WAS OPERATION IRAQI FREEDOM LEGAL?

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As this is being written, although there appears to be broad agreement that Operation Iraqi Freedom was a necessary, wise, and just use of military force, there is still a widespread view that it was unlawful under the U.N. Charter. Indeed, the U.N. secretary general has made that assertion,[252] and the president of the American Society of International Law estimated that 80 percent of international lawyers agreed that the intervention was unlawful. In view of the seriousness of this charge, the issue merits attention in any consideration of the problem of Iraq.

Before addressing the legal merits of the issue, it might be useful to note that there are occasions when violating international law may be justified. In an 1810 letter to Maryland newspaper editor John B. Colvin, Thomas Jefferson reasoned that observing the law was important, but it

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was not the *highest* duty of a nation. "The laws of necessity, of self preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself . . . thus absurdly sacrificing the end to the means."[253]

When John F. Kennedy threatened to use armed force to prevent the Soviet Union from delivering nuclear-armed ballistic missiles to Cuba in 1962, he almost certainly violated international law. Neither Cuba nor the Soviet Union had used or threatened to use force against America, the Security Council had not authorized the threat of force, and the United States at the time had nuclear missiles in Turkey aimed at the Soviet Union. Yet, most of the world understood that this was a prudent measure given the character of the Castro regime.

A common theme in writings by many international lawyers today is that operations like the 1999 NATO intervention in Kosovo and Operation Iraqi Freedom are illegal under the Charter, but they are also probably justifiable in moral and policy terms because of their humanitarian benefits.

In reality, the legal case for Operation Iraqi Freedom is much stronger than most critics realize. Moreover, to the extent that it may arguably have been contrary to current law, it may contribute in the long run to the progressive development of customary legal rules to make them compatible with twenty-first-century values.

International law is a dynamic institution, formed in part by formal international agreements like the U.N. Charter, but equally by state practice eventually accepted as creating legal rules. Circumstances and values change, and new technology may require decisions on issues that previously were of little import. Throughout most of human history, for example, issues such as who owned the fish in the sea or the land beneath the sea had no relevance. There were fish enough for all, and the inaccessible ocean bottom had no apparent value. During the twentieth century, however, highly efficient harvesting technologies threatened stocks of migratory fish, and it became feasible to extract valuable resources—such

as oil—from the ocean floor. Issues of legal ownership then became important. When President Truman declared U.S. jurisdiction over the offshore continental shelf in 1945, the proclamation was widely accepted and began the process of changing the legal regime governing the law of the sea. Thirteen years later, national jurisdiction over the continental shelf was codified in a U.N. treaty on the law of the sea.

In a similar way, Operation Iraqi Freedom may contribute to clarifying and perhaps broadening what is generally referred to as *jus ad bellum*, or the international law governing the initiation of coercion in international relations.

The History of *Jus ad Bellum*

THROUGHOUT MOST OF THE HISTORY of the nation-state system, the supreme entity has been the sovereign state. Rules of law governing state behavior depended entirely upon the consent of those states, and the lack of effective international enforcement mechanisms required states to resort to "self-help" measures to protect their interests. War was permissible not only to redress grievances, but also to conquer territory or commit other acts of blatant international aggression.

As the Permanent Court of International Justice confirmed in its 1927 *Lotus* case, international law is a permissive regime, and restrictions upon the sovereignty of states "are not to be presumed" in the absence of a clear legal rule regulating their conduct in a given area. With the consent of all parties, disputes may be submitted to international tribunals, arbitral panels, mediation, or other means of third-party dispute resolution. Consistent with their other legal obligations (including the modern prohibition against the aggressive use of armed force), states may also seek to redress their grievances by measures of self-help (e.g., a reciprocal breach in response to a material breach of a treaty obligation by another state), and other members of the world

community can assist in pressuring wrongdoers to behave by what is often called "horizontal enforcement" of the law.

Jus ad Bellum in the Twentieth Century

THE HORRORS OF WORLD WAR I led in 1919 to the establishment of the League of Nations, and in 1928 the Pact of Paris (also known as the Kellogg-Briand Treaty) outlawed resorting to war as an instrument of national policy. This, it was hoped, would end all nondefensive uses of armed force.

Unfortunately, although the League was the vision of President Woodrow Wilson, the U.S. Senate refused to consent to the ratification of the covenant that would have made the United States a member. A more fundamental problem was that neither the League of Nations nor the Kellogg-Briand Treaty address—much less resolved—the issue of enforcement.

When Japan invaded Manchuria in 1931, the League of Nations debated and issued a report condemning the act. Japan withdrew from the League, and nothing else was done. Nor did the United States have the will to try to enforce the treaty initiated by Secretary of State Frank Kellogg and his French counterpart. Secretary of State Henry Stimson limited the American response to a threat "not to recognize" Japan's territorial gains achieved by conquest.

In 1935, Italy invaded Ethiopia. Once again, the League of Nations debated and passed a resolution condemning the aggression, but nothing serious was done to enforce international law. The lesson was apparently not lost on Adolf Hitler. As the brilliant Yale historian Donald Kagan has observed: "The democracies seemed weak, indecisive, and cowardly, and their failure and inaction gave courage to their enemies."[254] When Hitler threatened to invade Czechoslovakia's Sudetenland at the 1938 Munich Conference, France and Great Britain assured

him they would not intervene—in the vain and ultimately tragic belief that his aggression would end there, and that appeasement would keep them at peace.

The United Nations

In the final months of World War II, world leaders gathered in San Francisco to establish the United Nations. Although it is widely assumed that the goal of the United Nations was to unite countries in response to future acts of international aggression, the new organization's primary purpose was actually more proactive. The great Chinese military thinker Sun Tzu, writing 2,500 years ago, observed that the "acme of skill" is not to win one hundred victories in one hundred battles, but to "subdue the enemy without fighting."[255] Consistent with this wisdom, the new United Nations was premised upon what might accurately be described as a "preemptive" approach. Article 1 begins:

> The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and *removal* [my emphasis] of threats to the peace, and for the suppression of acts of aggression.

Actually responding to "acts of aggression" was thus framed as a fallback to the strategy of preventing aggression by *removing* "threats to the peace" before aggression can occur. Through this lens, then, it seems clear that in the debate over the war in Iraq, France and Russia breached that fundamental undertaking of the Charter, as after a dozen years of failed political and economic sanctions they proved unwilling to approve "effective" collective measures to remove a regime the Security Council had unanimously determined to be a "threat to the peace."

The basic prohibition against the use of force was contained in Article 2(4) of the Charter, which provided:

> 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.

Although commentators often referred to "just-war" theory in assessing American threats to use force to remove Saddam Hussein from power, the law of the Charter differs significantly from that of the more traditional approach. The framers of the Charter had personally lived through two world wars, and they placed greater emphasis on preserving "peace" than upon achieving "justice." Whereas just-war theory would permit some wars to promote more just societies, or even to propagate the Christian faith, the Charter basically limits resort to force (absent authorization of the Security Council) to situations where defensive force is necessary to preserve human life.

This time, the world organization was to have teeth. A Security Council was established with power to enforce the U.N. Charter's prohibition against aggression. Article 25 of the Charter obligated all U.N. members to carry out decisions of the Security Council, and Chapter VII of the Charter authorized the Council to take a variety of measures—including authorizing member states to use armed force against an offending state—under the heading "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

Security Council Action on Iraq (1990–2003)

The easiest way to justify Operation Iraqi Freedom would be to find formal authorization from the U.N. Security Council, as occurred when the Council in 1990 authorized Operation Desert Storm. Short of that, the Council may have made factual determinations that strengthen other theories that the operation was lawful. Finally, a review of Security Council action may reveal a pattern of behavior that suggests the Secu-

rity Council clearly lacked the will to carry out its responsibilities under the Charter.

Even prior to Iraq's 1990 invasion of Kuwait, the U.N. Security Council had found it necessary to pass no fewer than fifteen separate resolutions dealing with Iraq—most of them related to Iraq's 1980 invasion of neighboring Iran and the use of illegal chemical weapons during that conflict. When Iraq invaded Kuwait on August 2, 1990,[256] the Security Council responded the following day with Resolution 660. Acting under Chapter VII, Articles 39 and 40, the Council decreed "that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990."

As an aside, this is a fine example of the careless draftsmanship that characterizes some Security Council resolutions. Why on earth demand that Iraqi forces be kept in "the positions in which they were located on 1 August," when they were aggressively poised for invasion on the border of Kuwait? Surely it would have been preferable to give Iraq the option of returning these forces to their barracks, permitting them to go on furlough, or even demobilizing some of them. In this instance the consequences were not serious. Similarly careless phraseology in Resolution 687, however, has been interpreted as imposing no conditions on Iraq in return for the 1991 cease-fire beyond voicing an insincere "promise" to obey the law—with no requirement of actual compliance.

