

JUST WAR OR JUST PEACE AFTER SEPTEMBER 11:
AXES OF EVIL AND WARS AGAINST TERROR
IN IRAQ AND BEYOND

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One week before the 2003 Iraq war commenced, as British Prime Minister Tony Blair faced resignations from his Cabinet and recalcitrant opposition from his public, he remarked to a journalist: “What amazes me is how many people are happy for Saddam to stay. They ask why we don’t get rid of Mugabe, why not the Burmese lot. Yes, let’s get rid of them all. I don’t because I can’t, but when you can, you should.”¹

This was a revealing statement in the lead-up to a war of regime change. In particular, it suggests the ambiguous position of human rights violations as a *casus belli* in the Iraq war: the Prime Minister was not suggesting that Saddam Hussein’s human rights record in itself was sufficient to warrant his overthrow, but he was arguing that those who thought that it *should* be sufficient to oust a dictator ought to embrace the opportunity to overthrow him for other reasons; demands for consistency in such circumstances were in reality a call for paralysis. The problem with Blair’s position, however, is that it was disingenuous. His own support for the war might well have been consistent with a desire to oust Saddam Hussein, but the driving factor was aligning British interests with those of its U.S. partner, whereas human rights concerns were far lower down the list of priorities for Iraq.²

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1. PETER STOTHARD, THIRTY DAYS: TONY BLAIR AND THE TEST OF HISTORY 42 (2003); see also Michael Ignatieff, *Human Rights, Power, and the State, in MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE* 59 (Simon Chesterman et al. eds., 2005).

2. See Ignatieff, *supra* note 1. On the U.S. decision to go to war generally, see BOB WOODWARD, PLAN OF ATTACK (2004).

Such ambivalence about the recourse to force reflects two countervailing trends through the 1990s: the increasing preparedness to use force for humanitarian and other non-defensive purposes on the one hand, and the dependence of any actual use of force on the willingness of a state or group of states to lead in such action on the other. This article examines the changing nature of justifications for the use of force since the end of the Cold War, with particular reference to the increased role of the U.N. Security Council and the controversy surrounding the decision to invade Iraq without an explicit Council mandate in 2003. The article first discusses the re-emergence of just war language in the foreign policy of the United States before examining the formal legal justifications given for the Iraq war. The third section of the article discusses the impact of the war on institutions of international order.

I. AXES OF EVIL, WARS AGAINST TERROR

Though typically referred to as “neo-conservative,” the ideology embraced by the Bush administration is better understood as a form of radical idealism. Prior to the September 11, 2001, attacks in New York and Washington, D.C., this was not the case. President Bush had proclaimed his desire for a “humble” foreign policy;³ his main adviser on foreign affairs, Condoleezza Rice, had outlined a conservative manifesto of U.S. foreign policy for a future Bush administration before the 2000 presidential election.⁴

From the early days of the Bush administration, it appeared that the former Cold Warriors and Sovietologists whom President Bush imported into his team were preparing to structure the twenty-first century around the containment of China—a bipolar model familiar to them. The new administration abandoned the Clinton doctrine of China as a “strategic partner” in favor of a more hard-line position that regarded it as a “strategic competitor.” This position was driven in part by concerns about China’s increasing influence and in part by domestic criticism of China’s human rights policy. It

3. See David E. Sanger, *The First Lesson for Bush: It's Still the Economy*, N.Y. TIMES, Dec. 24, 2000, at D4.

4. Condoleezza Rice, *Campaign 2000: Promoting the National Interest*, 79(1) FOREIGN AFFAIRS 45 (Jan./Feb. 2000).

was quickly tested when a U.S. spy plane collided with a Chinese fighter jet approximately three months after President Bush took office.⁵

The September 11 attacks transformed this strategic environment.⁶ Following the terrorist attacks, there was an immediate call within the United States for a military response. President Bush stated that the United States would “hunt down and punish those responsible for these cowardly acts,”⁷ a goal later amplified in his response to a question as to whether he wanted Osama bin Laden dead: “I want justice. There’s an old poster out west, as I recall, that said, ‘Wanted: Dead or Alive.’”⁸

The U.N. Security Council swiftly passed a unanimous resolution condemning the “horrifying terrorist attacks,” which it called a “threat to international peace and security.”⁹ The Council further stressed that “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.”¹⁰ This explicitly adopted the language used by President Bush to implicate Afghanistan’s Taliban regime as at least partly responsible for the acts of its Al Qaeda “guests.” Finally, the Council stated its readiness to take “all necessary steps” to respond to the attacks.¹¹

Though the Security Council did become central to the sweeping measures intended to deny terrorists financing, support, and safe haven,¹² the implicit offer of a Chapter VII legal

5. Elisabeth Rosenthal & David E. Sanger, *U.S. Plane in China after it Collides with Chinese Jet*, N.Y. TIMES, Apr. 2, 2001, at A1.

6. On the attacks and immediate aftermath, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 237 (2002).

7. George W. Bush, Remarks by the President Upon Arrival at Barksdale Air Force Base (Sept. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html> (last visited May 29, 2005).

