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SOME REALISM ABOUT UNILATERALISM

ANTHONY CHASE*

“The fresh look is always the fresh hope.”

–Karl Llewellyn¹

THE GREAT FEAR

A specter is haunting international politics—the specter of American unilateralism.² Robert Rubin, the highly regarded former United States (“U.S.”) Secretary of the Treasury, told National Public Radio’s Diane Rehm that he hoped 2004 would bring a national debate over the country’s “relatively unilateralist policy,” an approach to “how we deal with the rest of the world” that is “not going to work but also creates an enormous antagonism against the United States.”³ At one level, anxiety about American unilateralism simply expresses a desire that U.S. foreign policy, and the way it is applied, should be popular with as many nations as possible. And it would be nice if some of those nations could more enthusiastically support American policy, whether diplomatically, financially, or militarily.

At another level, the unilateralist critique covers concerns about an American embrace of the doctrine of preemption or preventative wars⁴ as

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1. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960).

2. See generally NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE* (2003); SAUL LANDAU, *THE PRE-EMPTIVE EMPIRE: A GUIDE TO BUSH’S KINGDOM* (2003); CLYDE PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* (2003). For a wide range of contributors with conflicting views on the subject, see generally *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* (Gwyn Prins ed., 2000) [hereinafter Prins]; *UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES* (David M. Malone & Yuen Foong Khong eds., 2003) [hereinafter Malone & Khong].

3. *The Diane Rehm Show* (WAMU radio broadcast, Dec. 2, 2003), http://www.wamu.org/dr/2003/drarc_031201.html (audio commentary) (last visited Mar. 27, 2004).

4. Jeff Guntzel, *Iraq Peace Team Briefing #2: Preemptive Strikes and International Law*, Aug. 27, 2002, http://www.iraqpeaceteam.org/pages/iptbriefing_2.html (last visited Mar. 27, 2004).

Addressing an enthusiastic crowd of West Point Military Academy graduates on June 1, 2002, George W. Bush declared, “Our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend

well as an abandonment of the long-standing U.S. commitment to the United Nations (“U.N.”) organization.⁵ Does the launching of preemptive wars revealed a new and dangerous departure in American foreign policy? Has American deployment of military force without U.N. Security Council support signaled that the U.S. has decided to undercut the premiere world peace organization, an institution the U.S. played such a critical role in bringing into existence? The purpose of this essay is to measure the current criticism of American unilateralism against both the reality of contemporary politics and the rules of international law.

our lives.” The crowd roared. Bush was thinking about Iraq that morning. He was not thinking about international law.

Id.

5. See Richard Falk & David Krieger, *Subverting the UN*, THE NATION, Nov. 4, 2002, http://www.thirdworldtraveler.com/United_Nations/Subverting_UN.html.

To save the UN from the [Bush] Administration’s destructive and radical unilateralism, other key nations will have to stand up to its bullying. France, Russia and China, because of their veto power in the Security Council, could withhold legal authority for America to proceed to war. Whether they will exercise this power, given the pressure they’re under from the Administration, remains to be seen If [the US] were to go ahead with war, it could deliver a death knell not only to Iraq but also to the UN itself. It is emblematic of US global waywardness that it is necessary to hope for a veto to uphold the legitimacy and effectiveness of the UN as a force for peace but to also be concerned that Administration threats of unilateral military action could render the veto ineffective and thereby the role of the Security Council largely meaningless.

Id. Within months, the fears of Falk and Krieger were realized. See Matthew Rothschild, *Bush Trashes the United Nations*, THE PROGRESSIVE, April 2003, <http://www.progressive.org/april03/roth0403.html> (last visited Mar. 27, 2004); see also Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May–June 2003, <http://www.foreignaffairs.org/20030501faessay11217/michael-j-glennon/why-the-security-council-failed.html> (last visited Mar. 27, 2004).

[O]n March 5 [2003], France and Russia announced they would block any subsequent resolution authorizing the use of force against Saddam. The next day, China declared that it was taking the same position At this point it was easy to conclude, as did President Bush, that the UN’s failure to confront Iraq would cause the world body to “fade into history as an ineffective, irrelevant debating society.” In reality, however, the council’s fate had long since been sealed. The problem was not the second Persian Gulf War, but rather an earlier shift in world power toward a configuration that was simply incompatible with the way the UN was meant to function. It was the rise in American unipolarity—not the Iraq crisis—that, along with cultural clashes and different attitudes toward the use of force, gradually eroded the council’s credibility.

Glennon, *supra*.

FIRST STRIKE

The current language of “preemptive strikes” originates in American political discourse immediately following the Second World War.⁶ Kenneth Waltz observes that during the brief period when the U.S. alone possessed nuclear weapons, it was debated whether we should “drop the bomb quickly before the likely opponent in a future war has time to make his own.”⁷ The question remained unanswered on that summer afternoon in 1949 when news arrived that the Soviets, within five months of the establishment of NATO, had detonated an atomic device in Kazakhstan. On the one hand, such strategic thinking could lead to George C. Scott’s hysterical antics in front of the NORAD-like global positioning map in Stanley Kubrick’s classic motion picture, *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (1964). On the other hand, one suspects that when India and Pakistan periodically approach the brink of nuclear war over Kashmir, most Americans hope the Pentagon has something up its sleeve, designed to preempt the kind of atomic conflagration on the Indian subcontinent which, uncontrolled, might finally produce Carl Sagan’s legendary “nuclear winter.”

But the most recent version of anti-preemption ideology was ably, even nobly, offered by West Virginia Democrat, Robert C. Byrd, on the floor of the U.S. Senate, in February, 2003.⁸ Undaunted by the drum beat of war or the building momentum behind President Bush’s Iraq invasion plan, Senator Byrd deplored his colleagues’ willingness to “stand passively mute” while the country was dragged into a potentially disastrous war. “This nation,” declared Byrd, “is about to embark upon the first test of a revolutionary doctrine.”⁹ The senator did not hesitate to identify it: the doctrine of preemption, he asserted, “the idea that the United States or any other nation can legitimately attack a nation that is not imminently threatening but may be threatening in the future—is a radical new twist on the traditional idea of self-defense.”¹⁰ Not least was Byrd’s concern that the preemption doctrine “appears to be in contravention of international law and the UN Charter.”¹¹

6. Arthur Schlesinger, Jr., *Good Foreign Policy a Casualty of War: Today, It Is We Americans Who Live in Infamy*, LOS ANGELES TIMES, Mar. 23, 2003, at M1, available at <http://www.commondreams.org/views03/0322-01.htm> [hereinafter Schlesinger I].

7. KENNETH WALTZ, *MAN, THE STATE, AND WAR* 236 (rev. ed. 2001).

8. Senator Robert C. Byrd, *Senate Remarks: We Stand Passively Mute*, Feb. 12, 2003, http://byrd.senate.gov/byrd_speeches/byrd_speeches_2003february/byrd_speeches_2003march_list/byrd_speeches_2003march_list_1.html (last visited Mar. 27, 2004).

