover, it applies not only to "protected persons" within the meaning of the Fourth Geneva Convention, but rather to all residents, without distinction based on identity: Jews, Arabs, or foreigners.[118] The HCJ stressed that the military commander's duty to protect their lives and their human rights derives from the very fact of their presence in an area under his control.

However, the military commander is not free to perform any activity on military-security grounds, as his authority is limited by the duty to take into account humanitarian considerations relating to the welfare of the local population. Therefore, even if the construction of the fence is justified by security reasons, its specific route must nevertheless consider the needs of the local population. In the words of the HCJ:

> The law of belligerent occupation recognizes the authority of the military commander to maintain security in the Area and to protect the security of his country and her citizens. However … this authority must be properly balanced against the rights, needs, and interests of the local population (para. 34).

The HCJ endorsed Professor Dinstein's opinion that "the laws of war usually create a delicate balance between two magnetic poles: military necessity on the one hand, and humanitarian considerations on the other".[119] The HCJ also relied on the humanitarian provisions embodied in Article 46 of the Hague

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Conventions of 1949", 46 *A.J.I.L.* 393, 422 (1952), suggesting that Article 64 is an elaboration of Article 43 of the Hague Regulations.

116 *Supra* note 7. Article 43 reads as follows:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

117 Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations", 25 *Isr. Y.B. Hum. Rts.* 1, 12-16 (1995).

118 The HCJ relies in this matter on its case-law: H.C. 72/86, Tzalum Case, 41(1) *P.D.* 528, 532, summary in 19 *Isr. Y.B. Hum. Rts.* 371 (1989); H.C. 2717/96, Wafa Case, 50(2) *P.D.* 848, 856, summary in 30 *Isr. Y.B. Hum. Rts.* 330 (2000); H.C. 4219/02, Gusin Case, 56(4) *P.D.* 608, 611, summary in 32 *Isr. Y.B. Hum. Rts.* 379 (2002).

119 Y. Dinstein, "Legislative Authority in the Administered Territories", 2 *Tel Aviv Univ. L. Rev.* 505, 509 (Hebrew, 1973).

Regulations[120] and in Article 27 of the Fourth Geneva Convention,[121] concluding that they impose a double obligation upon the military commander: a "negative" obligation to refrain from action that injures the local inhabitants and a "positive" obligation to take action in order to ensure that the local inhabitants shall not be injured. In addition to these fundamental provisions, additional provisions deal with specifics, such as the seizure of land (Article 23(g) and 52 of the Hague Regulations; Article 53 of the Fourth Geneva Convention). These norms create a single tapestry that recognizes both human rights and the needs of the local population, as well as security needs from the perspective of the military commander. As these norms may often clash, a balance must be fashioned between them. The proper balance is based on the principle of proportionality.

D The Principle of Proportionality

The HCJ adopts proportionality as a balancing principle between the needs of the local population and the security needs of the occupying State because it is "a basic principle in international law in general and in the law of belligerent occupation in particular," and because of its role as a central standard in Israeli administrative law, which applies to the acts of the Israeli military commander in the West Bank.

The HCJ observes that the principle of proportionality has often been applied by the Court as a standard restricting the power of the military commander in many matters, including: assignment of a place of residence; surrounding towns and posting checkpoints on access roads in order to prevent terrorist acts; injury to the property of residents due to combat activities of the IDF; declaration of an area as a "closed military area"; the means used to protect worshippers and their access to holy places; the demolition of houses for operational needs and for deterrence purposes; the living conditions of detainees in the Area; arrests for investigation and denial of meeting a lawyer; the siege of those hiding in holy places, and the regulation of the recording and identification of residents of the Area.

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120 *Supra* note 7. Article 46 provides as follows:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

121 *Supra* note 8. Article 27 provides that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof …. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

i The Meaning of Proportionality and its Sub-Tests

According to the principle of proportionality, the decision of an administrative body is legal only if the means used to achieve it are in proper proportion to the objective. The specific content of the general principle of proportionality is defined by three sub-tests:[122]

1) The "suitable means" (or "rational means") test provides that the means must be related to the objective, i.e., the means used by an administrative body must rationally lead to the realization of the objective.
2) The "least injurious means" test requires that the means used by an administrative body be calibrated so as to inflict the least possible injury, i.e., from among the means that may be used to achieve an objective, the least injurious must be employed.
3) The "proportionate means" test (or proportionality "in the strict sense") requires that the damage caused to an individual by the means used in order to achieve an objective must be in proper proportion to the benefit gained by that means. This test is commonly applied in an "absolute manner", whereby the benefit of an administrative act is directly compared to the damage that results from it. However, it is also possible to apply the test in a "relative manner", meaning that an administrative act is tested vis-à-vis an alternative act, whose benefit will be somewhat smaller. Thus, the original administrative act will be considered disproportionate (in the "strict sense") if a certain reduction in the benefit gained by choosing the alternative ensures a substantial reduction in the injury caused.

The HCJ ruled that the means used by an administrative authority are proportionate only if the three subtests are cumulatively satisfied.

ii Application of the Proportionality Tests to the Route of the Fence

The HCJ ruled in *Beit Sourik* and *Alfei Menashe* that the principle of proportionality also applies to the exercise of authority by a military commander in an area under belligerent occupation and, therefore, applies to the examination of the legality of the separation fence.

Following the conclusion that the fence is intended to realize a security objective which the military commander is authorized to achieve, the question arises whether the fence's route is proportionate. The HCJ opined in both cases

122 For comments on these sub-tests, *see* M. Cohen-Eliya, "The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence", 38 *Isr. L. Rev.* 262, 276-289 (2005).

that proportionality of the fence must be assessed in light of three questions, which reflect the three sub-tests of proportionality:

1) Does a rational connection exist between the route of the fence and the goal of the construction of the separation fence?
2) From among the various routes which would achieve the objective of the separation fence, is the chosen means the least injurious one?
3) Does the fence's route injure the local inhabitants to the extent that there is no proper proportion between the injury and the security benefit derived from the fence?

According to the "relative" application of the test, the fence will be found disproportionate if an alternate route (ensuring a smaller advantage in terms of security than the route chosen by the respondent) is proposed, provided that the alternate route causes significantly less damage than the original one.

Applying these sub-tests, the HCJ disqualified forty kilometers of various segments of the fence examined in *Beit Sourik* because they did not meet the third "strict" proportionality test. In *Alfei Menashe,* the route of the fence creating the enclave complied with the first proportionality test, but failed the second because the objective of securing Alfei Menashe could be achieved by an alternate route that would pass closer to the settlement and leave the Palestinian villages outside.

III Summary and Conclusion

The commonalities, differences and specifics involved in the decisions regarding the separation fence may be summarized as follows:

1) Both Courts held that the legal status of the West Bank is that of belligerent occupation. However, while the ICJ included East Jerusalem in this status, the HCJ did not.
2) Both Courts held that an occupying State is not permitted to forcibly annex an occupied territory, but they based this conclusion on different grounds.
3) Both Courts ruled that the 1907 Hague Regulations form part of customary international law and are therefore pertinent in the West Bank.
4) Both Courts held that the 1949 Fourth Geneva Convention is pertinent to the West Bank. However, while the ICJ ruled on its *de jure* application, the HCJ applied it *de facto*, following Israel's consent to such application.
5) While the HCJ relied on Article 23(g) of the Hague Regulations, the ICJ held that it is applicable only during hostilities, and thus not pertinent to the West Bank.
6) While the ICJ ruled that the construction of the fence led to confiscation of property contrary to Article 46 of the Hague Regulations, the HCJ replied that the property was only temporarily requisitioned and was followed by payment of compensation.

7) Both Courts invoked Article 53 of the Fourth Geneva Convention as relevant to destruction or requisition of property. However, while the ICJ concluded that such acts were not justified by military exigencies, the HCJ ruled that they had been justified by military necessity.
8) While the ICJ ruled that the human rights conventions to which Israel is a party are applicable to the West Bank, the HCJ agreed to their application to the fence issue as part of the applicable law of belligerent occupation.
9) Both Courts concluded that construction of the fence infringed various rights of the Palestinian inhabitants. However, while the ICJ specified the rights involved under international humanitarian and human rights law, the HCJ concluded that the fence injured the Palestinian inhabitants to a degree that was disproportionate to its security objective.
10) While the ICJ stated that Israeli settlements on the West Bank were illegal, the HCJ did not express any position on the issue because it regarded the question as irrelevant to the legality of the fence and its route.
11) While the ICJ discussed and rejected as irrelevant Israel's plea of self-defense under Article 51 of the UN Charter, the HCJ did not discuss it because it was not raised in the petitions brought before the Court.
12) While the HCJ examined the fence's legality and route in light of the scope of a military commander's authority in an area under belligerent occupation and by application of the principle of proportionality, this approach was not shared by the ICJ.

In conclusion, this article indicates an undisputable point – that the ICJ's Advisory Opinion on the separation fence is controversial. It is therefore doubtful whether it will be widely accepted as a correct statement, application and interpretation of the relevant international law.

Chapter 20

"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality

Wolff Heintschel von Heinegg

Introduction

During the course of Operation Iraqi Freedom (OIF) United States forces used their bases and installations on German territory with the consent of the Government of the Federal Republic of Germany. Members of US armed forces, weapons and other military equipment, as well as supplies, were transported to Iraq via German territory. Moreover, the German Government consented to the use of German airspace by US forces and German armed forces were ordered to guard US military installations in Germany. Lastly, contingents of the German Navy deployed to the Mediterranean (Operation Active Endeavour) and to the sea off the east African coastline (Operation Enduring Freedom) continued to escort US vessels transporting troops and military equipment to the theatre of war.