8. George W. Bush, Remarks by the President to Employees at the Pentagon (Sept. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010917-3.html> (last visited May 29, 2005).

9. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. ¶ 1, U.N. Doc. S/RES/1368 (2001).

10. *Id.* ¶ 3.

11. *Id.* ¶ 5.

12. See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

umbrella for the U.S. military response was not accepted—apparently out of a desire on the part of the United States to preserve maximum flexibility in the form that response might take.¹³ Similarly, the United States did not seek the direct assistance of NATO, which had invoked the collective self-defense provisions of Article 5 of the Washington Treaty for the first time.¹⁴ On September 18, 2001, President Bush declared a national emergency¹⁵ and signed into law a joint resolution of Congress that authorized him to use:

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁶

The “war on terror” soon came to dominate U.S. foreign policy and to define the Bush presidency.¹⁷ Notably, U.S. officials quickly embraced China as a potentially helpful ally in the war on terror—an embrace reciprocated by Beijing, which saw it as an opportunity to improve relations with the United States and to gain concessions on issues such as U.S. arms sales to Taiwan.¹⁸ Broader transformations soon followed as a humble foreign policy became more aggressive. Eleven years after his father declared, prior to ousting Iraq from occupied Kuwait, that the rule of law would supplant the rule of the jun-

13. See Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L.Q. 401, 401 (2002).

14. NATO Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s0111002a.htm> (last visited May 29, 2005).

15. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

16. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

17. See generally BOB WOODWARD, BUSH AT WAR (2002).

18. James Dao, *Closer Ties with China May Help U.S. on Iraq*, N.Y. TIMES, Oct. 4, 2002, at A5; Congressional Research Service, CRS Report for Congress, *China-U.S. Relations: Current Issues for the 108th Congress*, by Kerry Dumbaugh (CRS Report RL31815, Apr. 28, 2003) 2.

gle,¹⁹ the younger President Bush declared a war on terror and defined the immediate enemy as an “axis of evil,”²⁰ suggesting a preparedness to use ethical arguments and absolute ethical statements as a substitute for legal—or, it might be argued, rational—justification.

President Bush’s unfortunate tendency to use the language of crusades in respect of conflicts against Islamic states, if not against Islam itself, has often been noted in the press. U.S. military operations against Afghanistan were referred to initially as “Infinite Justice”—a title that captured the rhetoric of President Bush and the national sentiment in the weeks after September 11. This was swiftly changed, however, when the Council on American-Islamic Relations and other Muslim groups complained that only God could dispense such justice.²¹ It was peculiarly unfortunate that in both Afghanistan and Iraq the European Crusaders of the Middle Ages were known as “Franks”—coincidentally the surname of General Tommy Franks, the Commander in Chief of U.S. Central Command who oversaw the two more recent battles.

This awkwardness in packaging reflected a larger problem with recourse to the rhetoric of the “just war.” Though typically identified today with humanitarian intervention, the origin of arguments that war may be waged on behalf of an oppressed population have always overlapped with arguments that war may be waged against the wicked. Such justifications for taking up arms can be found in the writings and practice of most religions and of those empires styling themselves as civilized.²² In sixteenth and seventeenth century Europe, wars

19. See Andrew Rosenthal, *Bush Vows to Thwart Iraq Despite Fear for Hostages; U.S. Won't Be 'Blackmailed': He Hints at Force*, N.Y. TIMES, Sept. 12, 1990, at A1.

20. George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited May 29, 2005).

21. Jonathan Weisman, *Mobilization Name Changes*, USA TODAY, Sept. 26, 2001, at A5; Sarah Boxer, *Operation Slick Moniker: Military Name Game*, N.Y. TIMES, Oct. 13, 2001, at A13.

22. On Christianity in particular, see 35 THOMAS AQUINAS, *SUMMA THEOLOGICA* 81-85 (Blackfriars & McGraw-Hill 1972); AUGUSTINE, *QUESTIONS ON THE HEPTATEUCH, ON JOSHUA*, Question 10; 2 FRANCISCO SUÁREZ, *The Three Theological Virtues: On Charity*, in *SELECTIONS FROM THREE WORKS* § 5(5), at 825-26 (1944); HUGO GROTIUS, *THE LAW OF WAR AND PEACE (DE IURE BELLI AC PACIS)* 71-77, 205-34 (Louise R. Loomis trans., Walter J. Black 1949)

and interventions over religious differences were frequent,²³ and many writers continued to accept such wars as just, either in and of themselves or insofar as they were undertaken on the orders of God.²⁴ It took a rare writer such as Alberico Gentili to observe that not merely Jews and Christians, but Ethiopians, Spartans, Turks, and Persians had all been stirred to arms by divine influence.²⁵ Prime Minister Blair appeared to draw a clearer distinction between humanitarian and quasi-religious calls to arms, a distinction that was sometimes effaced—to Blair's embarrassment—by President Bush.²⁶

One year after the September 11 attacks, the White House issued its major policy response to the new strategic environment. Though President Bush continued to use religiously infused rhetoric in his speeches, the National Security Strategy outlined the new agenda in milder language.²⁷ Much of the document was spent elaborating and justifying the concept of pre-emptive intervention; together with the stated policy of

(translating Book II Chapters i and xx); EMMERICH DE Vattel, *THE LAW OF NATIONS: PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ([1758] 1916), II, iv. On Islam and the doctrine of *jihād*, see MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 51-73 (1955).