9. *Id.*

10. *Id.*

11. *Id.*

Arthur Schlesinger heralded Byrd's comments, endorsed a plan to have the senator's "doctrine of preemption" speech printed in the New York Times as a "full-page advertisement," and decried the fact the U.S. was going to war "not because of enemy attack," but because of "the Bush Doctrine of preventive war."¹² Like Byrd, Schlesinger saw the radical preemption doctrine as representing "a fatal turn in U.S. foreign policy."¹³ Schlesinger had himself argued the previous summer that "[o]ne of the astonishing events of recent months is the presentation of preventive war as a legitimate and moral instrument of U.S. foreign policy."¹⁴ Denied legitimacy, morality, and any basis in law or the Charter of the U.N., how could such a "revolutionary doctrine" have been adopted as the driving principle behind the deployment of American troops abroad, in the Iraqi desert, very definitely in harm's way?¹⁵

In order to answer this question it is necessary to juxtapose, to the admonitions of Byrd and Schlesinger, two interesting and widely-acknowledged features of American political history.¹⁶ First, as was frequently observed at the time of the September 11, 2001, terrorist assault on New York and Washington, Americans are hardly accustomed to having their homeland attacked.¹⁷ Whether as targets of bombers, missiles or civilian aircraft transformed into missiles; this was something new and uncomfortable, and deeply traumatizing, for many thousands of Americans.¹⁸ The territory of the U.S. and its possessions had not been attacked since the bombing of Pearl Harbor in 1941.¹⁹ And setting that devastating strike on America's Pacific fleet to one side, the country had never been attacked, let alone invaded, at least not since the British, our partners at the time in a not so special relationship, rather unceremoniously burned the White House in 1814.²⁰ Dolly Madison managed to save a full-length portrait of George Washington from the flames.

Second, another common observation, provided for our purpose here by Seymour Melman, is that "[t]he Permanent War Economy of the United

12. Schlesinger I, *supra* note 6.

13. *Id.*

14. Arthur Schlesinger, Jr., *The Immorality of Preventive War*, LOS ANGELES TIMES, Aug. 26, 2002, reprinted in History News Network, <http://hnn.us/articles/924.html> [hereinafter Schlesinger II].

15. *Id.*

16. See Byrd, *supra* note 8; Schlesinger I, *supra* note 6.

17. See Schlesinger I, *supra* note 6.

18. *Id.*

19. See Schlesinger II, *supra* note 14.

20. See Press Release, White House Historical Association (Fall 1998), http://www.whitehousehistory.org/10/subs/images_archives/journal4prerelease.pdf.

States has endured since the end of World War II in 1945” and, indeed, “[s]ince then the U.S. has been at war—somewhere—every year, in Korea, Nicaragua, Vietnam, the Balkans, Afghanistan—all this to the accompaniment of shorter military forays in Africa, Chile, Grenada, Panama.”²¹ Like Melman, Sidney Lens refers to “permanent war,”²² Carl Boggs to “militarism,”²³ and Chalmers Johnson to the “sorrows of empire.”²⁴ In their classic study of America’s postwar economy, Paul Baran and Paul Sweezy identify defense spending as crucial to the maintenance of “monopoly capital” itself.²⁵ In any event, when you add it all up, something has got to give. It simply is not possible for a country virtually never to be attacked, go to war only when attacked, and to be constantly at war. The weak link here is the part about going to war only when attacked. It is true that America has at least had the option of being isolationist throughout most of its history because it is a big country, bounded by two large oceans, and has thus been relatively safe, at least until recently, from foreign navies or the armies of God. It is also true that the U.S. has been almost constantly at war with someone somewhere for the past sixty years. To suggest that going to war before the fight has a chance to come to you is somehow un-American, however, or more politely is “against the American grain,” is just not supported by the historical record.²⁶

PERMANENT WAR

Anyone who has seen Frank Capra’s compelling World War II-era documentary film series, *Why We Fight*, knows that there appeared to be some pretty compelling reasons for American soldiers being sent to fight in Europe, even though nobody in Europe had attacked the U.S. Capra’s argument was simple and straightforward, designed specifically for young soldiers about to be sent into combat: we fight now in order to prevent something a lot worse later. Who can forget Capra’s globe drenched in totalitarian domination—like a can of paint dumped on the free world—smothering

21. Seymour Melman, *They Are All Implicated in the Grip of a Permanent War Economy*, COUNTERPUNCH, <http://www.counterpunch.org/melman03152003.html> (Mar. 15, 2003).

22. See SIDNEY LENS, *PERMANENT WAR: THE MILITARIZATION OF AMERICA* (1987).

23. See CARL BOGGS, *MASTERS OF WAR: MILITARISM, AND BLOW BACK IN THE ERA OF AMERICAN EMPIRE* (2003).

24. See CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004).

25. See PAUL A. BARAN & PAUL M. SWEEZY, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* (1966).

26. See LENS, *supra* note 22; BOGGS, *supra* note 23; JOHNSON, *supra* note 24; BARAN & SWEEZY, *supra* note 25.

our rights and liberties under a flood of fascist conquest? Not exactly “a wonderful life” to look forward to—so that’s why we fight.²⁷

Not just Korea and Vietnam, but the whole of the Cold War was fought not in self-defense, conventionally understood, but to prevent or preempt the communists from gaining a foothold in the Western Hemisphere (Cuba), or another foothold in the Western Hemisphere (Nicaragua), or to try to keep that first domino from falling (China today, Japan tomorrow), or the second (Vietnam, then Laos and Cambodia), or to prevent our allies from realizing we could not be trusted to keep our word or our international commitments. Americans were prepared to do whatever we had to abroad, now, in order to prevent being forced to live under the communist jackboot, at home, later. One of the last great theatrical events of the Cold War was the costly ABC television miniseries, “Amerika,” which not only lost twenty million dollars but also somehow failed to explain how the Russians were able to take over the U.S. without a fight.²⁸ The part of the script where, finally, Americans take up arms in the actual defense of the homeland, of American territory—a real war rather than more of the same endless worldwide preemptive skirmishing—was simply lost, or redacted, or erased, like the famous 18.5 minute gap in Richard Nixon’s tapes. Whatever else the doctrine of preemption or preventative war may be it is not, as Senator Byrd described it, revolutionary.²⁹ And, contrary to Arthur Schlesinger, it is not something invented by a former owner of the Texas Rangers baseball team.

The point, obviously, is not that the doctrine of preemption is moral or legal or even necessary—just that it is neither new nor something foreign to the American experience. Despite their recent potshots at Bush administration foreign policy, Byrd and Schlesinger know this perfectly well. Senator Byrd, after all, was a supporter of the Vietnam War in spite of the fact the Vietnamese had not landed sampans on Redondo Beach.³⁰ Byrd, like strategic policy planners in the Johnson and Nixon administrations, justified the brutal American war in Southeast Asia as a mission to prevent Vietnam, and then its neighbors, from falling to communism. Secretary of State, Dean Rusk, described the Vietnamese as merely “stalking horses” for Red China. Never mind the fact, as it turned out, that the only domino to fall after Saigon

27. See JOSEPH MCBRIDE, FRANK CAPRA: THE CATASTROPHE OF SUCCESS (St. Martin’s Griffin 2000) (1992).

28. See Anthony Chase, *Historical Reconstruction in Popular Legal and Political Culture*, 24 SETON HALL L. REV. 1969, 2009–11 (1994).