Four days later, on August 6, 1990, the Council acted again. Resolution 661, passed pursuant to Chapter VII, imposed an embargo on the sale or transfer of weapons and virtually everything else to or from Iraq, but it specifically did not affect "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs." This was modified from time to time, but the Security Council has always permitted the exporting to Iraq of humanitarian supplies, and in 1995 it authorized the sale of oil by Iraq for the limited purpose of funding the supply of food, medicines, and other humanitarian supplies needed by the Iraqi people.[257]

In this regard, it might be useful to point out that in the 1990s Saddam Hussein initiated a game of "chicken" with the world community

with respect to humanitarian aid. He correctly gambled that the world community cared far more than he did about the welfare of innocent Iraqis, so he refused to make full use of the opportunity to alleviate the humanitarian crisis through the oil-for-food program. Indeed, U.N. experts have reported that a substantial part of the food and medicine that was received under this program was stored in warehouses rather than distributed to needy Iraqis, and Saddam reportedly exported some of it illegally for personal financial gain. By refusing to address the (totally unnecessary, and unintended by the United Nations) human suffering of the Iraqi people, Saddam Hussein was taking terrorism to a new level—essentially threatening to slaughter his own civilians if the world community did not give in to his demands and permit him to develop illegal weapons of mass destruction. In propaganda terms, the maneuver was highly successful, since the international sanctions—and the United States—were widely blamed for the resulting deprivations.

Saddam Hussein ignored the Security Council's demands and proceeded with the rape of Kuwait. On November 29, 1990, again acting under Chapter VII, the Security Council passed Resolution 678, which gave Iraq "one final opportunity" to comply with Resolution 660 and, if Iraq had not complied by January 15, 1991, authorized member states to use "all necessary means" to implement earlier resolutions "and to restore international peace and security in the area." This final clause obviously expanded the authorization from simply expelling Iraqi military forces from Kuwait to a broader authority that might arguably have permitted the removal of Saddam Hussein from power.

Some legal scholars who argue that Operation Iraqi Freedom was unlawful clearly misunderstood the full scope of Resolution 678. For example, Professor Mary Ellen O'Connell (writing in a publication of the American Society of International Law) argued that "resolution 678 never authorized the use of force to forcibly change Iraq's government."[258] This contention appears to contradict the statement made in the immediately preceding paragraph in her own article, where she wrote: "Resolution 678 allowed the use of 'all necessary means,' including, presumably, taking the defense of Kuwait to Baghdad and ending

the regime of Saddam Hussein."[259] If the only way to restore "peace and security in the area" was to remove from power a repeat offender who refused to change his ways, that would seem fully consistent with the authority granted by the Security Council.

Unfortunately, when the United States Congress in January 1991 granted President Bush the constitutional authority[260] to use armed force "pursuant" to Resolution 678, it narrowed the authority to that of implementing only Security Council Resolutions 660 through 677, which did not include the authorization to "restore peace" provided in Resolution 678. That was necessary in order to get sufficient Democratic votes to pass Senate Joint Resolution 2. Even with the narrowed language, the resolution was opposed by more than four out of five Senate Democrats and could have been defeated by a shift of just six votes.

Saddam continued to ignore the Security Council, and on January 16, 1991, the U.S.-led coalition launched Operation Desert Storm, shocking many observers by expelling Iraqi forces from Kuwait and decimating Saddam's much-touted Revolutionary Guard in six short weeks. On February 27, Iraq informed the Security Council by letter that it would comply with all Security Council resolutions. As the world watched images of fleeing Iraqi forces being cut down at will by American air power, President George H. W. Bush—following the advice of Joint Chiefs of Staff Chairman General Colin Powell—announced that the coalition commanded by General Norman Schwarzkopf had ceased combat operations.

On March 2, in Resolution 686, the Security Council reaffirmed Resolution 678 and other prior resolutions and underlined "the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities." The following day, acting again under Chapter VII, the Security Council approved Resolution 687, the resolution governing the cease-fire, by a vote of 12–1–2 (with Cuba the dissenter, and two abstentions). The cease-fire resolution included the following provision:

> Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:
>
> (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;
>
> (b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities.

Paragraph 9 required that Iraq yield possession of all of its weapons of mass destruction to a U.N. "Special Commission," which would also oversee the destruction of prohibited ballistic missiles in Iraq. Paragraph 32 required Iraq "to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism." As a Security Council decision under Chapter VII of the Charter, this immediately became a binding legal obligation on Iraq. Paragraph 33 of Resolution 687 declared that "upon official notification by Iraq to the Secretary General and to the Security Council of its acceptance of the provisions above," a "formal cease-fire" would enter into effect between Iraq and the U.N. coalition that had implemented Resolution 678.

Article 2(2) of the U.N. Charter imposes an obligation of "good faith" on all members in connection with fulfilling their Charter obligations, and the demanded "notification" was obviously but a symbol for the underlying bargain that, in return for the cease-fire, Iraq would carry out the obligations it had accepted in good faith. Sadly, that assumption proved misguided. Thus began a futile charade in which the Security Council passed Chapter VII resolutions denouncing Iraq's failure to comply, followed by further violations by Saddam Hussein, to which the Security Council responded merely by passing new resolutions. By the late 1990s, whatever credibility the world community had derived from the success of Operation Desert Storm had largely been frittered away by the Security Council's unwillingness to "take effective collective measures" as envisioned by the Charter.

As early as August 15, 1991, for example, Resolution 707 noted "with grave concern" Iraq's continued violation of the terms of Resolution

687 and declared under Chapter VII that Iraq was in "material breach" of the cease-fire resolution, which "provided the conditions essential to the restoration of peace and security in the region." Once again, it demanded that Iraq:

> provide full, final and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than 150 kilometres, and of all holdings of such weapons, their components and production facilities and locations, as well as all other nuclear programmes, including any which it claims are for purposes not related to nuclear-weapons-usable material, without further delay.

When Iraq had not complied by October 2, the Council passed Resolution 778, again "condemning" under Chapter VII Iraq's continued failure to comply with its obligations. An interesting resolution was passed on October 15, 1994, after Iraq had moved military units toward its border with Kuwait. Security Council Resolution 949 explicitly "recalled" and "reaffirmed" previous resolutions on Iraq, "in particular paragraph 2 of resolution 678 (1990)," which, it will be recalled, had authorized member states "to use all necessary means"—a clear authorization to use military force—"to restore international peace and security in the area."

In 1996 the Council passed Resolution 1060, "deploring" Iraq's continued violations and again "demanding" immediate compliance. It too was ignored by Saddam. This went on painfully, year after year, until on March 2, 1998, the Security Council had had enough and expressed its determination "to ensure full compliance by Iraq without conditions or restrictions with all its obligations" under previous resolutions. And to make sure that *this* time Saddam would take them seriously, the Security Council threatened that "any further violations" would be followed by the "severest consequences" for Iraq.

Saddam was apparently less than intimidated. A few months later, on August 5, 1998, he announced that Iraq would no longer allow U.N. weapons inspections (though monitoring continued for a few more

months). The "severest consequences" that the Security Council could agree upon consisted of passing Resolution 1194, "condemning" Iraq's decision to cease all cooperation and declaring it to be "a totally unacceptable contravention" of Iraq's legal obligations. A clearly annoyed Security Council once again "demanded" that Iraq "rescind" its decision and "cooperate fully" with the United Nations. But Saddam Hussein had long ago stopped taking the threats and blustering of the U.N. Security Council seriously. Perhaps he had been secretly assured that one of his allies on the Council would veto any meaningful effort to uphold the Charter; or perhaps—like Hitler sixty years earlier, who assured his generals that he had seen the British and French leaders at Munich, and they were "little worms"[261] who lacked the will to resist him—he had concluded that his adversaries would not seriously challenge him. In any event, having by now approved more than a dozen Chapter VII resolutions in as many years denouncing Iraqi violations of its orders, recognizing that Iraq constituted a threat to the peace, and issuing renewed ultimatums ordering Iraq to clean up its act, by 1998 the Security Council had achieved a level of irrelevance as the "primary organ" of the world community for the maintenance of international peace and security rivaling that of the League of Nations more than six decades earlier.

On October 31, 1998, Iraq announced that it would also terminate UNSCOM monitoring; five days later, the Security Council (to no one's surprise) passed Resolution 1205 noting "with alarm" the Iraqi decision and expressing, yet again, its determination "to ensure immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687" and other relevant resolutions (by then there were evidently too many to list). And, apparently convinced that its previous approach had been too tough, the Council now hinted that if Iraq would just promise once again "to fulfill all its obligations" the Council might quickly bring an end to its 1990 economic embargo.

Although the Security Council had years earlier authorized the importation into Iraq of foodstuffs, medical equipment and supplies, and other "humanitarian" relief needs, Saddam Hussein had continued

to hold a significant portion of the supplies sent to Iraq in warehouses, reserved for his personal use, to reward the party faithful, or to be sold illegally at a profit. So on December 17, 1999, acting again under Chapter VII, the Security Council passed Resolution 1284, which called upon Iraq "to take all steps to ensure the timely and equitable distribution of all humanitarian goods, in particular medical supplies, and to remove and avoid delays at its warehouses." This was given the same careful attention Saddam had given to past Security Council resolutions, and the humanitarian situation deteriorated still further.