23. See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 66-71 (rev. ed., McMillan 1954).

24. Coleman Phillipson, *Introduction* in 2 ALBERICO GENTILI, *DE JURE BELLI* 34a ([1612] 1933), lists Bartolus, Baldus, Joannes da Lignano [Giovanni de Legnano], John Wycliffe, Domingo Soto, Covarruvias, and Ayala; see, e.g., GIOVANNI DA LEGNANO, *TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO* 224-31 ([1447] 1917) [x-xi]; BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III* ch. 2, §§ 28, 30 (John Westlake ed., John Pawley Bate trans., Carnegie Institution of Washington 1912) (1582) (stating that war may not be declared against infidels merely because they are infidels but that a just war may be waged on heretics who abandon the Christian faith; the author goes on to state that another just cause of war is where infidels "are found hindering by their blasphemies and false arguments the Christian faith and also the free preaching of the Gospel rule") (citing ALFONSO OF CASTILE, *DE IUSTA HÆRETICORUM PUNITIONE* [ON THE LAWFUL PUNISHMENT OF HERETICS], bk 2).

25. GENTILI, *supra* note 24, at 36 [I, viii].

26. See, e.g., James Blitz, *Leap of Faith*, *FIN. TIMES MAG.*, Apr. 26, 2003, at 14.

27. NAT'L SEC. COUNCIL, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* § V (2002), available at <http://whitehouse.gov/nsc/nss.pdf> (last visited Feb. 23, 2005) [hereinafter NATIONAL SECURITY STRATEGY].

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dissuading potential adversaries from hoping to equal the power of the United States, it implicitly asserted a unique status for the United States as existing outside of international law as it applies to other states.²⁸ At the same time, however, the National Security Strategy noted that threats to the United States now came not from fleets and armies but from “catastrophic technologies in the hands of the embittered few.” In such a world, failing states were said to pose a greater menace to U.S. interests than conquering ones.²⁹

The novelty of the National Security Strategy is frequently overstated: Many of the ideas contained within it were far from new. In particular, a draft Defense Planning Guidance had been leaked in 1992—at the end of the previous Bush administration—that also articulated a bluntly unilateralist message.³⁰ Interestingly, the 1992 document was drafted by Paul D. Wolfowitz, then Under-Secretary of Defense for Policy and later Deputy Secretary of Defense under President George W. Bush, for approval by Dick Cheney, Secretary of Defense in 1992 and later Vice-President. Criticism of the 1992 document led to a substantial rewrite. In any event, it was seen as a parting shot from a lame-duck administration.

Politics and technology conspired to give new life to these ruminations. The strategic change brought about by the September 11 attacks followed an evolution in battlefield capacity that made war by remote control and proxy a possibility. As Martin Shaw has observed, the ability to transfer risk has radically altered both the decision to have recourse to force as well as the moral evaluation of conduct in war.³¹ Through the 1990s, this lowered the threshold for conducting military oper-

28. Cf. 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 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (commenting that most international lawyers “couched their opinions in terms of ‘traditional international law,’ observing that it provided no clear basis for the intervention but usually refraining from condemning the intervention as illegal”).

29. NATIONAL SECURITY STRATEGY, *supra* note 27, at 1.

30. *Excerpts from Pentagon’s Plan: “Prevent the Re-Emergence of a New Rival,”* N.Y. TIMES, Mar. 8, 1992, at A14; see also Patrick E. Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*, N.Y. TIMES, Mar. 8, 1992, at A1.

31. Martin Shaw, *Risk-Transfer Militarism and the Legitimacy of War after Iraq*, in SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW? (Paul Eden and Thérèse O’Donnell eds., 2004).

ations—the so-called “Vietnam syndrome” from which the United States was believed to suffer—allowing an expansion in military action for broadly humanitarian purposes.³² In Afghanistan in 2001, this transfer of risk was not merely at the level of specific battles, but in the more general war aims—with predictable results. By minimizing the use of its own troops in favor of using Afghan proxies, more weapons were introduced into a country that was already heavily armed, empowering groups that fought on the side of the United States, whether or not they supported the embryonic regime of Hamid Karzai.³³

The war in Iraq may be a correction to this trend. With U.S. casualties passing 1,000 eighteen months after the commencement of hostilities, more U.S. soldiers died in Iraq than in all other combat operations through the decade combined. In addition to challenging the received wisdom that air power can now determine all battles, the more recent conflict gives the lie to another accepted truth: that industrialized countries cannot sustain casualties. Instead, when public opinion believes that soldiers are fighting and dying for a proper purpose, casualties may indeed be accepted. Through the 1990s, the reasons for U.S. military engagement were often unclear or not firmly held—epitomized by the withdrawal of all troops from Somalia after eighteen U.S. soldiers were killed in the “Black Hawk Down” incident of October 1993. The danger for President Bush heading into an election year and the second year of occupation of Iraq was that the purpose of an ongoing U.S. presence in Iraq—and the steady stream of casualties that went with that occupation—was becoming less clear as time passed.