The German Government tirelessly emphasized that it was merely contributing to "securing the Alliance", but that it was not, and would never, contribute to the US war-fighting effort.[1] While maintaining that Germany was not a party to the conflict, the Government was anxious to avoid any reference to neutrality.

The ensuing discussion in Germany focused on the alleged illegality of the attack on Iraq and on whether German conduct could be characterized as assisting an internationally wrongful act.[2] In a recent judgment, however, the Federal Administrative Tribunal also examined the Government's position based on the

1 See the statement by former German Foreign Minister Fischer in: Frankfurter Rundschau of December 13, 2002, at p. 2. On March 22, 2003, the Federal Government declared: "Should Turkey become a party to the conflict a new situation would exist that would, according to the position we have taken for months, result in the removal of German officers from NATO's AWACS aircraft", see http://www.auswaertiges-amt.de/www/de/infoservice/presse/presse_archiv?archiv_id=4246 (last visited on December 15, 2005).

2 See, *inter alia*, *M. Bothe*, Der Irakkrieg und das völkerrechtliche Gewaltverbot, in: 41 Archiv des Völkerrechts 255-271 (2003).

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law of neutrality.[3] The Tribunal concluded that the German Government had not only assisted in an illegal attack on Iraq but had, moreover, violated its obligations under the law of neutrality.

The Federal Administrative Tribunal's position would appear to be unfounded if one takes into account that Germany's attitude towards OIF closely resembled that of a number of third States vis-à-vis post-World War II international armed conflicts. State practice since 1945 seems to justify the conclusion that the law of neutrality is now obsolete due to derogation, or applies only if there is a state of war proper, or if a third State not actively participating in hostilities has formally declared its neutrality. As a result, third States would in the majority of international armed conflicts be allowed to benevolently favor one of the parties to the conflict, i.e. be considered "non-belligerent".

The present contribution aims to show that allegations of derogation of the law of neutrality are, to say the least, premature and that there is no basis for concepts such as "benevolent neutrality" or "non-belligerency". This is not to say that post-World War II State practice has been without effect on this body of law, only that the modification has not resulted in a legal vacuum permitting States to act at will.

I "Non-Belligerency" and Neutrality in International Law

Until the beginning of the 20th century the *jus ad bellum* recognized the sovereign right of States to resort to war and to "continue political commerce by other means", i.e. by use of military force. During that time it was beyond doubt, at least in theory, that third States could only choose between neutrality and belligerency. States not taking part in an ongoing war were considered to be bound by Hague Conventions V and XIII of 1907.[4] However, the international system changed considerably with the founding of the League of Nations and the adoption of the Kellogg-Briand Pact. In light of these developments, a growing number of international lawyers began to claim that there was no room for strict neutrality. It was said that third States were either entitled to actively assist a victim of aggression or were, at a minimum, obliged to differentiate between the belligerents by adopting a benevolent position towards the victim State.[5]

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3 Federal Administrative Tribunal, Judgment BVerwG 2 WD 12.04 of June 22, 2005, available in German at http://www.bverwg.de.

4 Printed in: Documents on the Laws of War, at 87 and 128, 3rd ed., *A. Roberts and R. Guelff* (eds.) (Oxford 2001).

5 *A. Cavaglieri,* Belligerenza, Neutralità e Positioni Giuridiche Intermedie, Rivista di Diritto Internazionale 13 (Ser. II Vol. 8, 1919), at 58-91, 328-362, 345; *A.S. de Bustamente y Sirven,* Droit International Public, Tome 4, at 513 et seq. (Paris 1937); *T. Komarnicki,* RdC 80 *(1952 I),* 395 ff., at 431 f.; see also *ILA,* Budapest Articles of Interpretation of the Briand-Kellogg Pact, ILA Report 38th Conference, Budapest 1934, 66 et seq.

After a short period of initial euphoria[6] the number of those advocating "non-belligerency" as a special legal status decreased. The concept[7] re-emerged when the US adopted the "Neutrality Act of 1939".[8] Under the Act, US allies were entitled to acquire important goods on a cash-and-carry basis, while Germany and her allies were denied that right. Subsequently, i.e. before its official entry into the Second World War, the US[9] did not confine itself to economically assisting Great Britain. For example, US Coast Guard vessels participated, albeit indirectly, in measures directed against German vessels.[10] During the evacuation of Dunkirk a unit of US warships was sent to Lisbon to protect American interests by preventing French gold from falling into the hands of the Axis Powers. The US Government had officially purchased the gold to enable France to acquire American weapons. (It may be added that the weapons were never delivered.[11]) On September 3, 1940, the so-called "Destroyer Deal" was announced.[12] Finally, on

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With regard to the position taken by US international lawyers see *Ph. C. Jessup,* Neutrality: Its History, Economics and Law, Vol. IV, at 121 et seq. (New York 1936); *P. Fauchille,* Traité de Droit International Public, Tome II: Guerre et Neutralité, at 653 (8ième ed., Paris 1921); *P. de la Pradelle,* L'évolution de la neutralité, in: 14 Revue de Droit International 197-221, at 210 (1934); *J. Fischer Williams,* Sanctions under the Covenant, in: 17 British Year Book of International Law 130-149, at 145 et seq. (1936).

6 See also *Ph. C. Jessup,* (*supra* note 5); *Fauchille* (*supra* note 5), at 653 et seq.; *de la Pradelle* (*supra* note 5), at 210.

7 Under the Senate's *Joint Resolution* of January 19, 1933 (the so-called *Borah* Resolution), the U.S. President was entitled to proclaim that the US was adopting a status of non-belligerency. However, the right to impose an arms embargo on one of the parties to a conflict was later abolished by a strict duty of impartiality. Therefore, during the *Chaco* crisis for example, the US Government was not allowed to differentiate between the parties to that conflict. The Neutrality Act of 1935 subjected the exports of arms and ammunition to strict control measures. See *Ph.C. Jessup (supra* note 5), at 124 ff.*; E.M Borchard/W.P. Lage,* Neutrality for the United States, at 315 (2nd ed., New Haven 1940). The unilateral arms embargo imposed on Italy by several members of the League of Nations was the only example of international recognition of a status of "non-belligerency". See *I.F. Wallas,* Die völkerrechtliche Zulässigkeit der Ausfuhr kriegswichtiger Güter aus neutralen Staaten, at 91 et seq. (Hamburg 1970).

8 Printed in: 34 AJIL 44 et seq. (1940). See also *W.P. Deac,* America's Undeclared Naval War, in: 87 U.S. Naval Institute Proceedings, 70-79, at 73 (October 1961); *Ph.C Jessup,* The 'Neutrality Act of 1939', in: 34 AJIL 95-99 (1940); *Q. Wright,* Rights and Duties under International Law, in: 34 AJIL 238-248 (1940).

9 At the beginning of World War II Italy, Spain and Turkey also adopted a position of "differentiated" neutrality. See *D. Schindler,* Aspects contemporains de la neutralité, in 121 Receuil des Cours 263 (1967 II).

10 Cf. *W.P. Deac* (*supra* note 8), at 73 et seq.

11 *Ibid*., at 74.

12 Dept. of State Bulletin Vol. 3, 201 (7 September 1940); printed in: 35 AJIL 767 (1941 Suppl.). See also the critical evaluations by *H.W. Briggs,* Neglected Aspects of the

March 11, 1941, with the adoption of *Lend Lease Act,* the US gave up any pretense of impartiality.[13] US Attorney General *Jackson* justified the US position on March 27, 1941, by referring to the right of non-participants to discriminate against a law-breaker and by relying on the "just war" doctrine.[14]

Indeed, *Hugo Grotius* believed that third States were obliged to refrain from acts favoring a belligerent whose cause was unjust:

> Eorum, qui a bello abstinent, officium est, nihil facere, quo validior fiat is, qui improbam fovet causam, aut quo justum bellum gerentis motus impediantur.[15]

That position was, however, rejected by *Bynkershoek* in the 18th century. According to him, the justness or unjustness of a cause is without prejudice to the neutral's position:

> Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum, ejus non est, inter utrumque amicum, sibi invicem hostem, federe judicem, & ex causa aequiore vel iniquiore huic illive plus minusve tribuere vel negare. Si medius sim, alteri non possum prodesse, ut alteri noceam. Sed, ajes, utrique mittam, quicquid mihi videbitur, & sic postulat ratio amicitiae; si, quod alteri miseram, ille utatur in necem alterius, quid ad me? At tu noli sic sapere, quin potius crede, amicorum nostrorum hostes bifariam considerandos esse, vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret ope consilio, eosque juvare milite auxiliari, armis,

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Destroyer Deal, in: 34 AJIL 569-587 (1940); *E. Borchard,* The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases, *ibid.* 690-697; *L.H. Woolsey*, Government Traffic in Contraband, *ibid.* 498-503. See also the more favorable evaluation by *Q. Wright,* The Transfer of Destroyers to Great Britain, *ibid.,* 680-689.

13 Cf. *W.P. Deac* (*supra* note 8) at 74; *Q. Wright,* The Lend Lease Bill and International Law, in: 35 AJIL, 305-314 (1941).

14 Printed in: 35 AJIL 348 et seq. (1941). See also *Q. Wright*, The Present Status of Neutrality, in: 34 AJIL 391-415, at 402: "If neither of these events [determination of breaches of international law] occurs, the matter has been, in practice, left to the self-determination of each state. Each one is judge in his own case, a condition of anarchy which, unfortunately, international law has tolerated. Clearly if each non-participant in hostilities individually passes on the guilt or innocence of the participants and discriminates against the state which it thinks has illegally resorted to hostilities, the various non-participants may decide differently, and there may be serious confusion. […] But [....] the jural situation becomes, under modern conditions, equally confused if non-participating states unilaterally decide that none of the participants in hostilities have broken obligations, and so proclaim neutrality." Parantheses added by the author.