In November 2002, in response to pressure from the United States and Great Britain, the Security Council approved Resolution 1441—once again acting under Chapter VII and thus again implicitly recognizing that Saddam's regime remained a "threat to the peace." Two pages of preamble "recalled" and "deplored" various acts of Iraqi noncompliance with prior Council resolutions—specifically, "recalling" that "resolution 678 (1990) authorized Member States to use all necessary means . . . to restore international peace and security in the area," and deploring that the government of Iraq had failed to comply with "its commitments pursuant to resolution 687 (1991) with regard to terrorism" and its commitment "to end repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance in Iraq."

The Council now, once again, formally found Iraq to be "in material breach" of the cease-fire resolution. Acting again under Chapter VII, the Council decided "to afford Iraq, by this resolution, a *final opportunity* [my emphasis] to comply with its disarmament obligations under relevant resolutions of the Council." And, as if referring to previous unenforced threats would strengthen rather than weaken the resolution's effect, the Council recalled "that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations."

At the end of January 2003, chief U.N. inspector Hans Blix told Security Council members: "Iraq appears not to have come to a genuine acceptance, not even today, of the disarmament which was demanded of it and which it needs to carry out to win the confidence of the world and to live in peace." When the United States and Great Britain demanded that the Security Council authorize the use of force, France and Russia nevertheless promised to veto any such resolution. At that point it became apparent that the Security Council lacked the will to "take effective collective measures" to deal seriously with the problem, and the Security Council essentially became irrelevant to the task of trying to uphold the rule of law and implement the primary purpose of the Charter. If anything was going to be done to enforce the Security Council resolutions and protect the world community and the people of Iraq, the United States and Great Britain would have to accomplish it, acting outside the Security Council.

On March 20, 2003, the United States and Great Britain each reported to the Security Council that they were using armed force against Iraq—signaling the start of Operation Iraqi Freedom. The legal justifications given were somewhat different: the British focused upon the need to enforce the resolutions of the Security Council, while the United States argued that Iraq's flagrant and material breach of Security Council Resolution 687 for more than a decade had the effect of terminating the cease-fire agreement and leaving Resolution 678—authorizing the use of force against Iraq to restore peace and security to the area—in force.

Professor O'Connell dismisses the American argument on the theory that

> [Security Council] resolutions are not treaties and do not automatically terminate upon material breach. . . . They are not agreements among equals reached through negotiations, aimed at achieving consensus and binding on all parties alike if they give their consent. Council resolutions . . . are mandates imposed on certain states that must be respected, whether those states consent or not.[262]

In theory, she is certainly correct. But the cease-fire provision of Resolution 687 was in fact worded as if it were an international agree-

ment with Iraq. Whereas Chapter VII resolutions of the Security Council are legally binding upon all states, Iraq's record of totally ignoring them may have led some on the Security Council to assume that a requirement that Iraq "accept" the Security Council's terms might increase the likelihood that this time Iraq would obey the law. Paragraph 33 of Resolution 687 provided that the Security Council:

> Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678.

There is, however, a more fundamental problem with the American argument.[263] Although not a party to the 1969 Vienna Convention on the Law of Treaties, the State Department had acknowledged that its substantive provisions do reflect customary international law and are thus binding upon the United States. While, pursuant to Article 3, the Vienna Convention applied only to treaties made "between states," its basic principles may have a broader scope. Article 60 deals with terminating or suspending treaties because of a material breach, and provides that in the case of a bilateral treaty—that is to say, a treaty with only two parties—a material breach by one entitles the other to terminate or suspend the treaty. But if the "agreement" upon which the cease-fire in Iraq was based is viewed as "bilateral," it is between Iraq and the U.N. Security Council, and presumably neither the United States nor Great Britain can elect on behalf of the Council to declare the 1991 agreement terminated. It is important to understand that a material breach does not, ipso facto, terminate the underlying agreement; it merely creates a right in the other party or parties to declare the treaty terminated.

If one elected instead to view the cease-fire as a multilateral agreement between Iraq and the individual states who were members of the Security Council when the agreement was reached, it would be governed by the principles set forth in Article 60(2) of the Vienna Convention,

which empowers "the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it. . . ." This theory would require not merely a new resolution of the Security Council (requiring the concurrence of all five permanent members), but also a unanimous decision of either those states who were on the council or their current successors in interest.[264] Neither theory would permit the United States and/or the United Kingdom to terminate the agreement, despite the fact that Iraq's material breach has been affirmed by various Security Council resolutions over more than a decade.

On the other hand, one might argue that a more reasonable and less legalistic approach is warranted in this case, and that it is obviously clear that the cease-fire agreement was intended to be predicated upon Iraq's fulfillment of various legal obligations—including certain key measures of disarmament under international supervision. The Vienna Convention on the Law of Treaties generally favors a textual approach to interpreting international agreements, but context may be considered when a textual interpretation "leads to a result which is manifestly absurd or unreasonable." It is not reasonable to suppose that the Security Council did not intend for Iraq to fulfill the obligations it had assumed as part of its "consideration" for the cease-fire—obligations which, under the Charter, did not require the specific consent of Iraq, since by ratifying the Charter it had already consented to carry out the decisions of the Security Council.

It is also absolutely clear that Iraq materially breached those agreements and refused legally binding demands by the Security Council to comply for more than a decade. It is also clear that by 2003 the Security Council lacked the will to fulfill its Charter responsibility to enforce the law against Iraq. When France and Russia announced that they would veto any resolution authorizing the use of force, they essentially removed the Security Council as a meaningful player in the struggle for peace in Iraq.

Under Article 24 of the Charter, the Security Council has only "primary responsibility" for the maintenance of international peace and security, and under Article 51 individual states have the right to use force defensively "*until the Security Council has taken measures necessary*

to maintain international peace and security" [emphasis added]. Examining the situation in Iraq in light of the totality of the circumstances—including Saddam's long history of unprovoked aggression against at least four neighboring states, his repeated use of weapons of mass destruction against neighbors and his own people, and repeated Chapter VII findings by the Security Council that he remains a "threat to the peace" (a finding implicit in every Chapter VII resolution)—it seems silly to say that France or Russia can claim the right to immunize from effective defensive action an obvious and recognized threat to world peace. Such an interpretation of the Charter would seem to fall into the "manifestly absurd" category discussed above.

So whether or not one accepts the American argument that military force against Iraq remains authorized by Resolution 678, the lawfulness of Operation Iraqi Freedom ought to be ascertained in the context of Saddam Hussein's past behavior, the factual determinations often unanimously made by the Security Council, and the applicable law—including the law of individual and collective self-defense and the doctrine of "humanitarian intervention" (both of which will be discussed below).

Iraqi Support for International Terrorism

In addition to its numerous resolutions directed specifically at Saddam Hussein's Iraq (some of which also mentioned the issue of terrorism), the Security Council has repeatedly denounced international terrorism and authorized the use of armed force in self-defense against countries that sponsor terrorism. Such resolutions predate the September 11 attacks on the United States. For example, on October 18, 1999, Resolution 1269 condemned "all acts of terrorism" and "reaffirmed" that "the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security."

The very first words in Article 1 of the U.N. Charter are, "The Purposes of the United Nations are: (1). To maintain international peace and security." The Security Council has declared that the "suppression of acts of international terrorism, including those in which States are involved, is an essential contribution" to that goal. It is thus difficult to argue that the effort to remove from power a significant supporter, funder, and facilitator of international terrorism is contrary to the purposes of the Charter.

One day after the September 11, 2001, terrorist attacks in the United States, the Security Council unanimously passed Resolution 1368, expressing its determination "to combat *by all means*"—language arguably even stronger than the phrase "by all necessary means" used in Resolution 678 in 1990 to authorize the use of military force—"threats to international peace and security caused by terrorist acts." It also recognized "the inherent right of individual or collective self-defense in accordance with the Charter," *presumably to emphasize that the United States and its supporters had an independent right to use armed force against the perpetrators of those attacks.* The Council also reaffirmed that "any act of international terrorism" was "a threat to international peace and security."

Two weeks later, on September 28, the Security Council invoked Chapter VII in unanimously passing Resolution 1373 deciding that "all States shall . . . prevent and suppress the financing of terrorist acts." One of the facts that does not seem to be in dispute is that—both before and after the passage of this resolution—the Iraqi regime of Saddam Hussein provided money and various other types of support for international terrorism. (That a much stronger case can be made, pointing to Iraq's direct sponsorship of terrorism, should be clear from evidence presented in chapters 2, 3, and 7 of this book.)

Reaffirming "the need to combat by all means . . . threats to international peace and security caused by terrorist acts," Resolution 1373 also—in binding language under Chapter VII—prohibited states from "providing any form of support, active or passive, to entities or persons involved in terrorist acts," from giving "safe haven to those who finance, plan, support, or commit terrorist acts," and from permitting "the movement of terrorists or terrorist groups" through their territory.