II. LAW AND OPERATION “IRAQI FREEDOM”

In contrast with the rhetoric of evil and terror, and the adoption of a doctrine that implicitly asserted the right of the United States to attack potential adversaries before a threat

32. Thomas G. Weiss, *The Humanitarian Impulse, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 37 (David M. Malone ed., 2004).

33. Chris Johnson et al., *Afghanistan’s Political and Constitutional Development* (Overseas Development Institute, London, Jan. 2003), at <http://www.odi.org.uk/hpg>.

could materialize, the actual legal justifications presented for the invasion of Iraq in March 2003 reflected a more traditional form of conservatism—at least in the legal reasoning deployed in support of the military action.³⁴

The British government produced a formal opinion of the Attorney-General, the outlines of which were made public two days before hostilities commenced.³⁵ In essence, this opinion held that Security Council Resolutions 678 (1990) and 687 (1991) provided for a conditional cease-fire against Iraq only and that Resolution 1441 (2002), adopted unanimously by the Council, declared Iraq to be in breach of its 1991 obligations and thus “revived” the original resolution authorizing the use of force. As for whether a further resolution (which the British government had sought until it became clear that no satisfactory resolution would pass muster) was required, Lord Goldsmith wrote:

Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorise force.³⁶

The deputy legal adviser of the British Foreign Office resigned in protest over this line of legal reasoning,³⁷ which prompted two former legal advisers to express their dismay at “the superficiality of much of the debate over Iraq.”³⁸ The British letter transmitted to the President of the Security Council as hostilities commenced was more succinct, stating that the objective of the action was “to secure compliance by Iraq with its disarmament obligations as laid down by the

34. *But see* Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003) (examining the implications of the war in Iraq on the norm of self-defense).

35. *See, e.g.*, Lord Goldsmith, *Legal Basis for Use of Force Against Iraq* (Mar. 17, 2003), *available at* <http://www.labour.org.uk/news/legalbasis>.

36. *Id.*

37. Ewen MacAskill, *Adviser Quits Foreign Office Over Legality of War*, *GUARDIAN* (London), Mar. 22, 2003, at 1.

38. Franklin Berman & Arthur Watts, *Letter to the Editor: Implications of Acting against Iraq without UN Sanction*, *TIMES* (London), Mar. 20, 2003, at 21.

Council.”³⁹ Earlier internal advice may have been even patchier, as it was withheld even at the expense of allowing a whistleblower to escape prosecution under the Official Secrets Act.⁴⁰

The U.S. government was even less forthcoming in its articulation of a formal legal argument, though the outline of a position could be discerned from statements by President Bush and other administration officials from September 2002 to March 2003. The coincidence of this period with publication of a new U.S. strategic doctrine of pre-emptive use of force in response to the threat of weapons of mass destruction and terrorism⁴¹ led many observers to assume that the Iraq war was the first application of the new doctrine. In fact, a narrower justification along the lines of the British argument is closer to the considered legal justification ultimately presented by the United States in its own letter to the President of the Security Council and subsequently.⁴²

Writing in the *American Journal of International Law*, the Legal Adviser of the U.S. State Department argued that the 2003 action was a continuation of the collective self-defense undertaken in response to Iraq’s 1990 attack on Kuwait and Iraq’s

39. Letter 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 (Mar. 20, 2003), U.N. Doc. S/2003/350 (2003).

40. In January 2003, Katharine Gun, a translator at the British General Communications Headquarters (GCHQ), leaked a memorandum from Frank Koza, Defense Chief of Staff (Regional Targets) at the U.S. National Security Agency, asking for British assistance in bugging delegates of six nations on the Security Council ahead of a vote on a resolution against Iraq. The trial against Gun collapsed in February 2004 when the prosecution offered no evidence. Though denied by government prosecutors, this was widely reported as being in response to her request for the disclosure of legal advice given to the Foreign and Commonwealth Office prior to the war in Iraq. See Frances Gibb & Greg Hurst, *C.P.S. Denies That Whistleblower Case Was Dropped Over Legality of War*, *TIMES* (London), Feb. 27, 2004, at 4; see also Martin Bright et al., *The UN Spy Scandal*, *OBSERVER* (London), Feb. 29, 2004, at 17, available at <http://observer.guardian.co.uk/focus/story/0,6903,1158834,00.html>.