29. Byrd, *supra* note 8; see also Paul J. Nyden, *Byrd Questions War Spending Request*, THE CHARLESTON GAZETTE, Sept. 23, 2003, <http://www.commondreams.org/headlines/03/0923-12.htm> (last visited Mar. 27, 2004)

30. *Id.*

was the genocidal regime of Pol Pot in Cambodia, to which the Vietnamese communists mercifully put an end.³¹

Schlesinger warned readers of the *Los Angeles Times*, in 2002, that by “using his weaponry, [Saddam] Hussein would give the U.S. president his heart’s desire: a reason the world would accept for invading Iraq and enforcing ‘regime change.’”³² He also alerted members of Britain’s Royal Institute of International Affairs in 1998 to the fact that, in the U.S., the “isolationist impulse has risen from the grave in what has always been its essential programme - unilateralism.”³³ Thankfully, Charles William Maynes, joining Schlesinger at Chatham House in 1998, assured the Royal Institute that “no country in history has been able to maintain a hegemonic position without a degree of ruthlessness in its international policies that would be profoundly distasteful to the American people.”³⁴ Distasteful to the American people, perhaps, but not to Arthur Schlesinger, not when in government.

As an assistant to President Kennedy, Schlesinger was much less skeptical of unilateralism, the doctrine of preemption, and “regime change.” Although Cheddi Jagan, the socialist Prime Minister of Guyana, met personally with Kennedy in Washington and assured him that Guyana had no interest in becoming a Russian base, Schlesinger nevertheless advised the President, as Jagan later recalled, “that the way to remove from the government my party, which had won three successive elections, was to change our traditional first-

31. See Nyden, *supra* note 29. “Byrd again referred to the Vietnam War, which he supported at the time.” *Id.*

But who was the aggressor in Vietnam The Sino-Soviet split became so evident by the mid-1960s that even the most militant Cold Warriors had to take notice. Perhaps the “enemy” was China, and Dean Rusk conjured up the frightening image of a billion Chinese armed with hydrogen bombs.

John Garry Clifford, *Vietnam in Historical Perspective (1975)*, excerpted from John Gary Clifford, *Change and Continuity in American Foreign Policy Since 1930*, in *PATHS TO THE PRESENT: INTERPRETIVE ESSAYS IN AMERICAN HISTORY* (James I. Patterson ed., 1975), http://www.ecfs.org/projects/fieldston57/since40/units/unit4/supplements/cliff_vietnam.html (last visited Mar. 27, 2004). “Containment continued during the 1960s, when the Kennedy and Johnson administrations escalated US military intervention against the advance of Vietnamese communism, which they believed was a stalking-horse for Chinese imperialism in Southeast Asia.” Jeffrey Record, *Thinking About China and War*, *AEROSPACE POWER J.*, <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj01/win01/record.html> (last visited Apr. 4, 2004). See generally GABRIEL KOLKO, *ANATOMY OF A WAR: VIETNAM, THE UNITED STATES, AND THE MODERN HISTORICAL EXPERIENCE* (The New Press 1994) (1985).

32. Schlesinger II, *supra* note 14.

33. Arthur M. Schlesinger, Jr., *Unilateralism in Historical Perspective*, in *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* 18, 24 (Gwyn Prins ed., 2000).

34. Charles William Maynes, *Two Blasts Against Unilateralism*, in *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* 30, 39 (Gwyn Prins ed., 2000).

past-the-post district electoral system.”³⁵ In the event, it was the Central Intelligence Agency that did the heavy lifting in removing Jagan’s government, but Schlesinger seemed much less concerned, at that time, about unilateral “regime change” than now.³⁶ Schlesinger’s own account of these events, in his memoir of the Kennedy presidency,³⁷ does not differ materially from that of Jagan, a democratically-elected national leader who lost his job because of an American wish to preempt any possibility of his moving farther to the left, down the road.³⁸ Although Arthur Schlesinger, in 2003, found rather thin the Bush/Rumsfeld case for Iraq’s representing an imminent threat to the U.S., there has of course never been even a remote possibility that Guyana could launch a military strike against the U.S.³⁹ But for psychotic cult leader Jim Jones, most Americans would probably never have heard of Guyana. Nevertheless, whatever eventuality was to be prevented, even John F. Kennedy believed in the doctrine of preemption.

ANTICIPATORY SELF-DEFENSE

More rigorously if less accessibly, debate over the legitimacy of preemptive war is fought out by international lawyers within the doctrinal terrain of what is called “anticipatory self-defense.”⁴⁰ Arthur Schlesinger, who has at least heard of the term, proves once again that a little knowledge can be a dangerous thing. “The president has adopted a policy,” warns Schlesinger, “of ‘anticipatory self-defense’ that is alarmingly similar to the policy that imperial Japan employed at Pearl Harbor on a date which, as an earlier American president said it would, lives in infamy.”⁴¹ This from the

35. Cheddi Jagan, *Is Guyana to be Another Vietnam?* (1968), at <http://www.jagan.org/articles2i.htm> (last visited Mar. 27, 2004).

36. Arthur Schlesinger, Jr., *Unilateral Preventative War: Illegitimate and Immoral*, LOS ANGELES TIMES, Aug. 21, 2002, <http://www.ratical.org/ratville/CAH/UPW1aI.html>; see ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 774–79 (1965) [hereinafter SCHLESINGER III].

37. See SCHLESINGER III, *supra* note 36.

38. See CHEDDI JAGAN, THE WEST ON TRIAL: MY FIGHT FOR GUYANA’S FREEDOM (1966); JOHN PLATTS-MILLS, MUCK, SILK AND SOCIALISM: RECOLLECTIONS OF A LEFT-WING QUEEN’S COUNSEL 399–417 (2001).

39. Schlesinger I, *supra* note 6.

40. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 71–79 (1993); YEHUDA Z. BLUM, FOR ZION’S SAKE 174–89 (1987); RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 136–50 (1989); JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 115–17 (1894); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 609–10 (6th ed. 1910).

41. Schlesinger I, *supra* note 6.

taciturn, bow tie-wearing, Democratic historian of the New Deal? When British Labour Party leader Tony Benn pushed his loyal phalanx of supporters further to the left, in spite of the fact that Margaret Thatcher, the “Iron Lady,” and her right-wing conservative colleagues waited menacingly just over the horizon, impatient to bury the coal miners’ union along with the rest of the British welfare state, historian Eric Hobsbawm suggested the wily Benn had “lost [his] marbles.”⁴² American anti-war protestors from the 1960s, instructed at the time by cautious liberals like Professor Schlesinger, never to employ sheer hyperbole in their denunciation of American policy (like referring to President Lyndon Johnson as a “fascist pig”), must now be shaking their heads in disbelief as a roller derby of cat’s-eyes, boulders, and steely shooters come careening off Schlesinger’s atrophied brow.