As has been demonstrated, Iraq violated all of these legal constraints. Moreover, the fact that Saddam's Iraq violated its international legal obligations with respect to terrorism was a specific finding of Security Council Resolution 1441, approved in November 2002.

Finally, if it is true that Saddam Hussein's regime was engaged in an ongoing campaign of terrorism against the United States—including the 1993 effort to assassinate former President Bush in Kuwait—probable Iraqi involvement in the first World Trade Center attack in February 1993 and its continued harboring of one of the suspected terrorists, as well as increasingly clear Iraqi cooperation with Osama bin Laden and al Qaeda in their campaign of terror against Americans—then the United States and its supporters have another independent basis for using force in self-defense, a principle that has been recently affirmed by the Security Council.

The Demand for "Regime Change"

PARTICULARLY OFFENSIVE TO INTERNATIONAL LAWYERS both in the United States and around the world was the American demand that, if Saddam Hussein continued to flagrantly violate his international legal obligations and force became once again necessary to uphold the Charter, a "regime change" would be part of the process. There was no legal basis, lawyers asserted, for using force to bring about a regime change.

This argument appears to slight the case of World War II, which imposed regime change in Germany, Italy, and Japan (though that was not the primary justification for waging that war). Moreover, the theory that it is legally permissible in exceptional circumstances to use force to effect a change of regime dates back centuries and can be found in the writings of some of the most respected writers on the subject.

Franciscus de Vitoria, for example, writing in his 1532 treatise *On the Law of War*, acknowledged:

> It is undeniable that there may sometimes arise sufficient and lawful causes for effecting a *change of prince* or for seizing a sovereignty; . . . especially when security and peace cannot otherwise be had of the enemy and *grave danger* from them would threaten the State if this were not done.

That, of course, was written long before the advent of weapons of mass destruction. Vitoria could have had no concept of the "grave danger" posed by a repeat offender like Saddam Hussein, in possession of nuclear and biological weapons and convinced that the world community lacked the will to resist his unlawful acts. And Vitoria clearly viewed the use of force to effect a regime change in this circumstance as *defensive* rather than aggressive in character.

We may also consider whether the operation violated Article 2(4) of the Charter. Did it impermissibly interfere with the "territorial integrity" or "political independence" of Iraq, or of any other country? Was it "inconsistent with the Purposes of the United Nations"? The answer to these questions would appear to be no. When the dust has settled, Iraq will presumably completely control every square foot of territory it held under Saddam Hussein. And with respect to legitimate governing authority, the sovereignty of Iraq will almost certainly have been *enhanced*, not diminished, by the intervention. The overwhelmingly dominant view today is that sovereignty resides in the *people* of a country, and it is wrong for such authority to be seized by military force—whether by a foreign conqueror or a domestic tyrant. There is similarly no indication that Iraqi "political independence" will be in any way diminished: to the contrary, the intervention will presumably contribute substantially to the self-determination of the Iraqi people.

The Security Council debates over Haiti or Somalia (discussed below) strengthen the argument that the Charter itself permits collective intervention to replace Saddam's dictatorial rule with a government of, by, and for the people of Iraq. In the case of Somalia, indeed, the U.N. supported intervention, while the United States was criticized for not acting quickly enough to help end the suffering. Finally, the dramatic

growth of international human rights law since 1945 may well have implicitly amended the Charter so as to permit the use of armed force by a state not only to protect the lives of its own people and other innocent victims of aggression from the wrongful use of force, but also to protect the lives of the Iraqi people themselves. In both cases, the balance being weighed is between the harm done to human life by resort to arms on the one hand, and the human destruction and suffering inflicted by a state on its own people in the absence of outside intervention on the other.

Individual and Collective Self-Defense Under the Charter

ONE OF MANY misunderstandings about the United Nations is the widespread belief that only the Security Council may authorize the use of military force in international relations. In reality, Article 24 confers upon the Security Council only the "primary responsibility" for the maintenance of international peace. Article 51 explicitly confirms that "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." Some scholars seek to read this as an exceptionally narrow right, but the committee that drafted Article 2(4) in San Francisco announced that "the use of arms in legitimate self-defense remains admitted and unimpaired" by the Charter.

Article 31 of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose.*" The first "purpose" set forth in the U.N. Charter is "to maintain international peace" by taking "effective collective measures for the prevention and removal of threats to the peace." The Security Council is the preferred and "primary" instrument for achieving this purpose, but it is not given exclusive authority.

Nor, for that matter, has the Security Council itself applied a narrow, literal interpretation to the language of the Charter. When in 1950 North Korea invaded South Korea, the Security Council immediately called upon U.N. members to respond collectively to the aggression, despite the fact that the "armed attack" had not been "against a Member of the United Nations." (Neither North nor South Korea were admitted to the United Nations until 1991.)

The right of individual states to use force defensively was an essential provision for the United States and many other states during the drafting of the Charter. This was in part precisely because Article 27 vests each of the five permanent members of the Security Council (China, France, Great Britain, the United States, and now Russia) with a veto over substantive decisions of that body.

Senator Arthur Vandenberg (R-Mich.), a member of the U.S. delegation to San Francisco, told the Senate:

> If the omission [of the right of collective self-defense, by which Member States could assist each other without Security Council authorization] had not been rectified there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon Article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance.[265]

Addressing the Inter-American Bar Association in 1949, Senator Vandenberg explained that the realization that Security Council action could be blocked by any of five permanent members made it imperative that the Charter permit states to defend one another (and, of course, themselves) when the Council is blocked from effective action. "If the Security Council fails to act—or is stopped from acting, for example, by a veto—Article 51 continues to confound aggression. The United Nations is thus saved from final impotence. So is righteous peace."

Whether the United States had a legal right under international law to use force against Iraq at the time of Operation Iraqi Freedom is dependent upon specific facts. If Saddam Hussein's government played a significant role in orchestrating, implementing, or merely financing

the September 11 attacks, or in more general terms was a major facilitator of al Qaeda, the right to act against it in self-defense would seem clear—particularly in view of the robust rhetorical response to those attacks on the part of the Security Council. Alternatively, if Iraq had been engaged in a series of attacks on the United States—such as trying to assassinate former President Bush, involvement in the first World Trade Center bombing in February 1993, the 2001 anthrax letters, etc.—that would also justify necessary and proportional measures of self-defense. Similarly, an ongoing campaign of terrorism or other forms of armed attacks against another country might give that country a right of self-defense and thus empower it to authorize the United States to assist in its collective self-defense.

It is important to understand that the legal rationale for acts of self-defense is not retribution or revenge, but only to prevent the further loss of life. Thus, the United States could not now take measures in defensive response to acts carried out by Iraq in 1991 in Kuwait. However, if Iraq were indeed continuing to hold Kuwaiti citizens hostage in Iraqi prisons, this would be relevant to the equation, in balancing the threat against the defensive response.

One can also argue that Iraqi attacks on American and British aircraft engaged in enforcing the "no-fly zones" in northern and southern Iraq created a right to respond with armed force in self-defense. This point has been acknowledged even by strong critics of Operation Iraqi Freedom.[266]

Anticipatory Self-Defense

The precise content of the law of self-defense at the time when the Charter was written is in some areas unclear. Particularly problematic was the issue of whether a country could respond once it became clear that a neighbor was about to attack or whether it would have to absorb the first strike. Many scholars recognized the moral

arguments for permitting defensive actions when the evidence of an imminent attack was overwhelming—especially if the aggressor was a repeat offender—but at the same time recognized that giving formal legal sanction to such a doctrine could also provide cover for blatant aggression. In 1939 Nazi Germany alleged that its invasion of Poland was a defensive response to a Polish attack on Germany, and in 1950 North Korea similarly tried to mask its aggression against South Korea with false allegations that it had been attacked first. The risk of abuse of a doctrine of anticipatory self-defense is even greater, since it would permit the use of force without even having to allege the other state fired a single shot.

Nevertheless, particularly with respect to an adversary like Saddam Hussein, who has a long history of committing unlawful aggression and violating the most fundamental rules of international law, the case for anticipatory self-defense is a compelling one. The most respected international law scholar at the time the U.S. Constitution was written was Emerich de Vattel, whose 1758 treatise *The Law of Nations* was widely read and quoted by the Constitution's framers. Consider this excerpt from Book III of that classic study:

> [T]here cannot exist a doubt, that, if that formidable potentate certainly entertains designs of oppression and conquest . . . the other states have a right to anticipate him. . . . This right of nations is still more evident against a sovereign, who, from a habitual propensity to take up arms without reasons, or even so much as plausible pretexts, is continually disturbing the public tranquility.