41. See generally NATIONAL SECURITY STRATEGY, *supra* note 27.

42. Letter from the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003); see also Lori Fisler Damrosch & Bernard H. Oxman, *Future Implications of the Iraq Conflict*, 97 *AM. J. INT’L L.* 553, 553-54 (2003).

persistent material breaches of the cease-fire terms concluded in April 1991. Describing the succeeding twelve years as “essentially ongoing conflict,” William H. Taft IV, writing with Todd F. Buchwald, stated that “a material breach of the conditions that had been essential to the establishment of the cease-fire left the responsibility to member states to enforce these conditions.” This position likened the 2003 invasion of Iraq to the unilateral imposition of no-fly zones in northern and later southern Iraq by the United States and the United Kingdom, for a time joined by France.⁴³ Similar justifications were raised when force was used in January 1993 and December 1998.⁴⁴ In a detailed analysis of the text of Resolution 1441 (2002), Taft and Buchwald wrote that the language “tracked the language of Resolution 678, and the resolution operated in the same way to authorize coalition forces to bring Iraq into compliance with its obligations.”⁴⁵ This somewhat optimistically glossed over the fact that Resolution 678 (1990) had provided a deadline for Iraq to comply with Council demands and specifically authorized the use of “all necessary means” in the event that Iraq did not. Resolution 1441 (2002), by contrast, was a study in ambiguity.

Resolution 678 was one of a series of resolutions that condemned Iraq’s invasion of Kuwait, called for its immediate withdrawal, imposed mandatory sanctions on Iraq, and declared Iraq’s purported annexation of Kuwait to be null and void. It authorized “Member-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.”⁴⁶ The potential breadth of these words was barely remarked upon in the course of the public statements. Cuba and Iraq denounced the Resolution as illegal due to its failure to refer to the specific articles of Chapter VII,⁴⁷ but only Yemen expressed concern at the possible scope of

43. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557, 558-59 (2003).

44. See, e.g., Letter from the Chargé d’Affaires A.I., United States Mission, to the United Nations (Dec. 16, 1998), U.N. Doc. S/1998/1181 (1998).

45. Taft & Buchwald, *supra* note 43, at 563.

46. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

47. S/PV.2963 (1990) at 20-21 (Iraq), 58 (Cuba).

“restor[ing] international peace and security in the area.”⁴⁸ Nevertheless, a limited understanding of the authorization was embraced by the first Bush administration. President George H.W. Bush himself later stressed that the resolutions “never called for the elimination of Saddam Hussein. It never called for taking the battle into downtown Baghdad.”⁴⁹ He elaborated on this view in memoirs written with Brent Scowcroft, stating that any such action would have split the coalition that had been formed against Iraq and “destroyed the precedent of international response to aggression that we hoped to establish.”⁵⁰ An earlier version of this argument appeared in the March 2, 1998, edition of *Time*⁵¹ but was removed from its on-line edition in Spring 2003, shortly before the war to remove Saddam Hussein commenced.⁵²

In the end, the decision was made to declare victory and go home, leaving Iraq weak but intact and with President Saddam Hussein still in power. Resolution 687 (1991), adopted on April 3, 1991, more than four weeks after the ceasefire of February 28, imposed an extraordinarily intrusive regime on Iraq, but the resolution provided that the Council was “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 The item remained on the Council’s agenda over the following years, though by the time of the U.S.-led invasion of Iraq in 2003 it had moved somewhat beyond its original scope, which was limited to “[t]he situation between Iraq and Kuwait.”⁵⁴

48. *Id.* at 33 (Yemen).

49. George H.W. Bush, Remarks to the American Society of Newspaper Editors, 1 PUB. PAPERS 568 (Apr. 9, 1992).

50. GEORGE H.W. BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 489 (1998).

51. George H.W. Bush & Brent Scowcroft, *Why We Didn't Remove Saddam*, *TIME*, Mar. 2, 1998, at 31.

52. Tony Greiner, *The Case of the Disappearing Article*, *LIBRARY JOURNAL*, Apr. 15, 2004, at 58, available at <http://www.libraryjournal.com/article/CA408331>.

53. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., ¶ 34, U.N. Doc. S/RES/687 (1991).

54. See, for example, the list of Security Council resolutions reproduced at http://www.un.org/Docs/sc/unsc_resolutions03.html (last visited May 29, 2005).

The formal argument, such as it was, advanced by the United States and Britain for the legality of the 2003 invasion depended on a very specific reading of Security Council Resolutions 678 (1990) and 687 (1991), also of Council resolutions more generally. In particular, the use of the term “material breach” is premised upon two questionable assumptions.