First, the Japanese did not attack Pearl Harbor in anticipation of an imminent attack on Japan by the U.S. Navy—indeed the “reasoning of Japan’s leaders was that the United States had little effective power in the western Pacific.”⁴³ More than that, Japan’s wartime goals were primarily economic. The Japanese “strategy was to carve out an area within which economic self-sufficiency would be possible and to defend it until the United States tired of war.”⁴⁴ So the legal doctrine of anticipatory self-defense could not be made to fit the facts in the Pacific in 1941. Second, Schlesinger would have been on firmer ground had he attributed the anticipatory self-defense argument to the Nazis: Hermann Göring, in fact, sought to justify at Nuremberg the German occupation of the Rhineland by claiming it constituted merely “mobilization measures in . . . case of an attack on Germany.”⁴⁵ Germany’s invasion of Europe, in Göring’s account, was carried out “from the very beginning only in the interest of defense.”⁴⁶ Third, the issue is not whether the anticipatory self-defense argument can be misused—Schlesinger, a staunch defender of Arkansas lawyer, Bill Clinton, should know by now that any legal argument can be misused. But that is not a reason for abandoning the law. The issue is whether in a given set of circumstances, a state’s use of force meets the requirements of an anticipatory self-defense argument. Fourth, Schlesinger not only fails to convey a sense of what rules govern the doctrine’s application but makes it sound as if it is just another excuse for a policy of “anything goes.” That is not true. Finally, one would never glean from Schlesinger the knowledge that anticipatory self-defense doctrine’s

42. TONY BENN, *THE END OF AN ERA: DIARIES 1980–90*, at 250 (Ruth Winstone ed., 1992).

43. JOHN K. FAIRBANK ET AL., *EAST ASIA: TRADITION AND TRANSFORMATION* 721 (1973).

44. *Id.* at 720.

45. MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945–46*, at 128 (1997).

46. *Id.* at 129.

basic formulation not only comes from American jurisprudence but is actually more than 150 years old.

“The classic illustration of this right of anticipatory self-defense,” observe Anthony Arend and Robert Beck, “was the *Caroline* case.”⁴⁷ Leaving the facts of the case to one side, it was Secretary of State Daniel Webster, who in 1842 in a note to Britain’s Lord Ashburton, coined the language that became the test for when a state can legitimately engage in anticipatory self-defense.⁴⁸ In short, “customary international law recognized a right of anticipatory self-defense provided the conditions of necessity and proportionality were met.”⁴⁹ Philip C. Jessup makes the interesting point that the *Caroline* test “is obviously drawn from consideration of the right of self-defense in domestic law . . . [but] [i]t is an accurate definition for international law.”⁵⁰ And just as an individual, under domestic criminal law, need not wait until he has been killed before he is legally allowed to defend himself against imminent deadly force, states need not wait until they have been bombed or their borders transgressed before they initiate a proportionate defense. This point of law has frequently been echoed in comments by President Bush to the effect that the U.S. need not wait for an attack like the one on the World Trade Center in order to be able to defend itself against terrorism.⁵¹

THE END OF HISTORY

Beyond his rejection of preemption/anticipatory self-defense, there was another extraordinary claim made in Senator Byrd’s February 2003 anti-war speech.⁵² He argued that unilateral American action against Iraq violated international law and the U.N. Charter.⁵³ It is, in fact, the decision by the Bush administration to invade Iraq without prior approval from the U.N. Security Council—indeed, in the face of a certain French veto—that has led

47. AREND & BECK, *supra* note 40, at 72.

48. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42–43 (1963); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105–06 (2000); 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, PEACE 298 (H. Lauterpacht ed., 8th ed. 1955).

49. AREND & BECK, *supra* note 40, at 72.

50. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 164 (1948).

51. See Robert Kagan, *On to Phase II*, WASH. POST, Nov. 27, 2001, <http://www.ceip.org/files/publications/wpost112701.asp>.

Saddam and his regime pose a direct and unacceptable threat to the United States. And therefore the United States has the right to take preemptive action. America need not wait ‘for terrorists to try to strike us again,’ the president said recently. We can take ‘the fight to the enemy.’

Id.

52. Byrd, *supra* note 8.

53. *Id.*

so many administration critics to argue that the U.S. has effectively buried the most important international organization ever created. To adequately evaluate this argument, it will be necessary to situate recent American history in its proper relationship to international law and the practice of the U.N. And to do that, it is essential to briefly survey the background of world politics, if you will, and the contours of modern American foreign policy.

If the U.S. found itself almost continuously at war, from Pearl Harbor through the fall of communism, the end of the Cold War suggested the possibility that a very different kind of world was just over the horizon. Everyone discussed how best to spend the “peace dividend.” When the U.N., with most of its member states on the same page, launched a military intervention in Kuwait in 1991, it was the U.N.’s first real military mission since the Korean War. When the effort succeeded, and Iraqi troops were ejected from Kuwait, it seemed a new day had dawned. The U.N., it was argued, had finally fulfilled the dream of San Francisco and Dumbarton Oaks. Former Reagan administration advisor, Francis Fukuyama, went so far as to suggest this new world represented, perhaps, “the end of history.”⁵⁴ With both fascism and communism decisively defeated by western liberalism by the close of the twentieth century, grand theorists might be forgiven for having jumped to the conclusion that seemingly intractable conflicts dominating the past century had finally been resolved.

Extending an inchoate, certainly uneven, human rights doctrine, however, into Yugoslavia at the point of a gun, the Clinton administration caused some to fear that America could not necessarily be trusted to use its relatively uncontested, world class military power wisely. “In the midst” of NATO’s intervention in Yugoslavia, Charles William Maynes recounts, he “had the occasion to ask the Secretary-General of NATO in public to cite the source for the legality of NATO’s decision to attack another country.”⁵⁵ The only response he got was that members of NATO had endorsed the action.⁵⁶ Worse still, it was believed the U.S. might have bombed a pharmaceutical plant in Sudan, certainly based upon flimsy intelligence, in an effort to distract domestic focus from the President’s personal political problems. When President Clinton unleashed a bombing campaign against Baghdad on the eve of a Congressional vote to impeach him, a chorus of critics accused the President of “wagging the dog”—that is, of manufacturing a military crisis abroad to divert attention from the Lewinsky scandal.⁵⁷ “I would like to

54. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2d ed. 1993).

55. Maynes, *supra* note 34, at 36.

56. *Id.*

57. See Anthony Chase, *Elections and Party Politics*, in *COLUMBIA COMPANION TO AMERICAN HISTORY ON FILM* (Peter C. Rollins ed., 2004).

think that no American president would even consider using the military to help him remain in office,” observed House Majority Leader Richard Armey, a Texas Republican, but he continued, “the fact that Americans are expressing these doubts shows that the president is losing his ability to lead.”⁵⁸

Operating under the umbrella of NATO peacekeeping, the U.S. did not seem to believe it needed U.N. Security Council permission to deploy force against the Serbian regime of Slobodan Milosevic. The desire to extend American might, however, has increased exponentially with the terrorist attacks of September 11, 2001. Clearly prepared to use whatever force might be required, the U.S. invaded and conquered first Afghanistan, then Iraq, in quick succession. Despite majority opposition within the Secretary Council and warnings from Secretary General Kofi Annan that the U.N. might soon follow the League of Nations into the dustbin of history, the U.S. invaded Iraq, backed only by a “coalition of the willing,” and briefly raised an American flag over Baghdad the day the capital city was taken. In June 2003, the British Broadcasting Company reported that, based on polling results, eighty-one percent of Russians and sixty-three percent of the French opposed the U.S. attack on Iraq.⁵⁹ In both Jordan and Indonesia, the U.S. was regarded as more dangerous than al-Quaida, and in nations as diverse as Canada, Brazil, France, and South Korea, the U.S. was perceived to be more dangerous than Iran, Syria, or both.⁶⁰ Germans, according to the authoritative news magazine, *Der Spiegel*, considered George Bush to be more dangerous to world peace than Saddam Hussein.⁶¹

While the U.S. occupation of Iraq dragged on during the summer of 2003 and American soldiers were killed in sniper or mortar attacks, debate raged on both sides of the Atlantic over why no weapons of mass destruction had yet been found and whether President Bush and British Prime Minister Tony Blair had leveled with trusting citizens, prior to launching hostilities, about the actual threat to Atlantic security posed by Saddam Hussein. If Democratic Senator John Kerry called for “regime change” in the U.S. during the war, another Democrat (and, briefly, presidential hopeful) Senator Bob Graham hinted that impeachment might be appropriate if Bush could be

58. Bill Sammon, *Clinton Unleashes Missiles on Iraq, Stalling House Vote to Impeach Him*, WASH. TIMES, Dec. 17, 1998, (quoting Richard Armey), http://www.mega.nu:8080/amp/stonewall_boguswar.html.