While modern scholars are divided on this point, the stronger view seems to be that there was indeed an established legal right to use force in anticipatory self-defense when the Charter was written, but that the circumstances had to be exceptional for such a claim to be viewed as legitimate. In a major law review article on "Anticipatory Collective Self-Defense in the Charter Era" published in 1998, Professor George K. Walker concluded (emphasis added):

> Thus, in 1945, when the Charter provided, through article 51, for an inherent right of individual and collective self-defense in the context of the contemporary Act of Chapultepec, the right that the Charter negotiators intended as inherent included a right of anticipatory collective self-defense. . . . [T]he terms of prior agreements, negotiated before and after 1945, and state practice, show that it would be appropriate, as a matter of international law, *to include anticipatory self-defense as a response option until the Council acts pursuant to article 51.*[267]

The fifty-eight years since the Charter was written have seen changes that tend to strengthen the case for recognizing a right of anticipatory self-defense—not the least of which is the proliferation of weapons of mass destruction. It was once possible to contend that a potential victim of imminent aggression should be required to wait until the first enemy tank had crossed the border before launching a defense; but such a determination becomes more problematic when the first clear evidence of aggression might be a nuclear or biological attack that could claim tens or even hundreds of thousands of lives. The demonstrated ability of modern aggressors to coordinate simultaneous attacks—as exhibited in the August 1998 attacks on American embassies in both Kenya and Tanzania, and the September 11 coordinated attacks on both World Trade Center towers and the Pentagon—tips the scales of justice still further in favor of permitting anticipatory self-defense in exceptional circumstances.

The case for preemptive action against Saddam Hussein is particularly strong. He not only holds a unique status among world leaders as a "repeat offender"—having been guilty of massive acts of international aggression against Iran in 1980 and Kuwait in 1990, and of lesser acts of flagrant aggression against Saudi Arabia and Israel in 1991—but he has also repeatedly demonstrated a willingness to use weapons of mass destruction against both his neighbors and his own people.

Most important, perhaps, the legal case for anticipatory self-defense is strengthened by the fact that the U.N. Security Council has repeatedly made the factual determination that Saddam's regime was a "threat to the peace," and that Saddam was in flagrant and material breach of numerous binding Security Council resolutions for more than

a decade. During the same period, economic sanctions and diplomatic pressures proved to be completely ineffective in enforcing international law, and the Security Council followed the example set by the worst traditions of the League of Nations in the 1930s.

The "Totality of Circumstances" Standard

The strongest of the arguments against the conclusion that Operation Iraqi Freedom was a lawful act of anticipatory self-defense is the contention that, historically, the doctrine has been applied to settings in which the specific attack anticipated was clearly identified and was *imminent.* This time there were no tanks ranged along the border with Kuwait, as there were in 1990 (but recall that even then, the official U.S. position was that no invasion was imminent). Circumstances have changed dramatically, and the time may have arrived when claims of anticipatory self-defense need to be judged by the totality of the circumstances.

Saddam Hussein was the only head of state in the world who had engaged in unprovoked flagrant armed aggression against no less than four sovereign states.

In 1990, the U.N. Security Council recognized by Resolution 678 Saddam's Iraq to be a threat to the peace, and, acting unanimously under Chapter VII of the Charter, authorized member states to use military force not merely to eject Iraqi forces from Kuwait but also to "restore peace and security in the area." Not only has that resolution never been repealed, but it also has frequently been reaffirmed by the Council.

In 1991 the Security Council predicated its cease-fire with Iraq upon Iraqi acceptance of a variety of conditions that were evidently deemed essential to keep Iraq from remaining a threat to the peace. To be sure, the actual language of Resolution 687 required only that Iraq "accept" the cease-fire terms, but actual compliance must have been an implicit element in the agreement unless it was intended to have no practical meaning.

There is some force, therefore, in the American argument that when the Security Council unanimously concluded that Saddam's Iraq had materially breached Resolution 687, the legal effect was to breach the cease-fire agreement and leave in place the authority of Resolution 678 to use force to restore peace and security to the region through the use of armed force. (As noted above, however, the general principle of the law of treaties is that a material breach does not terminate the agreement but merely creates a right in the injured party—in this case, ostensibly the Security Council—to declare the agreement void.)

Nor was the breach a mere technicality. As a repeat offender with a long history of cavalierly using illegal weapons of mass destruction against his neighbors and his own people, Saddam Hussein had been required by the Security Council to rid Iraq of all such weapons and delivery vehicles under international supervision. This was obviously because the Council believed if he were allowed to develop such weapons he would once again use them.

The Council had unanimously and repeatedly passed legally binding resolutions under Chapter VII—a section of the Charter reserved for "Threats to the Peace, Breaches of the Peace, and Acts of Aggression"—not only noting that Iraq was in material breach but also demanding compliance. Even without explicitly authorizing a further use of armed force, these resolutions weigh heavily in favor of effective international action to enforce the law against a clear and recognized threat to peace.

The "totality of the circumstances" test I am proposing also mitigates against requiring certain knowledge that a specific attack is imminent before defensive force may be used. The secretive nature of the Iraqi regime made such certain knowledge unlikely to be obtained, while the potential consequences of one or possibly multiple simultaneous WMD attacks weigh against any legal rule that would permit a repeat offender—who is in material breach of more than a dozen Chapter VII Security Council resolutions—still one more "free kick" before potential victims may lawfully defend themselves.

Finally, Saddam's known connections with international terrorist

organizations—also in violation of Chapter VII Security Council Resolutions—create the strong possibility of an Iraqi attack that might not leave any traceable fingerprints at the scene, as chapters 1, 2, 3, and 7 suggest. As the world changes, international law must adapt to address new realities. In early 2003, the United States knew that Saddam Hussein was a repeat offender responsible for numerous acts of blatant international aggression against several countries. He was a man who had gone to great lengths to obtain weapons of mass destruction, and he had repeatedly been found by the Security Council to be in flagrant breach of measures designed to eliminate such weapons and neutralize him as a threat to world peace. His totalitarian brutality made it very difficult to gain reliable intelligence about his intentions, but it was understood that, armed with WMDs, he could attack at a time and place of his own choosing—perhaps against multiple targets and quite possibly without even being clearly identified as the source of the attacks. In such a setting, to suggest that international law limits defensive responses to passively awaiting the next attack before reacting makes little sense.

The failure of the United States to provide leadership in the Security Council in the years after the 1991 Gulf War no doubt contributed to the current problem. Year after year, the Security Council would solemnly draw a new line in the sand and threaten Saddam that—*this* time—there really would be the most serious consequences if he didn't clean up his act. And each time that he ignored them—trying to convert his legal obligation to disarm under international supervision into a new "shell game" in which U.N. inspectors were challenged to "find the pea" in his vast, totalitarian country, or Iraq would be presumed to be in compliance—they would take a few more steps backward, pass a new resolution, and draw yet another line in the sand.

The Growth of International Humanitarian Law and the Right to Use Armed Force in Humanitarian Intervention

In the case of Operation Iraqi Freedom, the totality of circumstances must also take into account the nature of the Iraqi regime: its monstrous and unrelenting abuse of its citizens' most basic rights, and the fact that its continued existence was itself a function of this pattern of heinous abuse.

One of the most dramatic changes in international law during the last half of the twentieth century was the increased recognition that international law creates rights not merely for states but also for individual human beings. Historically, for a state even to take notice of the abuse that occurs when a foreign state elects to mistreat its own nationals was considered a wrongful act—an interference in another state's "internal affairs." Prompted in part by Hitler's genocide of millions of Jews, gypsies, and other "undesirables" during World War II, states increasingly recognized that international law had to provide some level of constraint on gross violations of human rights.

The underlying debate reflects the divergence of opinion among legal "positivists"—who argued that there was no law beyond that accepted by sovereign states through treaty or custom—and advocates of "natural law," who contended that certain behavior was so inherently evil as to be prohibited by God or nature. Natural law champions have included in their number Francis Bacon, Hugo Grotius, John Locke, and, of course, Thomas Jefferson, who helped found a remarkable new country on the theory that all men were "endowed by their Creator" with "unalienable Rights."

Beginning with some general language in Article 1 of the United Nations Charter, which establishes as a purpose of the organization "promoting and encouraging respect for human rights and for fundamental freedoms for all," in 1948 the U.N. General Assembly passed the (nonbinding) Universal Declaration of Human Rights. The Declaration affirmed that the "inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Numerous human rights conventions—which, unlike the Universal Declaration, were intended to be legally binding upon parties—would become part of international law in the decades that followed.

Humanitarian Intervention and the Security Council

The Security Council has on several occasions acted to address major humanitarian catastrophes. On December 3, 1992, the Security Council passed Resolution 794, which read in part: "Acting under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." The U.N.-sanctioned intervention in Somalia established the legal principle—long recognized by many international lawyers—that force could legitimately be used to prevent egregious violations of international humanitarian law within a single state that threatened the lives of large numbers of human beings.