First, it presumes an equivalence between treaties and resolutions. The Vienna Convention on the Law of Treaties defines “material breach” as an unjustified repudiation of a treaty or the violation of a provision essential to the accomplishment or the object or purpose of a treaty.⁵⁵ Crucially, it is grounds for suspending operation of the treaty. By arguing that Iraq was in material breach of Resolution 687, the United States and Britain were in effect arguing that the ceasefire put in place in April 1991 had been terminated or suspended.⁵⁶ The implication is that Resolution 687 can be equated with a treaty between Iraq and the members of the coalition ranged against it and that material breach by Iraq removed any obligations on those other states. This is dubious, not least because it was the United Nations—rather than the United States or other coalition partners—that had entered into an agreement with Iraq for the purposes of the resolution. In addition, the Vienna Convention also provides that material breach would not release the United States from an obligation “embodied in the treaty to which it would be subject under international law independently of the [materially breached] treaty.”⁵⁷ As Thomas Franck has observed, this put the United States “squarely back under the obligation of Charter Article 2(4),” which prohibits the use of force in the absence of an armed attack or prior authorization of the Security Council.⁵⁸

This leads to the second questionable assumption: that such a material breach somehow bypasses the provisions of the Charter governing the use of force. Such an argument evokes a body of law that predates the Charter and holds that serious

55. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 60 [hereinafter Vienna Convention].

56. James Blitz & Haig Simonian, *PM Signals Readiness for Iraq Attack*, FIN. TIMES (London), Dec. 10, 2002, at 1.

57. Vienna Convention, *supra* note 55, art. 43.

58. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 614 (2003); *see also* THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

violation of an armistice by one party entitles the other party to resume hostilities.⁵⁹ Whereas the earlier position made sense in a legal order in which war itself was not prohibited, the post-Charter position on the legality of the use of force makes an argument that unilateral recourse to force may be justified in such circumstances difficult to sustain.

This is especially true for circumstances in which the legitimacy of the use of force that led to the cease-fire depends on the delegation of power by the Security Council. Resolution 678 (1990) authorized the use of all necessary means to “uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions.”⁶⁰ Following the suspension of hostilities, the Council adopted Resolution 686 (1991) as a provisional cease-fire resolution, explicitly recognizing that the authorization in Resolution 678 (1990) remained valid for the period required by Iraq to comply with its terms.⁶¹ Resolution 687 (1991), by contrast, represented a “formal cease-fire” effective upon Iraq’s *acceptance* of the provisions.⁶² For the provisional cease-fire, the Council affirmed that the previous resolutions “continue to have full force and effect;”⁶³ the second resolution affirmed the previous resolutions “except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire.”⁶⁴ Indeed, China and India abstained

59. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18 1907, art. 40, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Regulations], available at <http://www.icrc.org/ihl.nsf/b0d5f4c1f4b8102041256739003e6366/e71fb6078e7343abc12563cd00516867?OpenDocument>. Given the provisions of article 2(4) and Chapter VII of the Charter, it has been argued that this does not apply to an alleged violation of a *UN-imposed* cease-fire. See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 125, 144 (1999).

60. S.C. Res. 678, *supra* note 46, ¶ 2 (emphasis added).

61. S.C. Res. 686, U.N. SCOR, 46th Sess., ¶ 4, U.N. Doc. S/RES/686 (1991). The relevant terms were that Iraq: rescind its purported annexation of Kuwait; accept in principle its liability for damages suffered by Kuwait and third states; release all prisoners; return Kuwaiti property; cease hostile or provocative acts; and provide information on mines and chemical and biological weapons in Kuwait and areas of Iraq temporarily occupied by allied forces pursuant to S.C. Res. 678. *Id.* ¶¶ 2-3.

62. S.C. Res. 687, *supra* note 53, ¶ 33.

63. S.C. Res. 686, *supra* note 61, ¶ 1.

64. S.C. Res. 687, *supra* note 53, ¶ 1.

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from Resolution 686 (1991) as they disagreed with the continuation of the Resolution 678 (1990) authorization to use force.⁶⁵ Both states later voted in favour of Resolution 687 (1991).⁶⁶

Though at times meticulously presented, the legal argument did not appear to be taken particularly seriously at the political level. When Saddam Hussein undertook a significant step towards compliance with Security Council demands by commencing the destruction of Al Samoud 2 missiles in late February 2003, the White House made it clear that disarmament would not be sufficient to head off war without Saddam Hussein also stepping down from power.⁶⁷ This clearly went beyond the enforcement of Council resolutions. Condemning the war as illegal, however, was in no one's interests. Those who had opposed the war most vocally, such as France, at times quietly advocated that the Council process be bypassed altogether so that the war could take place and leave time for the more important process of mending relations between Paris and Washington that had been strained by the awkward diplomacy in New York.

Commentators arguing that the invasion complied with international law were in a small minority. Some agreed broadly with the U.S. and British arguments concerning the series of Council resolutions.⁶⁸ Others more bluntly justified the invasion as lawful self-defense, noting that, after the September 11, 2001, terrorist attacks, the possibility that terrorists might gain access to weapons of mass destruction was an intolerable risk to the United States.⁶⁹ The alleged link with terrorists was never seriously argued before the Security Council, and the failure of the United States and Britain to locate the

65. S/PV.2978 (1991) 51 (China), 76 (India).

66. S.C. Res. 687, *supra* note 53 (adopted by a vote of 12-1-2, with Cuba against and Ecuador and Yemen abstaining).

67. Felicity Barringer & David E. Sanger, *U.S. Says Hussein Must Cede Power to Head Off War*, N.Y. TIMES, Mar. 1, 2003, at A1.