59. *Poll Suggests World Hostile to US* (BBC TWO news broadcast, June 16, 2003), <http://news.bbc.co.uk/2/hi/americas/2994924.stm> (last visited Mar. 27, 2004).

60. *Id.*

61. *Umfrage Zum Weltfrieden: Deutsche halten Bush für gefährlicher als Saddam*, SPIEGEL ONLINE POLITIK, Feb. 14, 2003, at <http://www.spiegel.de/politik/ausland/0,1518,235071,00.html> (last visited Mar. 27, 2004).

shown to have intentionally lied about Iraq's nuclear threat in his State of the Union address.⁶² Fletcher School professor, Michael J. Glennon, writing the lead essay in the Summer 2003 issue of *Foreign Affairs*, announced what then seemed increasingly obvious: the U.N. experiment was over.⁶³ "With the dramatic rupture of the UN Security Council," wrote Glennon, "it became clear that the grand attempt to subject the use of force to the rule of law had failed."⁶⁴

While the subsequent capture of Saddam Hussein by U.S. forces provided the Bush administration a brief respite from criticism of post-war U.S. policy in Iraq, it did not lead to any sort of let up in the mounting U.S. death toll. American service men and women continued to be killed almost every day by an Iraqi resistance that no longer appeared dependent upon Saddam Hussein for either strategic planning or inspiration. Turning his father's late-term political situation upside down, George W. Bush and his advisors hoped that an improving economy could still snatch victory from the jaws of defeat, that domestic success could trump the perception of international failure and thus secure a Republican return, by however narrow a margin, to the White House for another four years. But with continued European refusal to significantly aid the effort to build "democracy" in Iraq coupled with American denial of reconstruction contracts to private firms from nations that President Bush regarded as having earlier blocked America's path to war, the unilateralist tone to American foreign policy remained. Unchecked by the U.N. and seemingly indifferent to international law, the U.S. had become, if not a rogue state then, at least, a cowboy state, feared and disliked by many, including some former allies, around the globe. It was this state of affairs that former-Secretary Bob Rubin hoped would be seriously debated in the 2004 presidential election campaign.

GRAND STRATEGY

Was there a method to what, at least, several Democratic presidential contenders and some leading European diplomats regarded as a form of madness? Was there any sort of political or historical backdrop against which American foreign policy in the new century could be made to make some kind of sense or reveal a plan or strategy, of sorts? And what should be

62. Glen Johnson, *Kerry Says US Needs Its Own 'Regime Change'*, BOSTON GLOBE, Apr. 3, 2003, <http://www.commondreams.org/headlines03/0403-08.htm> (last visited Mar. 27, 2004); *Graham Defends Argument for Impeachment*, CNN.COM, July 27, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/07/27/graham.impeach/>.

63. See Glennon, *supra* note 5.

64. *Id.* at 16.

the proper relationship, anyway, between foreign policy goals and international legal rules?

Public international law is a norm, a set of standards, rules for governing the conduct of states in their relations with other states.⁶⁵ That is why it is alternatively referred to as international law or “the law of nations.”⁶⁶ But it is not a political strategy, a set of goals and purposes animating foreign policy. International law is, rather, a framework within which a strategy is mounted. Liddell Hart, Richard Rosecrance, and Arthur A. Stein describe grand strategy as a military policy combined with other elements of national strength. Yet they go further and, relying on strategic theorists like Richard Howard and Paul Kennedy, argue that grand strategy encompasses “the adaptation of domestic and international resources to achieve security for a state.”⁶⁷ They specifically underline the “necessity of including domestic politics and economics in any broad calculus of grand strategy.”⁶⁸

Consider the domestic economic and political angle first. One of the most fruitful theories of social development was given comprehensive statement in the work of historical sociologist Barrington Moore. In his landmark, *Social Origins of Dictatorship and Democracy*, Moore sketches “with broad strokes the major features of each of the three routes to the modern world.”⁶⁹ The first route “combined capitalism and parliamentary democracy after a series of revolutions: the Puritan Revolution, the French Revolution, and the American Civil War.”⁷⁰ One of the distinguishing aspects of these early modernizers—Britain, France, the U.S.—was the strength of “a group of the middle class,” or as economist Kohachiro Takahashi put it, “the class of free and independent peasants and the class of small-and middle-scale commodity producers.”⁷¹ This is the route to modern industrial society that Moore calls that “of bourgeois revolution, a route that England, France, and the United States entered at succeeding points in time with profoundly different societies at the starting point.”⁷² Moore is quick to point out that the second path to modernization “was also a capitalist one, but, in the absence

65. Public International Law, International Committee for Human Rights, <http://www.ichr-law.org/english/expertise/areas/pil.htm> (last visited Apr. 4, 2003).

66. *Id.*

67. *Beyond Realism: The Study of Grand Strategy*, in THE DOMESTIC BASIS OF GRAND STRATEGY 4, (Richard Rosecrance & Arthur A. Stein eds., 1993).

68. *Id.* at 5.

69. BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 413 (1966).

70. *Id.*

71. Kohachiro Takahashi, *A Contribution to the Discussion*, in THE TRANSITION FROM FEUDALISM TO CAPITALISM 68, 94 (Rodney Hilton, ed., 2d ed. 1976).

72. MOORE, *supra* note 69.

of a strong revolutionary surge, it passed through reactionary political forms to culminate in fascism.”⁷³ Here, Moore is describing the characteristic development of Germany and Japan. And following Max Weber’s “conflict in the two ways of capitalist activity,” Takahashi also contrasts social development in Western Europe with that of Prussia and Japan where “the erection of capitalism under the control and patronage of the feudal absolute state was in the cards from the very first.”⁷⁴ The third and final route observed Moore, in 1966, “is of course the communist one.”⁷⁵

In *Law & History, The Evolution of the American Legal System*,⁷⁶ the reader will find a much more systematic and fully explained rendition of this particular approach to history—the periodization over three centuries of an unfolding dialectic of bourgeois transformation, the map of how a particular approach to modern industrial society worked itself out in legal terms in the U.S. What is important here, however, is simply to stress the progressive and liberal capitalist nature of American society and politics, the particular form taken in this country by what Rosecrance and Stein refer to as the domestic bases of grand strategy. Given American liberal, rather than authoritarian, capitalist “path dependence,” how did this domestic orientation shape American grand strategy over the past century?⁷⁷

Immanuel Wallerstein characterizes the First and Second World Wars as part of one long conflict: “the end of the First World War represented far more a truce in a ‘thirty years’ war’ than a definitive victory for the Allies.”⁷⁸ “Germany had lost a battle in its struggle with the US to be the successor hegemonic power to Great Britain” but, Wallerstein concludes, “it had not yet lost the war.”⁷⁹ Two decades later, the U.S. entered into a strategic alliance with the Soviet Union in order to defeat fascism. In so doing, the U.S. adopted a “left of center” international position.⁸⁰ “When Germany moved definitively ‘right’ under the Nazis,” asserts Wallerstein, “it isolated itself diplomatically and allowed the US to construct the worldwide diplomatic ‘popular front’ which would ultimately make possible final victory in the

73. *Id.*

74. Takahashi, *supra* note 71, at 94–95.

75. MOORE, *supra* note 69.

76. ANTHONY CHASE, *LAW AND HISTORY: THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM* (1997).

77. See W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994).

78. Immanuel Wallerstein, *The USA in the World Today, in THE POLITICS OF THE WORLD-ECONOMY* 69 (1984).

79. *Id.*

80. *Id.* at 71.