Less than two years later, the Security Council authorized the use of force in order to restore democracy to Haiti. On July 31, 1994, the Council adopted Resolution 940, expressing "grave concern" over the "further deterioration of the humanitarian situation in Haiti" and "reaffirming that the goal of the international community remains the restoration of democracy in Haiti." Acting under Chapter VII, the Council authorized member states "to use all necessary means" to bring about "the restoration of the legitimate authorities of the Government of Haiti." While the resolution did make references to "humanitarian" problems, the situation was not in fact measurably worse than the dismal circumstances that had plagued Haiti for decades under prior dictators. The goal of the Council was not that of addressing genocide or

other egregious human rights violations, but rather that of restoring "democracy" to Haiti.

The Case of Kosovo

On September 23, 1998, the Security Council passed Resolution 1199, which asserted that "the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region," and acting under Chapter VII, the Council demanded "that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe." Russia, however, announced the intention to veto any resolution designed to authorize military force.

On March 24, 1999, NATO launched Operation Allied Force and for seventy-seven days carried out air attacks against Yugoslavia in order to persuade President Slobodan Milosevic to withdraw his troops from Kosovo. The following day, Russia introduced a resolution in the Security Council declaring the NATO bombing to be a "flagrant violation" of the U.N. Charter and a threat to international peace. The Russian resolution failed to pass by a vote of 3 to 12, and the 80 percent opposition strongly suggests that the members of the Security Council were not outraged at the idea of pursuing a humanitarian intervention outside the framework of the Security Council when Council action had been blocked by the threat of a veto.

On March 26, the British representative to the Security Council noted that the policies of the Milosevic government in Kosovo had already been declared a "threat to the peace" by the Security Council and reasoned: "In the current circumstances, military intervention is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe."

It is worth noting that both France and Germany actively supported NATO's humanitarian intervention in Kosovo, despite the fact that

Article 53 of the U.N. Charter prohibits "regional agencies" like NATO from taking "enforcement action" other than self-defense without Security Council authorization. France, Germany, Belgium, and the United States attempted to distinguish the Kosovo operation as a unique incident, asserting that

> they had never stopped attaching crucial importance to the central role of the Security Council. The armed attack was initiated only as an exceptional measure justified by the failure of that body to act. However, as soon as the Security Council was in a position to take the issue into its own hands, they would discontinue any military action.[268]

History, however, shows that Kosovo was not unique. Scholars have recently drawn parallels between Operation Allied Force and Operation Iraqi Freedom.[269]

Humanitarian Intervention Outside of the U.N.

Legal scholars have been divided on the issue of whether force could be used outside of the Security Council process to protect a defenseless populace against truly egregious and widespread violations of fundamental human rights by its own government. Few scholars, however, have criticized the Kosovo intervention on moral grounds. The similarities between the use of armed force to prevent the slaughter of innocents by an aggressor state in another state, and the use of force to prevent tyrants from using force to slaughter or egregiously abuse their own citizens, are obvious. In both cases, the balance being determined by the law weighs the rights of sovereign states to be free of external interference in their affairs versus the importance of preserving human rights to life and fundamental freedoms.

In March 1999, a publication of the American Society of International Law reasoned with respect to the NATO intervention in Kosovo:

> There are two possible arguments for intervention without Security Council authorization, but they both require an extension of recognized principles beyond the limits heretofore applied to them. The first is based on a limited right of humanitarian intervention to aid groups held captive or subjected to grave physical danger. The justification for humanitarian intervention is strongest when the intervening states are acting to protect their own nationals, as in the case of Israel's 1976 raid to release its nationals being held hostage at the airport in Entebbe, Uganda. The extended argument would be that in exceptional cases where peaceful means of alleviating a humanitarian crisis inflicted by a state on its own nationals have failed, and where the Security Council has recognized a threat to international peace, forceful intervention would be lawful so long as it is proportional to the situation.[270]

Consider for a moment the alternatives. If international law provides that *only* the Security Council may authorize the use of force if another Adolf Hitler emerges and starts slaughtering millions of innocent people, then it empowers any of five permanent members with an absolute veto to immunize such conduct. In such a case, international law would become part of the problem rather than an instrument for preserving peace, justice, and human life. As Jefferson recognized, we should not sacrifice the end to the means.

The dilemma was put well by U.N. Secretary General Kofi Annan in 1999 when he wrote of the "important questions" raised by the Kosovo conflict: "On the one hand is it legitimate for a regional organization to use force without a U.N. mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?"[271]

At the U.N.'s founding, the U.S. delegation in San Francisco in fact anticipated that the veto might be exercised to prevent Security Council action to stop armed aggression and refused to sign the Charter until it was clarified that traditional rights of individual and collective self-defense were preserved. The goal in both situations is the same: to prevent governments from unlawfully destroying large numbers of innocent human lives.

It is important to understand the basic values at stake in the humanitarian intervention debate. In deciding that force could not be used to redress economic or political disputes, the writers of the Charter placed great value upon the sanctity of human life. In permitting force in self-defense, they recognized that force may be justified in certain circumstances when, in the absence of defensive force, human lives would also be lost. When acting in humanitarian intervention, once again the use of force is intended to protect human life. The value that must be balanced against the desire to protect those lives is national sovereignty—a very important value in its own right, which is recognized in Article 2(7) of the Charter.

Professor Richard Falk, of Princeton University, was perhaps the foremost legal scholar in opposition to U.S. intervention in Vietnam and has been a critic of most other American interventions in the past half-century as well. But he was more supportive of intervention when the goal was protecting important humanitarian values. Writing in the *American Journal of International Law*, he concluded that a "normal textual reading" of the Charter would prohibit the NATO intervention in Kosovo, but he reasoned:

> to regard textual barriers to humanitarian intervention as decisive in the face of genocidal behavior is politically and morally unacceptable, especially in view of the qualifications imposed on the unconditional claims of sovereignty by the expanded concept of international human rights.[272]

Expressing concerns about the "self-marginalization of international law and international lawyers," Professor Falk notes that

> [I]t is often argued that the failure of the United Nations itself to evolve a collective security system justifies greater latitude in interpreting the occasions on which it is reasonable for a state to use force. This latitude allows for uses of force to uphold vital security interests or to serve the cause of humane governance that the Charter appears on its face to foreclose. In this regard, Articles 2(4) and 51, although

important guidelines, are no longer dispositive in relation to inquiries as to legality.[273]

More fundamentally, with respect certainly to a situation like Iraq, there is the question of where national "sovereignty" resides. Do we really believe that Saddam Hussein, by virtue of killing off much of his opposition and terrorizing the people of Iraq into submission, acquired the sovereignty of Iraq as his personal legal property? That would have been an accepted view many centuries ago, but the overwhelming majority view today is that sovereignty resides in the *people* of a country. If other states intervene for the limited purpose of restoring sovereignty to its rightful place by removing a tyrant who is slaughtering his people, it is difficult to contend that this violates the sovereignty of the people of Iraq.

Nor, for that matter, is it clear that such an intervention violates the use-of-force provisions of the Charter. Humanitarian intervention does not necessarily involve a threat to the "territorial integrity" or "political independence" of the state in question, and promoting human rights can hardly be considered "inconsistent with the Purposes of the United Nations."

Many experts believe that humanitarian intervention is already clearly lawful under the Charter. Others believe that, though moral, it is not yet easily reconciled with traditional interpretations of the Charter. At a minimum, it would appear that humanitarian intervention, as a matter of customary international law, is well on its way to becoming a recognized right—in certain exceptional circumstances.

When the Security Council has previously made a determination that a "threat to the peace" exists, and when it has then been prevented (by veto or threat of veto) from approving "measures necessary to maintain international peace and security" (per Article 51), the legal case for multilateral action outside the Council framework is a strong one.

Humanitarian Intervention and Iraq

The Security Council has repeatedly recognized the existence of serious humanitarian problems in Iraq. In Resolution 688, passed on April 5, 1991, the Security Council expressed its "grave concern" over the "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, . . . which threaten international peace and security in the region."

In Resolution 778, of October 2, 1992, the Security Council reaffirmed "its concern about the nutritional and health situation of the Iraqi civilian population, and the risk of a further deterioration of this situation," and noted that previous resolutions had "provided a mechanism for providing humanitarian relief to the Iraqi population." The Council deplored "Iraq's refusal to cooperate in the implementation of resolutions 706 (1991) and 712 (1991), which puts its civilian population at risk, and which results in the failure by Iraq to meet its obligations under relevant Security Council resolutions."

On December 17, 1999, the Council passed Resolution 1284, expressing its "concern" about "the humanitarian situation in Iraq" and its determination "to improve that situation." Acting under Chapter VII, the Council called upon the government of Iraq to take "all steps to ensure the timely and equitable distribution of all humanitarian goods, in particular medical supplies, and to remove and avoid delays at its warehouses."

On November 8, 2002, when the Security Council gave Iraq "a final opportunity" to comply with its disarmament obligations, it also deplored "that the Government of Iraq has failed to comply with its commitments pursuant to . . . Resolution 688 (1991) to end repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance in Iraq."