15 *Hugo Grotius,* De iure belli ac pacis libri tres, Liber III, Caput 17, para. 3. For the English translation of this paragraph by *F.W. Kelsey*, see: Classics of International Law, ed. by *J.B. Scott*, Oxford 1925: "It is the duties of those who keep out of a war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered."

> & quibuscunque aliis, quibus in bello opus habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello praeferremus, quod vetat aequalitas amicitiae, cui in primus studendum est.[16]

While the US Attorney General's position was challenged even in the U.S,[17] the US position prior to its entry into World War II is considered to have set a precedent[18] in terms of international recognition of an intermediate status of "non-belligerency".[19]

With the adoption of the UN Charter and its Article 2(4) prohibition on the use of force, an increasing number of international lawyers took the position that the right of non-participating States to remain strictly neutral has been considerably restricted or modified.[20] They maintain that the traditional law of neu-

16 *Cornelius van Bynkershoek,* Quaestionum juris publici libri duo, Liber I, Caput IX, p. 69 (Leyden 1737). For the English translation of this paragraph by *T. Frank*, see: Classics of International Law, ed. by J.B. Scott, Oxford 1930: "In my judgement, the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgement between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice. If I am a neutral I may not lend aid to one to an extent that brings injury to the other. But, you say, I will send to both whatever I choose, for thus friendship requires; and if one uses for the destruction of the other the things I send, that is not my fault. But you must not adopt such an opinion. We must rather consider the enemies of our friends from two different points of view, not only as our friends, but also as enemies of our friends. If we consider them only as friends we may properly help them with advice, with troops, arms, and whatever else they need in war. But in so far as they are enemies of our friends we may not do this, because we would then show preference to one side in the war, and this the equality of friendship, which has first claim, forbids."

17 *H.W. Briggs* (*supra* note 12) 34 AJIL at 569, n. 2 (1940); *E. Borchard*, in: 35 AJIL at 621 (1941).

18 A further example is the British and French position during the Russo-Finnish "Winter War" (1939/40). Both States furnished Finland with arms and ammunition. Norway and Sweden allowed their territories to be used for the transfer of the British and French subsidies. Moreover, Sweden itself delivered arms and sent volunteers across its borders. Cf. *I.F. Wallas* (*supra* note 7), at 98 et seq.

19 *E. Lauterpacht,* The Legal Irrelevance of the "State of War", in: 62 Proc. ASIL, 58-68, at 64 (1968)*; F.R. Coudert,* Non-Belligerency in International Law, in: 29 Virginia Law Review 143-151 (1942). With regard to the U.S. position see also *N. Orvik,* The Decline of Neutrality 1914-1941, at 195 et seq. (2nd ed., London 1971).

20 *D. Schindler* (*supra* note 9), in: 121 RdC at 261 et seq. (1967 II); *K. Skubiszewski,* Use of Force by States: Collective Security, Law of War and Neutrality, in: Manual of Public International Law, at 840 et seq. (M. Sorensen, ed., New York 1968)*; Ph.C Jessup,* in: 33 AJIL 549 et seq. (1939); 34 AJIL, 95 (1940); 48 AJIL, 98 et seq. (1954); *Q. Wright, AJ L* 34 (1940), 238 ff.; 391-415, 396 ff.; *F.R. Coudert* (*supra* note 19), 29 Virginia Law Review 143 et seq. (1942); *A. Gioia,* Neutrality and Non-Belligerency, in: International Economic Law and Armed Conflict, 51-110 (H.H.G. Post, ed., Dordrecht 1994); *O. Bring,* Comments, in: The Gulf War 1980-19880, 243-246, at 244

trality is inadequate to meet modern requirements[21] and therefore consider that third States are entitled to adopt a position of "benevolent"/"differential" neutrality in cases where one party to a conflict has violated the *jus ad bellum*.[22]

State practice since 1945 seems to confirm that view.[23] In post-World War II international armed conflicts States not parties have rarely complied with the comparatively strict rules of the law of neutrality laid down in 1907 Hague Conventions V and XIII. Instead, they have more or less openly supported one of the belligerent parties, either economically or militarily.

During the Iran-Iraq war (1980-1988) the majority of States not parties to the conflict defined their position as neutral.[24] Only France, Saudi Arabia and Kuwait did not feel bound by the laws of neutrality because they had, more or less officially, adopted a position of "non-belligerency".[25] Kuwait and Saudi Arabia assisted Iraq's war-fighting and war-sustaining efforts by means of considerable financial subsidies that enabled Iraq to, *inter alia*, purchase Soviet weapons. In addition, Saudi Arabia permitted its ports to be used to transfer war material destined for Iraq. Iraqi oil was exported via Saudi Arabian pipelines.[26] Despite its

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(*L.F. Dekker/H.H.G. Post*, eds., Dordrecht 1992); *G.M. Melkov,* Neutrality in War, in: Soviet Yearbook of International Law 237-251 (1978).

21 For example, *Ph.C. Jessup* warned: "[w]e should be sure that we do not increase the number of obstacles by a rigid adherence to traditional concepts which may have been the product of historical situations which do not have their counterpart today", 48 AJIL 98-103, 103 (1954).

22 See the references *supra* in note 19 et seq. Further *L. Oppenheim*, International Law Vol. II, at 651 (7th ed. by *H. Lauterpacht*, London 1963).

23 For an overview of post-World War II State practice see *P.M. Norton,* Between the Ideology and the Reality: The Shadow of the Law of Neutrality, in: 17 Harvard Law Journal 249-311, at 254 et seq. (1976); *H.S. Levie,* The Falklands Crisis and the Laws of War, in: The Falklands War, 64-77, at 74 et seq. (ed. by A.R. Coll/A.G Arend, Boston 1985); M. *Jenkins,* Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals, in: 8 Boston College International & Comparative Law Review 517-549, at 525 et seq. (1985); *A. Gioia/N. Ronzitti,* The Law of Neutrality: Third States' Commercial Rights and Duties, in: The Gulf War 1980-1988 *(supra* note 20), 221-242, at 222 et seq.; *R. Ottmüller,* Die Anwendung von Seekriegsrecht in militärischen Konflikten seit 1945, at 47 et seq. (Hamburg 1978); *F.A. Boyle,* International Crisis and Neutrality: U.S. Foreign Policy Toward the Iraq-Iran War, in: Neutrality – Changing Concepts and Practices, 59-96, at 69 et seq. (ed. by A.T. Leonhard, Lanham 1988); *F.V. Russo*, Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law, in: 19 Ocean Development and International Law 381-399 (1988); *B.A. Boczek*, Law of Warfare at Sea and Neutrality: Lessons from the Gulf War, in: 20 Ocean Development and International Law 239,at 256 (1989).

24 Cf. *A. Gioia/N. Ronzitti (supra* note 23), at 222.

25 See also 87 Dept. of State Bulletin 41 (August 1987); Netherlands Yearbook of International Law 390 (1988).

26 Cf. *F.V. Russo,* (*supra* note 23) 19 ODIL at 393 (1988).

traditional policy of not exporting war material to regions affected by war, France became one of Iraq's most important weapons' suppliers.[27]

Although other States had officially declared themselves to be strictly neutral, their actual conduct was not always in accordance with the laws of neutrality.

Repeatedly declaring that its policy was one of neutrality, the United States emphasized that no side would be supplied with war material, either directly or indirectly.[28] However, Iran was initially more severely affected by US restrictions than Iraq.[29] (The Iran-Contra affair revealed that Iran had nevertheless managed to acquire weapons in exchange for American hostages.[30]) Officially, exports to Iran were subject to severe restrictions under anti-terrorism legislation.[31] With regard to Iraq, the US declared that it would assist that country in maintaining its defense capabilities.[32] Hence, in October 1985, a license permitting the export of

27 Cf. Ch. *Rousseau,* Chronique des faits internationaux, in: 85 Revue Générale de Droit International Public, 177 (1981). See also 27 Annuaire Français de Droit International, 859 (1981), Vol. 28, 1095 (1982), Vol. 29, 853, 909 (1983), Vol. 30, 951, 1012 (1984), Vol. 31, 962 (1985), Vol. 34, 901 (1988). Prior to the outbreak of hostilities in 1980 France had already assisted Iraq in its effort to loosen dependence on Soviet deliveries. Early French deliveries after 1980 were justified by reference to contracts that had been signed prior to the commencement of active hostilities.

28 87 U.S. Dept. of State Bulletin 41 (August 1987); Vol. 81, 17 (July 1981); Vol. 82, 45 (July 1982); Vol. 83, 89 (July 1983); Vol. 85, 57 (April 1985); Vol. 86, 41 (March 1986); Vol. 87, 59, 62, 66 (July 1987); Vol. 88, 61 (July 1988). See, however, *F.A. Boyle (supra* note 23, at 70) who states that 'there were several indications from the public record that the Carter Administration tacitly condoned, if not actively encouraged, the Iraqi invasion of Iran in September of 1980 because of the administration's shortsighted belief that the pressures of belligerency might expedite release of the U.S. diplomatic hostages held by Tehran since November of 1979. Presumably the Iraqi army could render Iranian oil fields inoperable and, unlike American marines, do so without provoking the Soviet Union to exercise its alleged right of counter-intervention under Articles 5 and 5 of the Russo-Persian Treaty of Friendship".