68. *See, e.g.*, Christopher Greenwood, Memorandum on the Legality of Using Force Against Iraq, United Kingdom, House of Commons, Select Committee on Foreign Affairs, Minutes of Evidence, *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmcaff/196/2102406.htm>; Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003).

69. *See, e.g.*, John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 565 (2003).

alleged stockpiles of weapons of mass destruction—or, indeed, to substantiate a single claim made in the six months prior to the war⁷⁰—caused political difficulties for both President Bush and Prime Minister Blair. Still others, such as Ruth Wedgwood, queried whether international law should value “desultory process over substance.”⁷¹

A few political commentators, notably Michael Ignatieff,⁷² initially supported the action on the basis that, whatever intentions lay behind it, ousting Saddam Hussein would serve a humanitarian end. This recalled arguments of a right of humanitarian intervention that some had long argued should be applied to the brutal regime in Baghdad. Nevertheless, this position was undercut by the failure to articulate such a justification until other arguments, such as weapons of mass destruction and terrorist links, became strained. As Kenneth Roth, Executive Director of Human Rights Watch, observed:

[T]he killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition, intervention was not the last reasonable option to stop Iraqi atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximized compliance with international humanitarian law. It was not approved by the Security Council. And while at the time it was launched it was reasonable to believe that the Iraqi people would be better off, it was not designed or carried out with the needs of Iraqis foremost in mind.⁷³

70. See Thomas Powers, *The Vanishing Case for War*, N.Y. REV. OF BOOKS, Dec. 4, 2003, at 12, 14.

71. Ruth Wedgwood, *Legal Authority Exists for a Strike on Iraq*, FIN. TIMES (London), Mar. 14, 2003, at 19; see also Wedgwood, *supra* note 68, at 576, (noting after the conflict that the Iraqi people had been “freed from the brutality of Saddam Hussein,” despite “predictable difficulties in organizing a new government”—a change that had removed the threat posed by his weapons of mass destruction and which would enhance the “crucial hopes for Middle East peace”). Wedgwood concedes, however, that “[t]hese welcome consequences are not the single measure of international law.” *Id.*

72. See, e.g., Michael Ignatieff, *The Year of Living Dangerously*, N.Y. TIMES MAGAZINE, Mar. 14, 2004, at 13.

73. HUMAN RIGHTS WATCH, WORLD REPORT 2004, at 33 (2004).

Taft and Buchwald's conclusion on the lasting significance of Operation Iraqi Freedom and the right of pre-emption provides a useful legal qualification of the far more expansive rhetoric of the National Security Strategy: "Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated—without question—by the opponent and where, as here, it is consistent with the resolutions of the Security Council."⁷⁴ Whether or not this was the intended scope of the doctrine prior to the Iraq invasion, the difficulties experienced by the United States as an occupying power—and the domestic political consequences for President Bush and Prime Minister Blair—suggested that the doctrine might well be confined to Iraq in any case for the time being.

III. AFTER IRAQ

Evaluations of the Iraq war's implications for international order began as preemptively as the invasion itself. Immediate questions were raised about the relevance of the United Nations both outside and inside the organization. Richard Perle, then chairman of an advisory panel to the Pentagon, notoriously published an opinion piece on the second day of hostilities entitled "Thank God for the Death of the UN."⁷⁵

Cooler heads did not underestimate the depth of the crisis. Speaking to the General Assembly on September 23, 2003, six months after the invasion of Iraq, U.N. Secretary-General Kofi Annan noted that, three years earlier, "we shared a vision, a vision of global solidarity and collective security, expressed in the Millennium Declaration." In the wake of the Iraq invasion, he said, that consensus was being called into question. Without referring to any country, the Secretary-General warned that a policy of pre-emptive intervention—such as that adopted in the National Security Strategy of the United States⁷⁶—represented a "fundamental challenge to the principles on which, however imperfectly, world peace and stability

74. Taft & Buchwald, *supra* note 43, at 563.

75. Richard Perle, *Thank God for the Death of the UN*, *GUARDIAN* (London), Mar. 21, 2003, available at <http://www.guardian.co.uk/comment/story/0,,918764,00.html>.

76. See generally NATIONAL SECURITY STRATEGY, *supra* note 27.

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have rested for the last fifty-eight years.” Nevertheless, he warned, it was not enough to denounce unilateralism without also addressing the security concerns that make some states feel uniquely vulnerable.⁷⁷

The coalescence of interests that led to the unanimous adoption of Resolution 1441 (2002) was always likely to prove temporary. The United States remains fundamentally agnostic about the United Nations, using it when convenient while maintaining its intention not to be constrained by international law when it is burdensome. In Iraq, the United States presented the Council with an invidious choice: From January 2003 at the latest, it was clear that nothing that Iraq might realistically do would persuade the U.S. forces gathering at its borders to stand down. The other permanent members of the Council tend to view most crises at least partly through the lens of their status as permanent members: The continued involvement of the Council thus ensures their continued involvement as actors on the international stage more generally. For Britain this meant playing the role of message-carrier; for France and Russia it meant opposing the United States in the name of a multipolarity that would give them a say in world affairs more in accord with their self-perception. China’s foreign policy for the time-being is to be left alone while it develops its economy over the next few decades before assuming its rightful place on the world stage. The ten elected members are put in an even more difficult position, being excluded from some of the most important decisions of the Council. In the case of Iraq, the dangers of crossing the United States led to the unusual spectacle of bilateral threats subverting a multilateral forum in the name of a unilateral agenda. These competing and inconsistent approaches to the Council are a recipe for alliances of convenience rather than principled decision-making.⁷⁸