Although passed after the start of Operation Iraqi Freedom, Security Council Resolution 1472 of March 28, 2003, is also relevant. It reaf-

firmed "the right of the people of Iraq to determine their own political future," a right that was obviously far more likely to be achieved after the fall of Saddam Hussein's government.

Saddam's Record of Abuse of the Iraqi People

THE WORLD COMMUNITY REALIZED that the embargo begun in August 1990 could have disastrous consequences for the long-suffering people of Iraq, and over the years the Security Council tried hard to prevent or at least mitigate this harm. But Saddam Hussein, so far from desiring to mitigate harm to civilians, counted on the evident suffering of Iraq's civilian population to compel the Security Council to terminate the embargo that was complicating his military ambitions. Between the end of Operation Desert Storm and the start of Operation Iraqi Freedom, Saddam Hussein appropriated vast sums of money that could have been used to buy food and medical supplies for his people, and spent it instead on no less than forty-eight new "presidential palaces."

By the time Operation Iraqi Freedom began, more than half a billion dollars' worth of medical supplies, delivered to Iraq under the "oil-for-food" program, remained undistributed. According to Amnesty International, more than half a million children under the age of five died in the decade following the first Gulf War because of acute poverty and malnutrition, arising from corruption in Iraq.[274]

On August 15, 2001, Amnesty International (scarcely a "tool" of the U.S. or British governments) issued a report titled *IRAQ: Systematic Torture of Political Prisoners*, which recounted shocking stories of "gouging out of the eyes . . . severe beatings and electric shocks to various parts of the body.[275] The report noted that women had been tortured "simply because of family links," and noted the introduction in the mid-1990s of "judicial punishments such as amputation of hand and foot." The following excerpt provides a flavor of life under Saddam's Iraq:

> Torture victims in Iraq have been blindfolded, stripped of their clothes and suspended from their wrists for long hours. Electric shocks have been used on various parts of their bodies, including the genitals, ears, the tongue and fingers. Victims have described to Amnesty International how they have been beaten with canes, whips, hosepipe or metal rods and how they have been suspended for hours from either a rotating fan in the ceiling or from a horizontal pole often in contorted positions as electric shocks were applied repeatedly on their bodies. Some victims had been forced to watch others, including their own relatives or family members, being tortured in front of them.
>
> Other methods of physical torture described by former victims include the use of *falaqa* (beating on the soles of the feet), extinguishing of cigarettes on various parts of the body, extraction of fingernails and toenails, and piercing of the hands with an electric drill. Some have been sexually abused and others have had objects, including broken bottles, forced into their anus. In addition to physical torture, detainees have been threatened with rape and subjected to mock execution. They have been placed in cells where they could hear the screams of others being tortured and have been deprived of sleep. Some have stayed in solitary confinement for long periods of time. Detainees have also been threatened with bringing in a female relative, especially a wife or mother, and raping her in front of the detainee. Some of these threats have been carried out.

Consider as well this Amnesty International account of how the Iraqi judicial system under Saddam Hussein dealt with an accused critic of the government:

> [A] 29-year-old theology student from Saddam City, was arrested in June 1999 and was tortured for long periods in the building of Saddam Security Directorate. His wife, father and mother were reportedly brought to the building in August 1999 and were tortured in front of him to force him to confess to being one of those responsible for the disturbances in Saddam City. He was said to have confessed in order to spare his parents and his wife any further torture. They were

> released following his confession but he was sentenced to death later and was executed at the beginning of 2001.[276]

Other accounts in the Amnesty report included that of a Baghdad obstetrician who was beheaded in October 2000 for complaining about corruption in the health system, and the twenty-five-year-old wife of a man accused of antigovernment activities who had managed to flee the country. The Amnesty report recounts:

> Men belonging to *Feda 'iyye Saddam* came to the house in al-Karrada district and found his wife, children and his mother. Um Haydar was taken to the street and two men held her by the arms and a third pulled her head from behind and beheaded her in front of the residents. . . . The security men took the body and the head in a plastic bag, and took away the children and the mother-in-law. . . . The fate of the children and the mother-in-law remains unknown.[277]

The fate of a large number of Iraqis "remains unknown." According to United Nations Commission on Human Rights figures, Iraq has "the highest number of disappearances reported" in the world.[278]

According to Amnesty International, in mid-2000 a new sentence was approved "by the authorities" to punish those accused of making remarks critical of Saddam or his family: "amputation of the tongue."[279] In 2001, the United Nations Commission on Human Rights condemned Iraq for the "widespread, systematic torture and the maintaining of decrees prescribing cruel and inhuman punishment as a penalty for offences."[280]

Nor were innocent children spared punishment. A health coordinator in Yemen's refugee health program reported in January 2002 that an Iraqi child under her care had needle scars on its wrists and forearms. The child had been injected with an agent designed to cause severe mental retardation, in retaliation for the father's "suspected" opposition to Saddam's regime.[281]

One of the many damning reports about human rights in Saddam's

Iraq was submitted to the U.N. General Assembly by Secretary General Kofi Annan on October 14, 1999. It was prepared by a distinguished Dutch diplomat, Ambassador Max van der Stoel, in his capacity as the Special Rapporteur of the U.N. Commission on Human Rights on the human rights situation in Iraq. Among his findings was that the under-five mortality rate in the south and center of Iraq (home to 85 percent of the population) grew from 56 deaths per 1,000 live births prior to 1989 to 108 per 1,000 during the five-year period ending in 1999. In contrast, in the autonomous northern region of Iraq, where Saddam was not in control, the mortality rate *declined* 20 percent during the 1990s.[282]

Discussing Saddam's refusal to cooperate with the "food-for-oil" program, Ambassador van der Stoel noted that under phase IV of the oil-for-food program, "$15 million was allocated for the targeted feeding programme for children under five and for lactating mothers. Despite repeated requests made by the United Nations at different levels, as of 31 July only one application, for high-protein biscuits, at a value of just under $1.7 million, had been received by the Office of the Iraq Programme and approved by the Security Council. No application for therapeutic milk has been submitted to the Office of the Iraq Programme."

Apparently, Saddam's government felt that Iraqi children had *too much* milk: on August 11, 1999, Kuwait intercepted a boat traveling from Basra, Iraq, smuggling seventy-five cartons of infant milk powder and twenty-five cartons of infant feeding bottles. The captain of the boat confessed that he had in the past made half a dozen similar trips.[283]

The U.N. report provides a good summary of Saddam's refusal to cooperate with the oil-for-food program:

> After the imposition of international sanctions in August 1990, the Government of Iraq decided not to take advantage of Security Council Resolutions 706 (1991) of 15 August 1991 and 712 (1991) of 19 September 1991, adopted by the international community in response to the specific needs of the Iraqi people. These Security Council resolutions allowed Iraq to sell $1.6 billion worth of oil every six months,

> with the aim of importing humanitarian supplies. Instead, the Government of Iraq decided to rely only on domestic production to meet the humanitarian needs of its people, preferring to let innocent people suffer while the Government manoeuvred to get sanctions lifted. Indeed, had the Government of Iraq not waited five years to decide to accept the "oil-for-food" agreement proposed as early as 1991 in the above-mentioned resolutions to meet the humanitarian needs of the population, millions of innocent people would have avoided serious and prolonged suffering.[284]

The report quotes the executive director of the Office of the Iraq Program as saying in May 1999 that most of the $570 million worth of medicine and medical supplies that have arrived in Iraq under the oil-for-food program remained in government warehouses, which "are literally overflowing."[285] Although during the six-month period prior to the 1999 report an increase in oil prices had increased Iraq's income under the oil-for-food program to $3.86 billion, the government of Iraq had only budgeted $6.6 million in nutritional supplements for mothers and small children—less than half the 1996 sum.[286]

The conclusions of the 1999 U.N. report are ominous and warrant quotation at length (emphasis added):

> [T]he situation of human rights in Iraq is worsening and the repression of civil and political rights continues unabated. . . . At the beginning of 1992, the Special Rapporteur concluded that the gravity of the human rights situation in Iraq had few comparisons in the world since the end of the Second World War. The Special Rapporteur regrets that since then he has had no cause to change his view. The prevailing regime in Iraq has effectively eliminated the civil rights to life, liberty and physical integrity and the freedoms of thought, expression, association and assembly; rights to political participation have been flouted, while all available resources have not been used to ensure the enjoyment of economic, social and cultural rights. *Indeed, the Special Rapporteur has concluded that the political-legal order in Iraq is not compatible with respect for human rights and, rather, entails systematic and systemic violations throughout the country, affecting virtually the*

> *whole population*. . . . [T]here is no freedom of speech or action since the mere suggestion that someone is not a supporter of the President carries the prospect of the death penalty; and there is no freedom of information on radio or television, the most popular public media. The . . . Iraqi people do not enjoy, and will not enjoy in the foreseeable future, respect for their human rights. . . .
>
> Without firm determination on the part of the international community to respond substantially and meaningfully to the extremely serious violations referred to in the present report, the tradition of impunity which prevails in Iraq will almost certainly continue. Its unfortunate consequences will be, inter alia, to encourage the continuance of human rights violations, to dash hopes for the re-establishment of the rule of law, including accountable government, and to jeopardize efforts to establish peace and stability in the region. . . .
>
> Considering the gravity and the complexity of the situation and on the basis of the foregoing, the Special Rapporteur reiterates all the conclusions and recommendations formulated in his previous reports. . . . [T]he Special Rapporteur observes no improvement in the situation of human rights in Iraq. In sum, the prevailing regime of systematic human rights violations is contrary to Iraq's many international obligations and, as determined by the Security Council in its resolution 688 (1991), remains a threat to peace and security in the region.[287]

These chilling human rights reports have now been confirmed over again, as people liberated by Operation Iraqi Freedom have come forward to tell their individual stories.