29 That was due to the U.S. trade embargo imposed in response to the taking of American hostages in Tehran. See 80 Dept. of State Bulletin 1 et seq. (May 1980). After the hostages' release the trade embargo was relaxed, but an arms embargo was maintained. See 81 Dept of State Bulletin 11, 13 (February 1981); Vol. 87, 67 et seq., 72 (January 1987; Vol. 88, 75 et seq. (March 1988).

30 Cf. *A.T. Leonhard,* Introduction (*supra* note 23), at 4; *F.A. Boyle (supra* note 23), at 81 et seq.

31 49 Federal Register 190 (28 September 1984), 38243 ff.; 51 Federal Register 108 (5 June 1986), 20468 L; 51 Federal Register 199 (15 October 1986), 36702 f.; 52 Federal Register 190 (1 October 1987), 36749, 36756 f; 52 Federal Register 228 (27 November 1987), 45309 ff.; Dept. of State Bulletin Vol 84 (November 1984), 68.

32 87 Dept. of State Bulletin 66 (July 1987). The U.S. had made clear at the beginning of 1984 already that an Iraqi defeat would be contrary to U.S. interests and that it would take steps to prevent it.

45 *Bell 214 ST* helicopters partly suited for military use[33] was issued. In 1986 and 1987 Iraq was supplied with information gathered by US satellites and AWACS aircraft that had been deployed to Saudi Arabia.[34] The European Communities had also imposed an arms embargo on Iran in April 1980. The embargo was rescinded after the release of the American hostages.

Even though it had declared it was neutral in the conflict, the former Soviet Union resumed arms exports to Iraq after a futile attempt to normalize relations with Tehran.[35] It was thus characterized as Baghdad's "largest supplier of military equipment and a key source of economic aid."[36]

The United Kingdom's position was fairly clear. The sale of arms and military equipment was subject to strict controls under national legislation modified to ensure impartiality. No arms, ammunition or any other "lethal equipment" were exported to either party to the conflict.[37] However, in 1983 Iraq acquired material for chemical defense from the UK. Iranian allegations that the UK had also delivered chemical weapons were strongly rejected by the British Government.[38] In October 1985 the British Government published guidelines for exports to Iran and to Iraq. Even though it maintained the prohibition on "lethal equipment", the Government stated it would nevertheless "attempt to fulfill existing contracts and obligations". It added that it would not "approve of orders for any defence equipment which in HM Government's view, would significantly enhance the capability of either side to prolong or exacerbate the conflict."[39] With regard to an export credits agreement signed on September 24, 1987, the British Government stated that it would not contribute to Iraq's war effort as it only covered engines, services, medical and other humanitarian goods.[40]

During the Falklands/Malvinas conflict, the US did not characterize its position as "nonbelligerent". After US Secretary of State *Haig* tried in vain to mediate between the United Kingdom and Argentina, the US Administration announced it would assist Great Britain economically and militarily.[41] On April 29, 1982, the Senate declared that "the United States cannot stay neutral." On

33 The Reagan Administration also issued a license permitting the export of six *Lockheed L-100* aircraft and, later, of six small jets. Cf. *F.A. Boyle* (*supra* note 23), at 73 et seq.

34 *B.A. Boczek* (*supra* note 23) at 256; *F.A. Boyle (supra* note 23), at 70 et seq.

35 Cf. SIPRI Yearbook, at 297 et seq. (Stockholm 1987).

36 *M.H. Amzacost*, U.S. Soviet Relations: Testing Gorbachev's "New Thinking", 87 Dept. of State Bulletin 36 et seq., 39 (September 1987).

37 Cf. 52 British Year Book of International Law 520 (1981); 53, 559 (1982); 54, 549 (1983); 55, 597 (1984); 56, 534 (1985); 57, 644 (1986); 58, 638 (1987).

38 Cf. 55 British Year Book of International Law 588 (1984).

39 Cf. 56 British Year Book of International Law 534 (1985); 57, 644 (1986); 58, 638 (1987).

40 Cf. *A. Gioia/N. Ronzitti (supra* note 23), at 230, n. 57.

41 Cf. *H.S. Levie* (*supra* note 23) at 74 et seq.

May 4, 1982, the House of Representatives issued a similar declaration and assured Great Britain of "full diplomatic support [...] in its effort to uphold the rule of law." Great Britain received logistical and operational assistance from the US during the conflict. Although the British Government rejected Argentine allegations that Britain's victory was due mainly to massive military assistance,[42] it is beyond doubt that US assistance comprised:[43]

- *Fuel*. As part of a routine agreement, the US sent 1.5 million gallons of aviation fuel to the joint US-British airbase on Ascension Island.[44] It also made *KC-135* aerial tankers available to Britain, even though these were never sent to the South Atlantic. Instead, the RAF used its own *KC-135s* for midair refueling *of Vulcan* bombers making the 3,800-mile trip from Ascension to the Falklands, while US planes in Europe were reassigned to British NATO duties.
- *Ammunition*. The US sold an unspecified quantity of 20-mm shells and supplied sonar-equipped buoys for use in antisubmarine warfare. It is not, however, clear whether any of this equipment was ever used on the islands.
- *Missiles*. The US sold about *100 AIM-9L Sidewinder* missiles. Of the *27 Sidewinders* fired from *Harriers* during the war, 23 scored hits. These, however, were probably British missiles; the U.S. supplied *Sidewinders* were apparently used only to replenish inventories in Britain. Highly effective laser target indicators for British ground forces and a radar system for the Royal Navy's *Seawolf* SAMs were also supplied.
- *Intelligence and Communications*. As a NATO ally, Britain always had regular access to the U.S. built Defense Satellite Communications System that relays encrypted messages around the world. Routine information from US meteorological satellites was also available, although the satellites' effectiveness was severely limited by bad weather over the South Atlantic.

Despite the assistance, a British request for an undisclosed number of US AWACS's was rejected on the grounds that American servicemen, who would have had to man the aircraft, should not get involved in the conflict.

It should also be noted that the 1949 Geneva Conventions and the 1977 First Additional Protocol make a distinction between "neutral" and States "not parties

42 According to *Time Magazine* a British official stated: "All these claims that U.S. technology won the Falklands war for Britain are nonsense. It played a part, and we are grateful for that, but it was not the decisive element in our victory." See *Time Magazine* of June 28, 1982, Special Section: "Just How Much Did the U.S. help?".

43 *Ibid*.

44 The use of the air base had been agreed on in the treaty of August 29, 1962 on the "Use of Wideawake Airfield in Ascension Island by United Kingdom Military Aircraft" (13 UST 1917, TIAS 5148, 449 UNTS 177).

to the conflict".[45] Further, with the modern *jus ad bellum* distinguishing at least in theory between lawful and unlawful use of force – or rather between lawful and unlawful wars[46] – States are entitled to support the victim of aggression under the right of collective self-defense. In sum, there seem to be very good reasons for recognizing a special, intermediate, status between belligerency and neutrality.[47] If States are entitled to militarily assist a victim of aggression by actively joining in the hostilities, then *a fortiori* they must be entitled to distinguish between the aggressor and assist the alleged victim by means short of war.

Some authors refuse to recognize the concept of "non-belligerency" by maintaining that, under the UN system, States are not entitled to autonomously determine that aggression has occurred.[48] However, the Security Council's responsibility for international peace and security does not exclude member States' right to independently evaluate the legality of use of force if the Council is unable to act under Chapter VII.[49] The Council's responsibility is merely primary, not exclusive. States not parties to a conflict are therefore entitled to actively support one side in accordance and within the limits of the right of collective self-defense. However, they will have to identify the aggressor or law-breaker. It follows that the UN Charter does not seem to impose an absolute duty of neutrality and that neutrality is a facultative position.

It is nevertheless doubtful whether the right to get involved in an armed conflict by reference to the right of collective self-defense justifies the conclusion that, *de majore ad minus,* non-participating States are also free to openly discriminate against a party to an international armed conflict. Theoretically, the Charter does not exclude a position of "non-belligerency" if the "benevolent" neutral expressly justifies its behavior by reference to Article 51. It would have to demonstrate that it considers the assisted State the victim of an illegal attack and that it was willing to support that State by means "short of war". However, a "non-belligerent's" position would be similar to that of a State that has formally declared war against one of the parties without actively joining in the armed struggle. The difference between a "benevolent" neutral and the parties to a conflict would lie

45 E.g., Articles 2 lit. (c), 9 para. 2 lit. (a), 19, 22 para. 2 lit. (a), 39 para. 1, and 64 of the 1977 Additional Protocol I.

46 *J.L. Kunz,* Bellum Justum and Bellum Legale, in: 45 AJIL 528-534 (1951). See also *R.W. Tucker,* The Law of War and Neutrality at Sea, at 4 et seq. (Washington D.C. 1957).

47 *K. Skubiszewski (supra* note 20), at 840 f.; *D. Schindler* (*supra* note 9), in: 121 RdC at 263 et seq. (1967 II).

48 *I. Seidl-Hohenveldern,* Der Begriff der Neutralität in den bewaffneten Konflikten der Gegenwart, in: Um Recht und Freiheit. Festschrift v.d Heydte, 593-613, at 596 (ed. by *H. Kipp et al.*, Berlin 1977), believes that "differential" neutrality is a self-contradiction.

49 *H. Kelsen,* Collective Security and Collective Self-Defense under the Charter of the United Nations, in: 42 AJIL, 783-796, at 794 (1948).

only in the absence of use of armed force. If certain neutral duties do not apply to a "non-belligerent" then the same must hold true with regard to an alleged aggressor. The situation would thus not be governed by any legal rule at all. The alleged aggressor would not be obliged to accept being discriminated against.[50] Moreover, an aggressor State's UN membership does not imply renunciation of the rules of neutrality where the collective security system is not functioning. If States adopt a position of "differential"/"benevolent" neutrality, their "right" under Article 51 competes with that of the discriminated belligerent to claim observance of neutral duties. If the Security Council is unable to determine the aggressor (at least *ex post)* there would be no rules to serve as a legal yardstick.