'thirty years' war' of 1914-45."⁸¹ More recently, constitutional lawyer Philip Bobbitt has similarly regarded the First and Second World Wars as encompassed within one "Long War," a war that "could not have ended so long as fascism was alive in a great power."⁸² "Resolute actions might have deterred Germany for a time; absent such actions,"⁸³ in Bobbitt's view, "the temporary stalemate of Versailles was bound rapidly to end in violence."⁸⁴ How different was the view from Washington during the years immediately following the Second World War—with fascism defeated (in fact, prosecuted in court) and communism on the rise in Asia and enjoying a newly-won prestige in Europe due to the central role played by communists in a range of bold, if rarely militarily significant, anti-fascist resistance movements during the war. In terms of the international political picture, argues Wallerstein, "the US emerged as the uncontested hegemonic power."⁸⁵ "Furthermore, there were no longer any significant 'rightist' governments among the core states."⁸⁶ Thus, grand strategy took another turn. "[T]he US," says Wallerstein, "quickly shifted therefore from being 'left of center' to being the leader of a 'free world' alliance against the world left."⁸⁷ So just as the United States had assumed a position "left of center" in the 1930s, when it became apparent that fascism would be the main enemy for the foreseeable future, the U.S. took up an international stance "right of center" once the fascist threat had been eliminated.⁸⁸

While in the sweep of history, the fall of communism in 1989 may still deserve to be categorized as "current events," it seems clear from the present vantage point that the twists and turns of American grand strategy have already found expression in the post-communist world. Turning the "reverse course" (as it was called when the U.S. occupation policy in postwar Japan shifted to the right) on its head, the U.S. positioned itself "left of center" after the disintegration of the Soviet Union, i.e., once the communist threat had been eliminated. The U.S. has gone to war three times since 1989: twice against Saddam Hussein's Iraq and once again Slobodan Milosevic's Yugoslavia. While Hussein called upon all Muslims to resist American imperialism's effort to destroy Islam and Milosevic, in fact, directed his "ethnic

81. *Id.*

82. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 37 (2002).

83. *Id.*

84. *Id.*

85. Wallerstein, *supra* note 78, at 71.

86. *Id.*

87. *Id.*

88. See generally CHASE, *supra* note 76, at 197–202.

cleansing” against the ethnically-Muslim Albanian Kosovars in Yugoslavia, the two regimes had something crucial in common, even beyond constituting totalitarian dictatorships: they were both ideologically neofascist. Historian Walter Laqueur, in his exhaustive annotation of sources on fascism, produces Saddam Hussein as the essential contemporary neofascist, and as mundane a source as an online student encyclopedia cites Saddam Hussein, along with France’s Jean-Marie LePen and Russia’s Vladimir Zhirinovskiy, as prominent examples of neofascist political leaders.⁸⁹ The latter reference adds to the neofascist list “the Serbian Radical Party, led by Vojislav Seselj.”⁹⁰ The Serbian Radical Party, supported by deposed Yugoslavian President, Slobodan Milosevic, sponsored paramilitary forces in the Bosnian war and is even farther to the right than Milosevic’s party. After receiving about a quarter of the votes cast in the autumn 2002 Serbian presidential elections, Seselj was indicted for crimes against humanity and jailed by the war crimes tribunal in the Hague. Nevertheless, at the end of December, 2003, Slobodan Milosevic “and another U.N. war crimes suspect [Vojislav Seselj] won seats in Serbia’s parliament as [the] extreme nationalist [Serbian Radical] party swept week-end elections.”⁹¹ If the U.S./NATO intervention in Yugoslavia managed to secure its main aim, the protection of Albanian Kosovars from genocidal brutality administered by the country’s Serb majority, it has clearly failed to dissuade the Yugoslavian people from endorsing the parliamentary politics of neofascist war criminals.

Identifying the fundamental domestic basis of American grand strategy, following Rosecrance and Stein, it seems clear the U.S. has employed conventional balance of power tools to defend the social and economic foundations of the liberal capitalist state. In a nutshell, American grand strategy over the past century can be characterized in terms of a shift to the left (combating imperial Germany at the front end of the Long War, making the world “safe for democracy”), a shift to the right (engaging the Red Army in Russia in 1918), a shift left (diplomatic recognition of the Soviet Union during Roosevelt’s New Deal and a wartime “popular front” to defeat fascism), a shift right (the Cold War), and finally, or at least most recently, another shift back to the left (America at war with neofascism in Eastern Europe and the

89. *Neofascism*, BRITANNICA CONCISE ENCYCLOPEDIA, <http://www.britannica.com/ebc/article?eu=409628> (last visited Mar. 27, 2004); WALTER LAQUEUR, *FASCISM: PAST, PRESENT AND FUTURE* (1997); Dusan Stojanovic, *Milosevic and Another Jailed War Crimes Suspect Win Parliamentary Seats*, SAN DIEGO UNION TRIB. (AP), Dec. 30, 2003, <http://www.signonsandiego.com/news/world/20031229-1738-serbia-elections.html> (last visited Mar. 27, 2004).

90. Stojanovic, *supra* note 89.

91. *Id.*

Middle East in the wake of communism's demise). Thus, a remarkable pattern begins to emerge. Of Barrington Moore's three roads to modern industrial society, the U.S. has rigorously adhered to the first, that of liberal capitalism. V. I. Lenin characterized bourgeois democracy as the best possible political shell for capitalism and America's grand strategy, with or without acknowledgement of Lenin, has certainly amounted to a consistent effort to hew that course, drawing further to the left when fascism, the option on the right, appeared ascendant and correspondingly further to the right when communism, the option on the left, appeared to be gaining strength.⁹² Once the century's various channels and currents were charted, steering the helm of state became a relatively straightforward process, well within the capacity of Republicans and Democrats alike.

INTERNATIONAL LAW

Grand strategy, of course, is sometimes capable of dictating a foreign policy well within the confines of international law, and always, in any event, stands in an important relationship to international law—but the two are not the same. Defining international law as “the rules of legitimate behavior for states,”⁹³ Philip Bobbitt argues that because international law helps to shape the political goals that grand strategy exists to serve, it is “among the first resources consulted in a crisis, and its treaties and treatises are among the last resources deployed when violence has ended and its consequences must be healed.”⁹⁴ Where, then, is international law to be found? The generally recognized sources of international law, authoritatively established in the charter of the World Court, the primary judicial organ of the international legal system sitting in The Hague, the Netherlands,⁹⁵ are: international conventions; international custom as evidence of a general practice accepted as law; general principles of law accepted by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of various nations.⁹⁶ Testifying to the relative stability of this legal regime, the

92. See MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* (1998); ERIC HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991* (1994).