But perhaps this is as it must be. The Council is a political rather than judicial body, established not to dispense justice

77. Kofi A. Annan, Secretary-General’s Address to the General Assembly (Sept. 23, 2003), available at <http://www.un.org/apps/sg/sgstats.asp?nid=517>.

78. See Simon Chesterman & Sebastian von Einsiedel, *Dual Containment: The United States, Iraq, and the UN Security Council*, in SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW? (Paul Eden & Thérèse O’Donnell eds., 2004).

but to avoid war. This is not to suggest that the Council is not constrained by law; on the contrary, its legitimacy depends precisely upon its establishment by and conformity with the U.N. Charter.⁷⁹ Nevertheless, the Council operates by channeling the national interests of its members rather than as an independently established objective tribunal. Indeed, the Council's role in this case may be seen as one of dual containment: containment of Iraq, but also attempted containment of the United States. As the inspections process resumed in late November 2002, it soon became clear that the resolution of internal conflicts within the Bush administration would be at least as important in any decision to go to war as what the inspectors might find in Iraq. The dilemma for the Council, then, was and remains how far it could go to accommodate the United States without being seen as impotent and how far it could oppose the United States without condemning itself to irrelevance.

IV. CONCLUSION

The political tensions underlying legal arguments for the use of force sometimes approach caricature. James Rubin, for example, writes of debates between the NATO capitals in the weeks prior to the 1999 air campaign over Kosovo. A series of strained telephone calls between U.S. Secretary of State Madeleine Albright and U.K. Foreign Secretary Robin Cook had led Cook to cite problems "with our lawyers" over using force in the absence of U.N. endorsement. Albright's reply, reportedly, was: "Get new lawyers."⁸⁰

Equivocation about the role of international law in matters of state is hardly new: The history of international law is to some extent the struggle of raising law above the status of being merely one foreign policy justification among others.⁸¹ The Kosovo and Iraq interventions challenged this project in two quite discrete ways. Debates over alleged "humanitarian intervention" in Kosovo turned on whether formal legal struc-

79. See generally ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004).

80. James Rubin, *Countdown to a Very Personal War*, *FIN. TIMES* (London), Sept. 30, 2000, at Weekend I, IX.

81. Cf. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

tures should prevent action in support of a population at risk. In the case of Iraq, those who obstinately argued in favor of “desultory process” were ranged against the alleged security interests of the United States. Though both actions were, on the face of it, clear violations of Article 2(4) of the U.N. Charter, there was far broader acceptance of the earlier action in Kosovo. The reasons for this varied—the action took place under a wider coalition of countries, under the auspices of a regional organization, with less color of geostrategic self-interest, under a Democratic as opposed to Republican White House—but few seemed troubled by the hypocrisy of defending a lax reading of the Charter in the one case and then asserting a strict interpretation in the other. In particular, it was rare to see the various policy justifications described not as defenses against an inconvenient norm but as pleas in mitigation of a wrong. This distinction between unlawfulness and culpability has parallels in the determination of guilt and sentencing phases of a criminal trial in domestic legal systems, but does not easily translate to an international system lacking comparable institutions.⁸² For present purposes, it is sufficient to note that a clearer distinction between legal arguments and political justifications would more accurately reflect the manner in which international law is invoked in this context. It would also better protect norms such as the prohibition of the use of force against abuse by those with whose political justifications one might choose to disagree.

The lesson of Iraq, perhaps, is that demands for consistency, such as those rejected by Prime Minister Blair in the days before the Iraq war,⁸³ are more than calls for paralysis. Nor do such pleas discount the role of ethics in international affairs; on the contrary, they highlight what Benedict Kingsbury has called the “simple paradox that the positivist separation of law from moral argument and from politics is itself a moral and political position.”⁸⁴ International lawyers, more

82. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 204, 212-14 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

83. See *supra* note 1.

84. Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 403 (2002).

than anyone else, should be alive to the dangers of a world ordered not around norms and institutions but the benevolent goodwill of the hegemon of the day. This applies *a fortiori* when the enemies against which the hegemon would deploy its forces are described in absolute moral terms. For a war against terror, pursued by opposing forces defined by their evil, admits no compromise and probably no conclusion. The practical difficulties of such a war—in particular, the difficulties of persuading other right-minded governments to join the conflict on one's side—may have tempered enthusiasm for new crusades, but the institutions of world order remain fragile when defined by a great power as mighty as it is frightened.