Apart from theoretical considerations, post-1945 State practice does not allow the conclusion that "non-belligerency" has become part of customary international law. That view could only be upheld if a cursory analysis of State practice were sufficient. Proponents ignore the fact that third States assisting one belligerent against another never referred to the right of collective self-defense.[51] Instead, they either advanced contractual obligations, claimed that their assistance did not cover military ("lethal") items,[52] or simply acted clandestinely.[53]

State practice since 1945 thus cannot be relied on to "[prove] that a new state of non-belligerency has emerged as a concept of law. It would be all too easy to avoid duties of neutrality by just declaring a different status".[54] The very fact that "non-belligerents" endeavored in many cases to conceal their assistance indicates, if not proves, that they did not base their conduct on relevant *opinio juris*.

It may be added that the UN Security Council did not differentiate between "strict" and "benevolent" neutrals during the Iran-Iraq war. The Council instead called on *all* States not actively participating in the conflict to refrain from acts that would contribute to an escalation.[55] Moreover, neither the International Law Association's Helsinki Principles on Maritime Neutrality,[56] nor the San Remo Manual on International Humanitarian Law Applicable to Armed Conflicts at

50 That position is clearly taken by *E. Castrén,* The Present Law of War and Neutrality, at 434 (Helsinki 1954).

51 See also *St. Oeter*, Neutralität und Waffenhandel, at 136 (Berlin 1992).

52 For example, during the Iran-Iraq War the British Government stated that it would not deliver "lethal equipment" to Iraq, but added that it would nevertheless "attempt to fulfill existing contracts and obligations". See 56 British Year Book of International Law 534 (1985).

53 It suffices here to mention the Iran-Contra Affair. See *A.T. Leonhard*, Introduction, in: Neutrality – Changing Concepts and Practices (*supra* note 23), at 4.

54 *M. Bothe*, Neutrality at Sea, in: The Gulf War 1980-1988 (*supra* note 20), 205-211, at 207.

55 See, e.g., UN Doc. S/RES/540 of October 31, 1983; S/RES/582 of October 8, 1986; S/RES/598 of July 20, 1987.

56 ILA, Report of the Sixty-Eighth Conference, at 497 et seq. (London 1998).

Sea,[57] provide evidence that an intermediate "non-belligerent" legal status has been recognized. The Geneva Conventions' and the First Additional Protocol's seeming differentiation between neutral and States not participating in the conflict does not necessarily mean that "non-belligerency" has become a generally recognized concept of international law. The said provisions may well be the result of the uncertainty that delegates felt with respect to the status of the law of neutrality, especially as they were unable to decide whether that law applied only if there was a "state of war" or in any case of international armed conflict.[58]

States not parties to an ongoing international armed conflict will in many cases stand to profit economically, politically or ideologically from a relaxation of the relatively strict rules of traditional neutrality law.[59] It is not surprising that they have repeatedly tried to avoid or ignore the law of neutrality or to justify their conduct by reference to a status of "non-belligerency".[60] If, however, as the case of the Arab States demonstrates,[61] the aggrieved belligerent disposes of the necessary military or economic means to enforce traditional neutrality rules, "non-belligerents" will most often return to strict neutrality.[62] In the remaining cases the "benevolent" neutrals were simply lucky that their violations of the law went unpunished.

In contrast to the era in which a generally unlimited right to resort to war existed, today it is more difficult to accommodate the dichotomy of belligerency

57 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, available at: http://www.icrc.org. See also San Remo Manual on International Law Applicable to Armed Conflict at Sea (ed. by *L. Doswald-Beck*, Cambridge 1995).

58 *ICRC,* Commentary on the Additional Protocols of 8 June *1977* to the Geneva Conventions of 12 August 1949, MN 134 et seq. (Geneva 1987); M. Bothe, Neutrality in Naval Warfare, in: Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven, 387-405, at 390 et seq. (ed. by A.I.M. Delissen/G.J. Tanja, Dordrecht. 1991).

59 *Castrén* states: "It is advantageous for third States not to be forced to apply rules of neutrality, which only serve to restrict commercial relations between these States and their citizens on the one hand and conflicting States and other neutral States on the other, without, however, conferring any real additional benefits"; *E. Castrén (supra* note 50), at 34.

60 Cf. *P.M. Norton* (*supra* note 23, at 254 et seq.; see also *K. Zemanek,* The Chaotic Status of the Laws of Neutrality, in: Im Dienst an der Gemeinschaft, Festschrift für *Dietrich Schindler* zum 65, Geburtstag, 443-454, at 446 (ed. by *W. Haller/A. Kölz/G. Müller/D. Thürer*, Basel/Frankfurt 1989).

61 Cf. *P.M. Norton* (*supra* note 23), at 307.

62 During the *Yom Kippur* War (1973) many Western European States denied the U.S. use of its military bases for the purpose of assisting Israel by air, as well as use of their national airspace. On October 26, 1973 the Israeli merchant vessel *Palmah* had to leave the German port of Bremerhaven without the military equipment of U.S. origin it was to take to Israel. Cf. *R Ottmüller (supra* note 23), at 294 et seq.; *P.M. Norton* (*supra* note 23), at 294 et seq.

and neutrality.[63] Under the UN Charter, violations of the law of neutrality cannot, in principle, be countered by resort to armed force unless the violations constitute "armed attacks" within the meaning of Article 51. It may be said that the modern *jus ad bellum* which governs the relationship between belligerents and States not participating in a conflict has contributed to third State readiness to assist one of the parties as if there were no armed conflict at all. Despite the impatience that the international customary law-making process seems to generate, such acts should not be hastily taken as sufficient evidence of a corresponding rule of customary international law. They should, instead, be characterized as what they are: violations of the law of neutrality. Hence, as a matter of legal principle and in view of State practice, a legal status of "non-belligerency" has to be rejected.[64] Briggs's opinion, enunciated more than sixty years ago, still holds true:

> International law recognizes no such thing as the so-called 'status' of non-belligerency. 'Nonbelligerency' is in reality only a euphemism designed to cover violations of international law in the field of neutral obligations.[65]

It should be emphasized that proponents of "non-belligerency" recognize that their position presents considerable difficulties for adhering States.[66] While a "benevolent" State may justify deviating from the law of neutrality by claiming to enjoy a special legal status, the aggrieved belligerent is not obliged to recognize

63 Cf. *Ph.C. Jessup,* 48 AJIL 98-103, at 100 (1954); *Q. Wright,* 34 AJIL, 391-415, at 402 (1940).

64 Many international lawyers consider "non-belligerency" to be a merely political status. Cf. *H. Meyrowitz,* Le principe de l'égalité des belligérants devant le droit de la guerre, at p. 336 et seq. (Paris 1970); *R.L. Bindschedler,* Die Neutralität im modernen Völkerrecht, in 17 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1-37, at 26 (1956/57); *F. Deák,* Neutrality Revisited, in: Transnational Law in a Changing Society, Essays in Honour of *Philip C. Jessup,* 137-154, at 153 (New York 1972); I. *Seidl-Hohenveldern (supra* note 48), at 602 et seq.; *M.-F. Furet/L.-C. Martinez/H. Dorandeu,* La guerre et le droit, at 58 (Paris 1979).

65 *H.W. Briggs* (*supra* note 12), 34 AJIL 569-587, 569 n. 2 (1940). See also *Bothe* who states: "Unneutral support for a belligerent party has been and still is a violation of the law of neutrality. It gives rise to a right of reprisal for the belligerent which is affected by this violation"; *M. Bothe (supra* note 54), at 207.

66 *A. Gioia* (*supra* note 20), at 100 admits: "Indeed, even if an attitude of 'non-belligerency' is not considered as constituting, *per se,* a violation of international law, the aggrieved belligerent might perceive the behaviour of a 'non-belligerent' State as amounting, in certain circumstances, to complicity with the aggressor: this may be the case, in particular, where a 'non-belligerent' State supplies the enemy with arms or war materials, or where it grants loans or subsidies to the enemy." *O. Bring (supra* note 20), at 245, adds: "Since non-belligerents could be expected to deviate from the law of neutrality, they cannot reasonably expect to receive all the protection that flows from it."

it.[67] The aggrieved belligerent will have good reason to claim that the "benevolent" neutral did not comply with the duties of a neutral and will be entitled to resort to counter-measures. As there is no duty of acquiescence by the aggrieved belligerent, the difference between "benevolent" and "strict" neutrals is counterproductive. The relationship between a "benevolent" neutral and an aggrieved belligerent remains governed by the law of neutrality if there is no authoritative determination of responsibility for aggression by the Security Council. Thus, along with the *jus ad bellum,* it is also the law of neutrality that determines the measures that may be taken by the belligerent or the neutral. As stated by a commentator: "although the 'non-belligerent' may discriminate openly against one of the belligerents (and thereby furnish the latter with adequate cause for taking reprisals), it nevertheless retains a neutral status so long as it does not enter into the hostilities."[68]

II Law of Neutrality: Applicability

Although the law of neutrality has not been derogated or supplemented by an intermediate legal status, its scope of applicability is far from settled. While some maintain that neutral obligations arise only in a state of war, others claim that applicability depends on a formal declaration by a neutral State. Still others believe that neutrality law is applicable in every international armed conflict, at least when the conflict is characterized by intense hostilities of a certain duration.