93. BOBBITT, *supra* note 82, at 356.

94. *Id.*

95. See LORNA LLOYD, *PEACE THROUGH LAW: BRITAIN AND THE INTERNATIONAL COURT IN THE 1920S* (1997); HOWARD N. MEYER, *THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS* (2002) (for the official World Court web page, see International Court of Justice, *Peace Palace, the Hague, the Netherlands*, <http://www.icj-cij.org/icjwww/igeneralinformation.htm>).

96. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR, AND NEUTRALITY* 55–56 (Arnold D. McNair ed., 1926).

list of sources has remained unchanged since the World Court was founded, as the Permanent Court of International Justice, in 1922. In his “Report and Commentary” on the World Court project, published by the Carnegie Endowment in 1920, after listing these specific sources of international law, James Brown Scott provides a detailed examination of judicial decisions by which the law of nations had already been incorporated into the laws of England and the U.S., respectively. Although the international Advisory Committee of Jurists that drafted the World Court’s charter worked long and hard to agree to the language adopted, eventually, as the American delegate to the Committee, former-Secretary of State Elihu Root, put it at the time: “Leg over leg the dog went to Dover.”⁹⁷

This corpus of law has long been in the making, dating back to the work of the important Dutch writer, Hugo Grotius (1583-1645),⁹⁸ and to the Peace of Westphalia, whose adoption in 1648 signaled, in effect, that “the doctrine of sovereignty achieved ‘codification.’”⁹⁹ The emergence of the sovereign state as the dominant political unit, at least in Europe, was a prerequisite to the rise of a modern international law, a set of legal rules and principles whose “persons” are sovereign states. To be sure, the “fact that Shakespeare preceded the birth of modern international law,” as Theodore Meron reminds us, “does not mean that no broadly recognized rules applied, at least in principle, to nations’ conduct of war.”¹⁰⁰ In fact, it can be said that the gradual emergence of international law after the Peace of Westphalia represented a stage in the long process of development whereby principles applying to the conduct of war were transformed into the modern law of war.

For many, however, the transformation of principle into law, so far as international law is concerned, is more apparent than real. In what sense can the rules of international law be regarded as genuine law—or, at least, what is usually meant by the reference “law,” the kind of statutory and case law with which we are most familiar? And how can law exist in the absence of any enforcement mechanism, especially without a police force, criminal courts, jails, and so forth? Even without these, international law still looks a good deal like conventional, i.e., domestic or municipal law. Consider a

97. JAMES BROWN SCOTT, *THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS* 48, 106–111 (1920), *reprinted in* 7 *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW PAMPHLET SERIES* 32–37 (2000).

98. *See* EDWARD DUMBAULD, *THE LIFE AND WRITINGS OF HUGO GROTIUS* (1969); HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND THE LAW OF NATIONS* (A.C. Campbell trans., 1901).

99. AREND & BECK, *supra* note 40, at 16.

100. THEODOR MERON, *HENRY’S LAWS AND SHAKESPEARE’S WARS: PERSPECTIVES ON THE LAW OF WAR IN THE LATE MIDDLE AGES* 11 (1993).

concrete example: on July 25, 1998, the Kosovo Liberation Army (“KLA”) abandoned its Llapushnik Prison Camp due to Serbian military forces retaking the area around the camp.¹⁰¹ A number of prisoners held in the camp were marched into a clearing in a nearby forest and eleven of them were shot and killed.¹⁰² Haradin Bala, Isak Musliu, and Agim Murtezi were accused of being responsible for these murders and, in February 2003, were arrested by KFOR forces.¹⁰³ The three detainees were transferred to the detention unit of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and two of them will be tried, like the Serb political leaders, Slobodan Milosevic and Vojislav Seselj, for their conduct in Bosnia.¹⁰⁴

Bala and Musliu are charged with having planned, instigated, ordered, or committed acts or omissions such as imprisonment, violence, and murder against Serb and Albanian civilians held in the Llapushnik camp.¹⁰⁵ Agim Murtezi’s defense counsel, Stephane Bourgon, informed the ICTY that Mr. Murtezi was not the individual identified in the indictment and Murtezi was subsequently released.¹⁰⁶ This is a remarkable example of international law in practice where the elements of a conventional western legal system are clearly present (statutory rules, accusation, arrest, investigation, trial, punishment upon conviction) and, indeed, where some features are in play, in spite of the fact they might not be present in the standard legal process of many states. For example, Bala and Musliu, both members of the KLA, are being prosecuted for the same kind of infractions (crimes against humanity, violations of the laws or customs of war) as the Serb officials, Milosevic and Seselj. Murtezi was released because a careful investigation revealed he was the wrong man. And Fatmir Limaj, the KLA commander on whose orders Bala and Musliu allegedly relied, a member of Parliament and public figure, managed to leave Yugoslavia on a business flight before he could be arrested.¹⁰⁷ Thus can one identify elements of equality before the law and due process—even occasional common law’s inadequacy of enforcement—that tend to characterize municipal legal systems. Why, then, must international law, “as law,” receive such low marks?

101. Press Release, ICTY Office of the Prosecutor, Haradin Bala, Isak Muslu, and Agim Murtezi Transferred to the ICTY Following Their Indictment for Crimes Against Humanity and War Crimes, <http://www.un.org/icty/pressreal/2003/p729-e.htm> (Feb. 18, 2003).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Press Release, The Prosecutor v. Umjaetal: Agin Munezi Released Following the Withdrawal of the Indictment Against Him, <http://www.un.org/icty/pressreal/2003/p736-e.htm> (Feb. 28, 2003).

107. See Press Release, ICTY Office of the Prosecutor, *supra* note 101.

H.L.A. Hart, one of legal philosophers, does not think that it should.¹⁰⁸ Though reference to “international law” has been an accepted usage for almost two centuries, Hart nevertheless acknowledges that “the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists.”¹⁰⁹ But Hart believes that any comparison of international law with, and in contrast to, municipal law is misleading.¹¹⁰ War within the international system, he maintains, is not the same thing as violence between individuals, not least because “long years of peace have intervened between disastrous wars.”¹¹¹ This circumstance is without analog to municipal legal systems, and further, Hart regards as crucial that when international legal “rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts.”¹¹² Citing the immediate subordination of new states to international law and the similar case of states acquiring new territory or access to the sea, Hart rejects as “dogma,” with little respect for practical facts, the notion that “international obligations as self-imposed.”¹¹³ International law, in Hart’s view, can no more be reduced to mere moral exhortation than can the rules of municipal legal systems themselves.¹¹⁴

Writing in 1930, in the second edition of his *Grammar of Politics*, Harold Laski acknowledged, as H.L.A. Hart would a generation later, that “[t]he famous epigram that international law is not law at all has had a serious effect historically, both upon its prestige and its range of influence.”¹¹⁵ But Laski optimistically assessed the prospects for international law, suggesting that its rules “should be made universally binding through the power to have them definitely interpreted by a recognised tribunal.”¹¹⁶ It was the (then) new World Court which Laski hoped would constitute just such a tribunal, a court charged “with the task of consolidating international law, and revising its substance from time to time in the light of experience.”¹¹⁷ Thirty-years later, after a worldwide economic depression, another devastating world war and the onset of a cold war, Laski was still prepared to defend international law

108. H.L.A. HART, *THE CONCEPT OF LAW* 209 (2d ed. 1965).

109. *Id.*

110. *Id.*

111. *Id.* at 214.