The Human Costs of Saddam's Regime

When a senior official of the United Nations Commission on Human Rights asserts that there have been few comparisons since World War II to the human rights deprivation in Saddam's Iraq, it is clear that the situation was extremely serious—and that a consequent case existed for international humanitarian intervention. Sanctions had

been tried for more than a dozen years without visible success, as Saddam and his cronies were largely able to externalize the costs to the families and children of Iraq while hoarding scarce supplies for their own friends.

Measuring the extent of the humanitarian crisis is difficult. The total human costs of the 1980 Iraqi invasion of Iran and the 1990 invasion of Kuwait probably exceed one million deaths. Estimates of the numbers of Kurds killed by Iraq over the years range from 50,000 to 200,000, including 30,000 to 60,000 deaths due to unlawful chemical weapons, used against more than forty Kurdish villages in the 1980s. Human Rights Watch estimates that the number of "disappearances" in Iraq—that is, people who were taken off by government agents and never heard from again, or just "vanished" without explanation—is between 70,000 and 150,000, and many of these are presumably now dead.

Amnesty International alleges that Saddam's Iraq is also responsible for most of the "hundreds of thousands" of disappearances in the Middle East and North Africa in recent years, and estimates that an additional 500,000 children have died in Iraq in the past decade or so. An estimated 3 to 4 million Iraqis have fled their country and become refugees, ranking Saddam's regime second only to the Taliban's Afghanistan in the number of displaced persons it has created.

In January 1994, the Council of Europe passed Resolution 1022 declaring that the survival of Iraq's Marsh Arabs was threatened by Saddam Hussein's government. Human Rights Watch is one of several groups to conclude that the widespread killing of Iraqi Kurds violated the 1949 Genocide Convention and constituted "crimes against humanity."

Just as the case for anticipatory self-defense was clearly strengthened by the U.N. Security Council's numerous resolutions declaring Saddam Hussein's regime in Iraq to be a "threat to the peace" and in material breach of Chapter VII resolutions, the Security Council and other U.N. organs' documentation of Iraq's gross violations of internationally recognized human rights clearly strengthens the case for humanitarian intervention.

Discussing the NATO use of force in Kosovo in 1999, Professor Antonio Cassese of the University of Florence argued that the operation was probably unlawful under traditional interpretations of the Charter, but he noted that "a new customary rule" was most likely "in the process of emerging in the world community." Professor Cassese observed that "only very few states contended that the action on the part of NATO countries was contrary to the United Nations Charter in that it violated Article 2(4)," identifying fewer than ten dissenters. "Furthermore," he wrote, "the military action was also regarded as warranted in that it had been preceded by repeated pronouncements of the Security Council to the effect that the atrocities committed in Kosovo by the FRY against its own citizens amounted to a threat to the peace." He concluded: "This rule would legitimize the taking of forcible countermeasures by groups of states in the event of failure of the United Nations Security Council to authorize the use of force in response to gross, systematic and large-scale breaches of human rights amounting to egregious crimes against humanity."[288]

The point is a compelling one, and the pertinent question is whether the "emerging principle" had achieved the status of customary international law at the time of Operation Iraqi Freedom.

No friend of human freedom and dignity can favor a rule of international law that grants each of five states the legal power to immunize the kinds of appalling humanitarian abuse instituted in Iraq under Saddam Hussein's regime; but this is in fact the import of the claim that humanitarian intervention is impermissible without prior Security Council approval. If it is argued that customary international law had not yet reached the point where such an operation was clearly lawful in the absence of Security Council approval, it is perhaps all the more important that humanitarian coalitions engage in such operations in the interest of furthering the progressive development of such a customary rule.

The Proper Balance of Values

IN THE END, the United Nations' attempts to deter aggression and remove threats to the peace through nonforceful means failed. President Bush and Prime Minister Blair agreed to assemble a coalition of the willing to enforce the purposes of the Charter. There seems to be overwhelming consensus that this was the right thing to do; a strong case can be made that it was also a legal thing to do.

The fear, of course, is that Operation Iraqi Freedom will establish a precedent for other states, in less justifiable circumstances, to resort to force. Here again, the proper approach is to evaluate each situation in light of the totality of the circumstances: Saddam Hussein had created a thoroughly and uniquely malevolent regime, intentionally starving children and routinely engaging in the most brutal forms of torture imaginable not only against his political enemies but also against the friends and relatives of people even suspected of disloyalty. If the course of human history someday brings forth a comparable regime, Operation Iraqi Freedom may serve as a valuable precedent. Prior to that point being reached, Saddam's fate may serve as a valuable deterrent to budding tyrants who believe that emulating the behavior of Stalin or Hitler may be an acceptable means of maintaining political power.

Legal scholars will no doubt continue to debate for decades to come issues posed by Operation Iraqi Freedom. Evaluating the operation in the light of the totality of the circumstances, I would conclude that it probably was a lawful use of force. And to the extent that it stretched the edges of previously accepted permissible conduct, it may contribute to the progressive development of rules necessary for the maintenance of peace, security, and the rule of law in the modern world.

And since the very first "purpose" set forth in Article 1(1) of the U.N. Charter is to act collectively to "remove" threats to the peace—a status the Security Council repeatedly conferred on Saddam Hussein's regime each time it denounced his unlawful behavior pursuant to Chapter VII of the Charter—one cannot with a straight face contend that the effort of replacing this brutal tyrant has undermined the "purposes" of the Charter. While the Security Council may not have clearly authorized Operation Iraqi Freedom (an issue regarding which there is room for debate), the Council has formally made most of the factual findings necessary to justify the use of lethal force to remove Saddam Hussein from power.

In the end, the reaction of the Security Council to Operation Iraqi Freedom is noteworthy. Rather than condemning the operation as unlawful aggression, on May 22, 2003, the Security Council by a vote of 14–0 (with the representative of Syria absent) approved Resolution 1483, recognizing that the United States and Great Britain constituted "the Authority" in Iraq and supporting "the formation, by the people of Iraq with the help of the Authority and working with the Special Representative [of the U.N. Secretary General], of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority."

Thus, as this book goes to press, after the heavy lifting has been accomplished by the United States, Great Britain, and their allies, the world community seems once again united on the issue of Iraq. Rather than demanding the restoration to power of the regime of Saddam Hussein, the Security Council has formally endorsed "efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender"—which is precisely the goal of the coalition that removed Saddam's regime from power. It is difficult to believe that this unity would have been possible had the world community honestly felt that Operation Iraqi Freedom was an unlawful act of international aggression.

As we move further into the twenty-first century, an appropriate test for evaluating use-of-force situations when the Security Council is deadlocked is this: under the totality of the circumstances, was the force used aggressively (e.g., for conquest or perhaps to resolve some politi-

cal, diplomatic, or economic dispute) or defensively (either in defense of the state resorting to the use of force, in the defense of another state requesting assistance in collective self-defense, or in the defense of other human lives, made necessary by an extraordinary pattern of unlawful violation of fundamental human rights). Any *anticipatory* claim must be required to overcome a very high hurdle of presumptive illegitimacy. But that hurdle can surely be vaulted in a case in which a repeat offender has been expressly identified as a threat to the peace, and has violated numerous Chapter VII resolutions of the Security Council in a sustained effort to develop weapons of mass destruction.

Properly understood, Operation Iraqi Freedom reflects a proper balance of values in the twenty-first century.

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CONCLUSION

Most of the American public understands why the United States went to war with Iraq: 52 percent believe that Iraq (and Saddam Hussein personally) were involved in the September 11 attacks. A decisive majority—74 percent—support President Bush's handling of the situation in Iraq, and nearly as many—70 percent—say he has strong leadership qualities.[289] In Bush's words, "A president has to be the calcium in the backbone."[290] Nothing has tested those qualities of leadership more thoroughly than the shocking events of September 11, 2001.

Far worse scenarios were possible, however. Iraq had already admitted to having a huge biological weapons program that was never turned over to the U.N. weapons inspectors. As the president and other senior administration officials reiterated, in the lead-up to the war among the greatest dangers to the country was the possibility that Saddam Hussein could provide biological agents to al Qaeda (or other terrorists), and thus inflict enormous damage without U.S. authorities being able to determine who was responsible.