A No Derogation of the Law of Neutrality

There is widespread agreement that there is no longer room for application of neutrality law if the Security Council, acting under Chapter VII of the Charter, has authoritatively identified an aggressor State.[69] While the present author

67 *R.W. Tucker (supra* note 46), at 199 n. 5: "In fact, it would seem that what writers actually have in mind when they declare that the traditional law does not recognize a condition of nonbelligerency is that this law does not grant neutral states *a right* to depart from the duties otherwise imposed upon non-participants, a right in the sense that the injured belligerent is obliged to permit these acts and to refrain from taking reprisals."

68 *Ibid*. at 199 n. 5 and 259.

69 *ILA*, Helsinki Principles on the Law of Maritime Neutrality (*supra* note 56), Principle 1.2: "[…] In particular, no State may rely upon the Principles stated herein in order to evade obligations laid upon it in pursuance of a binding decision of the Security Council." San Remo Manual (*supra* note 57), para. 7: "Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States: (a) are bound not

shares this view, it should not be overlooked that the Council refers to the conditions laid down in Charter Article 39 only in the most general terms. Very often it will just state that it is "acting under Chapter VII". In view of the ensuing lack of authoritative determination of the aggressor/wrongdoer it may not be clear which party to an international armed conflict resorted to use of force in violation of the *jus ad bellum*, particularly if both sides claim to be acting in self-defense.[70] The uncertainty will be even greater where the Security Council is inactive, which, as is generally known, happens from time to time. Hence, the law of neutrality may have been modified by the UN Charter, but it has certainly not become obsolete. A UN member State is prohibited from taking a neutral stance only if the Security Council has authoritatively identified the aggressor or if it has decided on enforcement measures under Chapter VII.[71] But even then the Security Council may, in theory at least, absolve a member State from its duties under the Charter.[72]

Post-1945, third States have refrained in practice from characterizing one of the parties to an international armed conflict as an aggressor.[73] While their con-

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to lend assistance other than humanitarian assistance to that State; *and* (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression bu that State".

70 This was the case in the Falklands/Malvinas conflict (1982) and in the Iran-Iraq war (1980-1988).

71 *H.J. Taubenfeld*, International Action and Neutrality, in: 47 AJIL 377-396, 384 et seq. (1953); *Oppenheim*, International Law (*supra* note 22) at 647 et seq.; *J.F. Lalive*, International Organization and Neutrality, in: 24 British Year Book of International Law 72-89, 79 et seq. (1947); *M. Bothe* (*supra* note 54) at 205; *D. Schindler* (*supra* note 9), 121 Recueil des Cours 243 et seq. (1967 II); *E. Castrén* (*supra* note 50) at 434 et seq.; *R.W. Tucker* (*supra* note 46) at 171 et seq. See also Article 4 of the 1975 Wiesbaden Resolution of the Institut de Droit International: „Lorsque les Forces des Nations Unies sont engagées dans des hostilités, les Etats membres de l'Organisation ne peuvent ni se prévaloir des règles générales du droit de la neutralité pour se soustraire aux obligations qui leur sont imposées en vertu d'une décision du Conseil de la sécurité agissant conformément à la Charte, ni déroger aux règles de la neutralité au bénéfice d'une partie opposée aux Forces des Nations Unies."; 56 Annuaire de l'Institut de Droit International 542 (1975).

72 Cf. *J.F. Lalive*, (*supra* note 71) at 83. E.g., in case of a limited non-military enforcement measure (embargo) there is still room for an impartial stance. See further *G.P. Politakis*, Variations on a Myth: Neutrality and the Arms Trade, in: 35 German Yearbook of International Law 435-506, 440 et seq. (1992), who also advocates for the continuity of the law of neutrality and states: "It so happens that the long diagnosed malfunction of the UN coercive mechanism saved neutrality from decline, for in a world where aggression often prevails with impunity and the Charter's Chapter VII is kept in mothballs there can still be room for abstention and impartiality, at least technically."

73 Cf. *D.P. O'Connell*, International Law and Contemporary Naval Operations, in: 44 British Year Book of International Law 19-85, at 27 et seq. (1970), 19-85, 27 ff.; *R. Ottmüller* (*supra* note 23) at 47 et seq.; *P.M. Norton* (*supra* note 23) at 254 et seq.

duct may not always have conformed to the principle of impartiality, the accompanying lack of an authoritative Security Council pronouncement had a lasting impact in that they were forced to adopt and maintain a neutral status.[74]

B Applicability Ratione Materiae et Temporis

While State practice indirectly proves the continuing validity of the law of neutrality, there is no consensus as to when that body of law applies. Not surprisingly, the law of neutrality is paid lip service in situations that qualify as a "state of war". No one seems to doubt that in a war *strictu sensu* all non-belligerent States are automatically bound by the duties of abstention and impartiality provided for in Hague Conventions V and XIII of 1907 and the corresponding principles and rules of customary international law.[75] It has, however, never been clear when a state of war exists, apart, perhaps, from situations in which a declaration of war has been made. But, such situations have virtually vanished in State practice.

International lawyers nonetheless continue to almost unanimously maintain that the existence of a state of war automatically triggers the applicability of the law of neutrality.[76] According to that view, if an international armed conflict does not amount to a "war" States not parties are free to comply with the law of neutrality, but have no obligation to do so.[77] In such situations – often labeled *status mixtus*[78] – no State is bound by the law of neutrality against its will. Instead, its

74 See the references in the foregoing footnote. Further *H.S. Levie* (*supra* note 23) at 74 et seq.; *M. Jenkins* (*supra* note 23) at 525 et seq.; *A. Gioia/N. Ronzitti* (*supra* note 23) at 222 et seq.; *D. Schindler*, Transformations in the Law of Neutrality since 1945, in: Essays in Honour of Frits Kalshoven (*supra* note 58), 367-386, at 369.

75 See, *inter alia*, *H.-J. Wolff*, Kriegserklärung und Kriegszustand nach Klassischem Völkerrecht, at 134 (Berlin 1990).

76 *L. Kotzsch*, The Concept of War in Contemporary History and International Law, at 141 (Geneva 1956); *D. Schindler*, State of War, Belligerency, Armed Conflict, in: The New Humanitarian Law of Armed Conflict, 3-20, at 5 et seq. (ed. by A. Cassese, Napoli 1979); *E. Castrén* (*supra* note 50), at 34, 423; *D.P. O'Connell* (*supra* note 73), 44 BYIL 27 (1970); *K. Skubiszewski* (*supra* note 20), at 808; *Ch. Greenwood*, The Concept of War in Modern International Law, in: 36 International and Comparative Law Quaterly 283-306, 305 (1987); *St. Oeter* (*supra* note 51) at 85, 141; *Ch. Rousseau*, Le droit des conflits armés, at 371 (Paris 1983).

77 *G. Schwarzenberger*, Jus Pacis ac Belli?, in: 37 AJIL 460-479, 473 (1943); *E. Castrén* (*supra* note 50), at 423; *St. Oeter* (*supra* note 51), at 141 et seq.; *D. Schindler*, State of War (*supra* note 76), at 15; *Ch. Greenwood* (*supra* note 76), at 298, 300; *P. Guggenheim*, Traité de Droit International Public II, at 510 (Geneva 1954); *J. Stone*, Legal Controls of International Conflict, at 313 (New York 1959); *L.C. Green*, Armed Conflict, War, and Self-Defence, in: 6 Archiv des Völkerrechts 387-438, 391 (1956/57).

78 This concept was first described by *Georg Schwarzenberger*: "Whether the state of peace continues with the State against which limited force is applied or not, depends on the latter's decision. Similarly, it is left to third States to decide for themselves whether, in their relations with the contending States, they prefer the law of peace

relationship to the parties to a conflict continues to be governed by the law of peace. As there is no duty of abstention, third States may assist one of the belligerents, even by supplying the party in question with arms and other military equipment.[79] The aggrieved belligerent would not be allowed to resort to counter-measures.[80]

Determining the existence of a state of war is almost impossible. There is no generally recognized concept of war, nor consensus on the relevance of the actual conduct of third States. Some apply an objective standard, relying either on a formal declaration of war or on the factual application of measures belonging to neutrality law, such as prize measures.[81] Others believe that it depends on the intensity and duration of an ongoing armed conflict.[82] What both positions have in common is that they refer exclusively to the conduct of the belligerents and not, like proponents of a minority view,[83] to the conduct of non-belligerent States.[84]

Those who link the applicability of the law of neutrality to the existence of a state of war by combining conditions of applicability and admissibility strive to limit belligerent interference with third States and their nationals as far as possible. The suitability and efficiency of such endeavors will, however, be rather limited if the operation of the said legal limits is made solely dependent on the

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or neutrality. Even if all States directly and indirectly concerned acquiesced in the limited use of force, it appears to be a misnomer to call such a pax bellica by the name of peace. It is equally unwarranted to call war a state in which both contending States insist on the continuation of their peaceful relations, merely because third States wish to apply the law of neutrality during such a bellum pacificum. These constellations are incompatible with the states of peace and war; they constitute a state of their own, a status mixtus"; 37 AJIL 470 (1943). See also *Ph. C. Jessup*, Should International Law Recognize an Intermediate Status between Peace and War?, in 48 AJIL 48 98-103 (1954).

79 This view is taken by *St. Oeter* (*supra* note 51), at 142.

80 Cf. *D. Schindler*, State of War (*supra* note 76), at 12, 15; *K. Skubiszewski* (*supra* note 20), at 809; *St. Oeter* (*supra* note 51), at 85.

81 Cf. *L. Kotzsch*, Concept of War (*supra* note 76), 141 f.; *K. Skubiszewski* (*supra* note 20), S. 804 ff.; *St. Oeter* (*supra* note 51), at 85.

82 See the references *supra* note 76.

83 *Ch. Greenwood* (*supra* note 76), at 301: "Even in relation to the law of neutrality, therefore, the characterisation of a conflict as war by one of the parties has few, if any, legal consequences. The law of neutrality is brought into operation by the acts of the neutral States, not the belligerents." See also *D. Schindler* (*supra* note 76), at 15: "Neutrality is considered rather to be a voluntary attitude of States which can be taken in wars as in other armed conflicts."

84 A similar view is taken by *E. Castrén* (*supra* note 50, at 35): "The view that *third States* may fix the legal nature of an armed conflict by either recognizing or not recognizing a state of war [...] cannot be accepted [...] as its application would lead to arbitrariness and confusion." See further *P. Guggenheim* (*supra* note 77), at 510; *L. Kotzsch*, (*supra* note 76), at 143.

belligerents abstaining from making use of the measures provided for by the law of neutrality. The admissibility of prize measures, for example, presupposes that the belligerents are in fact interfering with neutral shipping and aviation. Similar doubts may be voiced with regard to reliance on the intensity and duration of an international armed conflict. In that case, the belligerents would simply have to escalate and/or prolong the armed conflict.

Lastly, the view that the applicability of the law of neutrality depends exclusively on the decisions of third States is unfounded. If it did, the duties of abstention and impartiality would cease to be legally binding on neutral States and become merely a political option.[85] It is also unclear why proponents of this view continue to rely on the existence of a state of war if, ultimately, the applicability of the law of neutrality requires only a third State decision to that effect. Their generic reliance on State practice[86] is not substantiated and seems to indicate a vague legal conviction, rather than proof of the existence of a customary international law norm.

Clinging to the concept of a state of war cannot therefore effectively protect third States from belligerent measures. The object and purpose of the law of neutrality is to protect States from the harmful effects of an ongoing international armed conflict and, by subjecting neutral States to certain legal obligations, to prevent an escalation of the conflict. This body of law does not replace the law of peace, but rather establishes legal limitations that the belligerents may not transgress even though they are engaged in armed hostilities. Post-World War II State practice[87] reveals that the law of neutrality has, in principle, applied in every international armed conflict irrespective of whether neutral States wished to be bound by it or not.

III The Current State of the Law of Neutrality

The law of neutrality has also been substantially modified. Belligerent and third States have in practice shown that they are only prepared to comply with the law of neutrality *in toto* in exceptional cases, even when there is unanimous agreement that an armed conflict qualifies as war *strictu sensu*.[88] It should not, however, be overlooked that both belligerents and neutrals also applied the law of neutrality in situations that did not amount to a state of war. Hence, neither the doctrine of *status mixtus*, nor reliance on the existence of a state of war, can furnish sufficient proof of State practice. That practice clearly shows, on the one hand, that

85 *E. Castrén* (supra note 50), at 35.

86 Cf. *Ch. Greenwood* (*supra* note 76), 297 et seq., 300; *D. Schindler* (*supra* note 76), at 14.

87 See the references *supra* notes 23 et seq. and accompanying text.

88 See also *D. Schindler* (*supra* note 76), at 14; *D. Schindler*, (*supra* note 74), at 374 et seq.; *Ch. Greenwood* (*supra* note 76), at 297, 300.

the law of peace has not been completely replaced by the law of neutrality and, on the other, that the law of peace has been partially modified by the law of neutrality. The fact that third States either abstained from supplying one party to a conflict with arms or denied being engaged in such activities (or conducted them clandestinely), proves that they did not believe they were free to choose between the law of peace and the law of neutrality.

The position of some authors who apply the law of neutrality *in toto* to every international armed conflict[89] is unsustainable in light of State practice. While it is true that the law of neutrality serves the interests of both belligerents[90] and neutrals, this does not necessarily mean that the law of neutrality is applicable *in toto* in every international armed conflict. State practice supports the view that the law of neutrality applies automatically and comprehensively in exceptional cases only, regardless of whether the armed conflict in question amounts to a state of war or not. According to modern State practice, the applicability of the law of neutrality depends on functional considerations that will, in most cases, result in a differential or partial applicability of that body of law.

A Interference with Neutral Trade

Some parts of the law of neutrality, like prize law, become applicable in an international armed conflict only when and insofar as the belligerents resort to recognized methods and means by, for example, interfering with neutral shipping and aviation.[91] Such measures are legal to the extent that the belligerents remain within the limits of the applicable rules. The legality of measures such as visit and search operations depends neither on the existence of a state of war, nor on considerations of necessity in the light of the *jus ad bellum*.

The last part of that contention has been seriously challenged by the United Kingdom. In 1986, after the British merchant vessel *Barber Perseus* was intercepted by Iranian units during the Iran-Iraq war, the Foreign Ministry declared:

> [...] under Article 51 of the United Nations Charter a State such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-

89 See, e.g., *M. Bothe* (*supra* note 54 at 206): "It is submitted that the practice during the Iran-Iraq war confirms the trend to substitute the notion of war by the notion of armed conflict in order to determine the field of application of what used to be called the 'law of war', including the law of neutrality." See also the criticism by *Ch. Greenwood*, Comments, in: The Gulf War 1980-1988 (*supra* note 20), 212-216, at 212 et seq.

90 *Ch. Greenwood* (*supra* note 76), at 299, also admits that "the law of neutrality may be useful in setting an upper limit to the rights of the combatants."

91 Therefore, according to the San Remo Manual (*supra* note 57), the admissibility of such measures is to be judged in the light of the *jus in bello*/law of maritime neutrality alone.

> defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict [...][92]

Although limited to naval warfare,[93] this position was re-emphasized in the recently published UK Manual of the Law of Armed Conflict,[94] paragraph 13.3 of which reads:

> In considering the rules set out in this chapter, it is necessary to bear in mind at all times one point of central importance, namely that the conduct of armed conflict at sea is subject to the limitations imposed by the UN Charter on all use of force. One particularly important aspect of those limitations is that even when resort to force is justified, it should not exceed what is necessary and proportionate to the achievement of the goal for which force may be used. In a conflict of limited scope, this may mean that a belligerent state is constrained, to a greater extent than the rules set out in the present chapter might suggest, in the action that it may lawfully take against the shipping or aircraft of states not involved in the conflict.

If the UK position correctly reflects customary international law, the admissibility of belligerent interference with neutral trade would have to be evaluated primarily in light of the right of self-defense and only secondarily in light of the law of neutrality. While some may consider the British position attractive because it sets up an additional legal requirement,[95] it is submitted that that view is unsustainable. It neither reflects State practice,[96] nor is it reconcilable with the principle of equal application of the *jus in bello*. Moreover, it implies an element of

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92 Statement by the Minister of State, Foreign and Commonwealth Office, January 28, 1986, House of Commons Debates, Vol. 90, col. 426; printed in: 57 British Year Book of International Law 583 (1986).

93 In this context the question arises why the alleged impact of the *jus ad bellum* is restricted to the law of naval warfare and maritime neutrality. If, as stated in the UK Manual, every resort to force is to be judged in the light of the *jus ad bellum*, then this should hold true for land and aerial warfare as well.

94 UK Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford 2004).

95 See, e.g., *J.G. Graham*, Proportionality and Force in International Law, in: 87 AJIL 391-413, at 412 (1993), who believes that since the Iran-Iraq war it has become "difficult to see how it can be argued that the rules regulating the conduct of armed conflict are unaffected by considerations relating to the use of force."

96 For an assessment of modern State practice with regard to prize measures see. *W. Heintschel von Heinegg*, Visit, Search, Diversion and Capture in Naval Warfare-Conditions of Applicability: Part II, Developments since 1945, in: 30 Canadian Yearbook of International Law 89-136 (1992).

arbitrariness that will in most cases prove counterproductive from the standpoint of effective protection of neutral commerce.

The San Remo Manual,[97] ILA Helsinki Principles,[98] and manuals of the U.S.[99] and the German Navies[100] start from the premise that the *jus ad bellum* and the *jus in bello* (the latter comprising the law of neutrality) are two distinct parts of international law. Keeping in mind the basic principle of equal application of the *ius in bello*[101] these texts neither distinguish between an aggressor and the victim of aggression, nor modify the *jus in bello* by reference to the legal limits of self-defense. Pursuant to these documents, all parties to an international armed conflict at sea may, in principle, resort to the full spectrum of methods and means of naval warfare, including measures short of attack.

While the British position cannot be said to reflect customary international law, it may be asked who, other than a belligerent State, is competent to decide what is "necessary and proportionate to the achievement of the goal for which force may be used". It is clear that an authoritative UN Security Council decision based on Chapter VII of the Charter could prevent a belligerent from making use of the full spectrum of measures provided for in the law of neutrality. In the absence of such a decision, however, it is generally recognized that belligerent States themselves are entitled to decide whether they will interfere with neutral shipping and aviation. The affected neutral States are limited to legally evaluating the concrete measures undertaken, i.e. they could judge their legality based on the law of naval warfare and the law of maritime neutrality.[102] Thus, the right to render a legally binding opinion on the lawfulness of an initial visit and search decision rests exclusively with the UN Security Council. Statements by neutral States on the legality of measures short of attack based on rules other than the *ius in bello* (including the law of maritime neutrality) are merely political in nature.

97 San Remo Manual (*supra* note 57), paras. 3 *et seq*.

98 ILA, Helsinki Principles (*supra* note 56), paras. 1.2 and 1.3.

99 The Commander's Handbook on the Law of Naval Operations, NWP 1-14 M, para. 5.1.

100 German Navy, Commander's Handbook – Legal Bases for the Operations of Naval Forces, MN 218 (Bonn 2004).

101 For a detailed analysis of this principle see *H. Meyrowitz*, Le principe de l'égalité des belligérants devant la droit de la guerre (Paris 1970). See also *Y. Dinstein*, The Conduct of Hostilities under the Law of International Armed Conflict, at 4 (Cambridge 2004).

102 Evidence can be found in the practice of States during the Iran-Iraq war. The attacks on neutral merchant vessels were condemned by the UN Security Council (UNSC Res. 552, 1 June 1984) and by member States of the European Community; see Bull. of the European Communities, Commission, No. 9, p. 7 (1980); European Political Co-operation Documentation, Bull. Vol. 3, No. 2, p. 93 (1987) and Vol. 4, No. 1, pp. 173 *et seq.* (1988).

The British position could also lead to an arbitrary application of the law of naval warfare and maritime neutrality. British conduct in the Falklands war (1982) and during the Iran-Iraq war (1980-1988) serves as an example.[103]

As is well known, the British government established a Total Exclusion Zone (TEZ) during the Falklands war. According to the announcement of 28 April 1982:

> The exclusion zone will apply not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The zone will also apply to any aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within the zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British forces.[104]

Pursuant to the wording of the proclamation the UK was prepared to attack every ship encountered within the limits of the TEZ. Based on the Nuremberg Tribunal's jurisprudence and on customary international law, the legality of the TEZ or of attacks therein was more than questionable.[105] It may well be that the proclamation was intended to deter rather than to provide a legal basis for attacks on neutral shipping. It may well be that it was nothing but a permissible ruse of war. At face value, however, and in view of the fact that the British government attempted to justify the TEZ by reference to self-defense, its action could also have, if considered necessary for reasons of self-defense, gone beyond the prescriptions of the law of naval warfare and established and enforced a "free-fire-zone".

In other words, when it is a party to an international armed conflict, such as the Falklands War, the British Government believes that it is entitled to broaden the spectrum of methods and means provided for in the law of naval warfare and of maritime neutrality by reference to the inherent right of self-defense. When it is not a party to an international armed conflict, such as the Iran-Iraq war, the British Government denies that very right to the belligerents, but claims to be entitled to judge and declare what is necessary and proportionate for the bel-

103 For a detailed analysis of that practice see *W.J. Fenrick*, The Exclusion Zone Device in the Law of Naval Warfare, in: 24 Canadian Yearbook of International Law 91-126 (1986). Further *R.P. Barston/P.W. Birnie*, The Falkland Islands/Islas Malvinas Conflict – A Question of Zones, 7 Marine Policy 14-24 (1983).

104 Printed in: 53 British Year Book of International Law 542 (1982).

105 However, *Fenrick* (*supra* note 103, at 112 *et seq.*) maintains that the British TEZ was legal in view of the fact that it was established in a remote sea area and that neutral ships were not attacked.

ligerents' self-defense. If that position were shared by other States (which is not the case), it would lead to a degree of legal ambiguity and insecurity that could ultimately induce both belligerents and neutrals to neglect the law of neutrality altogether.

B Essentials of the Law of Neutrality: Inter-State Relations

Only those parts of the law of neutrality that are strictly necessary for safeguarding its object and purpose become automatically applicable in inter-State relations. Third States are obliged to refrain from any activity that may contribute to the escalation of an armed conflict. They are especially prohibited from assisting one party in a manner that could lead to a temporal, spatial or other widening of the conflict.[106] Arms transfers by States are incompatible with the law of neutrality[107] and private transfers must be prevented on an impartial basis if and insofar as domestic rules provide.[108] Neutral territory, including neutral waters,[109] may not serve as a base of operations for any of the belligerents.[110] Moreover, neutral States are obliged to use all means at their disposal to prevent abuse of their neutral status by a belligerent.[111] Permission for or prohibitions on the use of neutral waters and neutral territory are subject to the principle of impartiality.[112] The parties to a conflict are obliged to respect the sovereignty and territorial integrity of neutral States, as well as their trade relations with other neutral States.[113]

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106 The continuing validity of this obligation is confirmed by statements of the British Government (57 British Year Book of International Law 638 et seq. [1987]), by the US Administration during the Iran-Iraq war (88 US Dept. of State Bull. 61 [July 1988]), and by UN Security Council Resolutions S/RES/540 of October 31, 1983, S/RES/582 of October 8, 1986, and S/RES/598 of July 20, 1987.

107 See the references *supra* in note 23 et seq.

108 Cf. *St. Oeter* (*supra* note 51), at 216 et seq., 221, 232, 235.

109 "Neutral waters", according to the San Remo Manual (*supra* note 57, para. 14): "consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States."

110 E.g., the US attack against Cambodia was in part justified by reference to the non-neutral conduct of that State. See statement by the Legal Adviser of the U.S. Department of State, *J.R. Stevenson*, of May 28, 1970, 62 US Dept. of State Bull. 765 et seq. (May 1970). See also *R.A. Falk*, The Cambodian Operation and International Law, in: The Vietnam War and International Law Vol. 3, 35-57 (ed. by R.A. Falk, Princeton 1972). See also San Remo Manual (*supra* note 57), paras. 15 et seq.; NWP 1-14 M (*supra* note 99), para. 7.3; German Navy, Commander's Handbook (*supra* note 100), MN 232.

111 San Remo Manual (*supra* note 57), paras. 19, 20; NWP 1-14 M (*supra* note 99), para. 7.3; German Navy, Commander's Handbook (*supra* note 100), MN 232.

112 San Remo Manual (*supra* note 57), para. 22; NWP 1-14 M (*supra* note 99), para. 7.3; German Navy, Commander's Handbook (*supra* note 100), MN 236 et seq.

113 See the foregoing references in notes 105 et seq.

Trade relations between neutrals and belligerents may only be interfered with in accordance with the relevant rules and principles of the law of neutrality.

The military manuals of the US[114] and German navies[115] demonstrate that States agree on the essentials of the law of neutrality. The UK manual is the only recent one that does not explicitly address the law of neutrality.[116] However, the amended version[117] of chapter 13 comprises five paragraphs showing that the UK also recognizes the essentials of the law of (maritime) neutrality:

> 13.9A Belligerent forces may not use neutral waters as a sanctuary.
>
> 13.9B Subject to Paragraphs 13.16 and 13.20, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warship and auxiliary vessels.
>
> 13.9C Subject to the duty of impartiality, and to Paragraphs 13.9D and 13.10-13.20, and under such regulations as it may establish, a neutral State may, without jeopardising its neutrality, permit the following acts within its neutral waters:
>
> a. passage through its territorial sea and, where applicable, its archipelagic waters by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
>
> b. replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
>
> c. repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.
>
> 13.9D A belligerent warship or auxiliary vessel exercising rights of passage through neutral waters should do so continuously and expeditiously unless unable to do so on account of damage, the stress of weather or by *force majeure*.
>
> 13.9E Should a belligerent State be in violation of the regime of neutral waters, as set out in this manual, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral state fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation

114 NWP 1-14 M (*supra* note 99), chapter 7.

115 German Navy, Commander's Handbook (*supra* note 100), MN 227 et seq.

116 UK Manual (*supra* note 95).

117 The amended version of the UK Manual, which was available on the internet until recently, will be published in due course.

> by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

A neutral State has no choice but to comply with these *essentialia neutralitatis* if it does not wish to become involved in an ongoing international armed conflict. Their applicability depends exclusively on the existence of such a conflict. In case of non-compliance, the aggrieved belligerent is not obliged to claim a violation of neutral duties. According to this author's view, the admissibility of belligerent interference with neutrals is not the relevant issue. The focus must instead be on the object and purpose of the law of neutrality, which is protection of the belligerents' interests and prevention of the escalation of the armed conflict. Under this reading, the *essentialia neutralitatis* must of necessity be automatically applicable in every international armed conflict. Whether and to what extent the remaining rules and principles of the law of neutrality are applicable will depend on the circumstances of each case. This does not mean that it will depend on the decision of a third State, but, instead, on whether the parties to an international armed conflict are willing and able to enforce the whole body of the law of neutrality. The failure of the belligerents to so enforce it (because they are confronted with a powerful neutral State or because they do not want to interfere with trade relations), does not imply that the essentials of the law of neutrality are meaningless or obsolete. Third States continue to be bound by the *essentialia neutralitatis* even if the belligerents refrain from enforcement. A functional and differential approach explains why States, in their military manuals for example, continue to recognize the traditional law of neutrality by quoting the 1907 Hague Conventions V and XIII. While the law of neutrality remains substantively unmodified, only the rules strictly necessary to achieve its object and purpose become automatically applicable during international armed conflict

Concluding Remarks

By assisting the US war-fighting effort in Iraq the German Government contravened the law of neutrality because it failed to adhere to the *essentialia neutralitatis*. Whether Operation Iraqi Freedom could be characterized as a state of war is irrelevant. As has been argued, the fact that Iraq was unable to react to the violations is also irrelevant. In view of Iraq's inability to react, some may conclude that it is futile to examine that case or to deal with the law of neutrality at all. It should, however, not be overlooked that the law of neutrality – despite the UN's collective security system – continues to serve the vital interests of States, like the Federal Republic of Germany, which depend heavily on international

trade. States should therefore think twice before departing from the essentials of neutrality law. If they were to be confronted with a belligerent far more powerful than Iraq in a future conflict, the law of neutrality could prove to be the only legal order effectively protecting their legitimate interests as States not taking part in the conflict.

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