112. *Id.* at 215.

113. H.L.A. HART, *supra* note 108, at 219.

114. *See generally id.* at 224, 227–32.

115. HAROLD J. LASKI, *A GRAMMAR OF POLITICS* 649 (1925).

116. *Id.*

117. *Id.* at 648.

“as law”—certainly by comparison with municipal law.¹¹⁸ “[T]o make the legal character of international law dependent upon its success in getting applied,” argued Laski, “is to apply to it canons of validity which the jurist does not dream of applying to national law.”¹¹⁹ Before considering whether U.S. interventions in Afghanistan and Iraq have, because of their transparent unilateralism, transgressed that international law in which Hart and Laski invested such confidence, it remains necessary, first, to juxtapose the development of the U.N. to the structure of international law.

THE UNITED NATIONS

The World Court has been sitting continuously in the Hague since the Court’s founding in 1922—with the exception, that is, of those years when the Nazis overran and occupied Belgium and the Netherlands. Describing the “creation of a nominally ‘new’ Court” after the defeat of the Nazis at the end of World War II, Howard Meyer states that “in doctrine, procedures, acceptance and application of precedent, facilities, and most staff personnel, even a few judges-to-be,” the post-war World Court was quite properly treated as a “re-created or revived Permanent Court of International Justice.”¹²⁰ Thus, the World Court has been and remains the world’s preeminent international legal institution. The U.N. organization, from the very beginning, was conceived more as a political than legal institution. To be sure, all legal institutions are “political” in the same sense that all reality is socially constructed. But the U.N. was not designed to replace international law or the World Court, and in that sense, is more about power politics than it is the law of nations. All of the major historical sources on the founding of the U.N. underscore complex problems of politics, not law, which had to be overcome, first by President Franklin Roosevelt, and subsequently by President Harry Truman and Secretary of State Edward Stettinius, so that agreement could eventually be reached at the U.N. founding conference in San Francisco.¹²¹

The U.N. Charter established the dominant position, within the organization, of the Security Council. The distinction alluded to here, between law

118. *Id.*

119. HAROLD J. LASKI, AN INTRODUCTION TO POLITICS 79 (1962).

120. MEYER, *supra* note 95, at 88.

121. See ANTHONY CLARK AREND, PURSUING A JUST AND DURABLE PEACE (1988); TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. (1997); EVAN LUARD, A HISTORY OF THE UNITED NATIONS, 1945–1955: THE COLD WAR YEARS (1982); STEPHEN SCHLESINGER, ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS (2003).

and power, between international rules and Security Council votes, was effectively drawn early on, in 1950, by John Foster Dulles. “It is not safe to give coercive power to the Security Council or to any other international body,” Dulles argued, “unless that body is bound to administer agreed law.”¹²² While world peace might be one of the goals of the U.N., the organization was not bound by international law. “At Dumbarton Oaks,” observed Dulles, “the Big Three did not make any provision whatever for developing international law.”¹²³ To be sure, Secretary of State Dulles was a right-wing politician, but the same could not be said of University of California, Berkeley’s Hans Kelsen, described by Philip Bobbitt as the “leading figure of twentieth century jurisprudence.”¹²⁴ In his treatise on the U.N., first published in 1950, Kelsen argues “[t]he competence of the Security Council coincides to a great extent with the competence of the entire Organisation.”¹²⁵ This is just another way of saying what many others have said since: given the role assigned to the Security Council under the Charter and the veto system of voting on the Council itself, the latter very nearly *is* the U.N. in terms of effective power.¹²⁶ “The Security Council,” concludes Kelsen, “has almost the character of a governmental body.”¹²⁷ Crucially, Kelsen points out that the Security Council, as a governmental body answerable only to itself, is not bound to follow any regime of law and “[i]f a state can rely upon one of the five powers,” i.e., one of the five permanent members of the Security Council (the U.S., Russia, France, Britain, and China), then “no action can be taken against it, even in case of open violation of the law. The veto right of the five permanent members of the Security Council may lead to a political system of more or less open clientage.”¹²⁸ And whatever else it may be, a political system of open clientage should not be confused with a legal system governed by international rules.¹²⁹

These comments from Dulles and Kelsen, now more than fifty years old, apply as perfectly today as they did when written. After all, the U.N. Charter, effectively exempting the Security Council from the rule of law, has gone virtually unchanged since it was written. In fact, Mohammed Bedjaoui, a member of the Institut de droit international, recently-retired judge and former President of the World Court, opens his book, *The New World Order*

122. JOHN FOSTER DULLES, WAR OR PEACE 198 (1950).

123. *Id.*

124. BOBBITT, *supra* note 82, at 586.

125. HANS KELSEN, THE LAW OF THE UNITED NATIONS 279 (1950).

126. *Id.* at 275.

127. *Id.* at 276.

128. *Id.* at 275.

129. *Id.* at 274–79.

and the Security Council, by quoting John Foster Dulles: “The Security Council is not a body that merely enforces agreed law. It is a law unto itself.”¹³⁰ Judge Bedjaoui adds that Dulles “was giving utterance to a vague idea - never clearly articulated but none the less generally received or suffered - to the effect that the Security Council applies a law of its own, i.e. an autonomous body of rules, much of which the Council elaborates at its entire discretion.”¹³¹ Conservative columnist and television commentator, Laura Ingraham, in a book attacking the current U.N. and its supporters as elitist, heralds the late Senator Patrick Moynihan of New York for his courageous stand against America’s opponents while he was our U.N. Ambassador.¹³² Nevertheless, in spite of the fact that she is a graduate of the University of Virginia Law School and clerked at the U.S. Supreme Court, Ingraham does not once mention Moynihan’s defense of international law—indeed, she seems never to have heard of international law.¹³³

Secretary of State Robert Lansing, according to Moynihan, “believed in law, and as much on those grounds as any other was suspicious of *organization*.”¹³⁴ Extending Lansing’s distinction, Moynihan argues that “the interested reader wants to be clear that the question of international law is independent of the question of international organization. The League of Nations, like the United Nations later, was designed to enforce law, not to make it”¹³⁵ But as long as the Security Council is a “law unto itself,”¹³⁶ as Dulles put it, or in Bedjaoui’s phrase, “applies a law of its own,” then it will remain important to sharply distinguish international law and its enforcement from the work of international organizations like the U.N.¹³⁷

SELF-DEFENSE AND SELF-HELP

Calcovoressi, Wint, and Pritchard record there were

at the end of 1941 three separate theatres of war: first, the USSR where Leningrad was invested, German forces had come within sight of Moscow . . . secondly, the remnant of a war in the west

130. MOHAMMED BEDJAOUI, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL I* (Bernard Noble, trans., 1994) (emphasis omitted).

131. *Id.*

132. See LAURA INGRAHAM, *SHUT UP AND SING: HOW ELITES FROM HOLLYWOOD, POLITICS, AND THE UN ARE SUBVERTING AMERICA* (2003).

133. *Id.*

134. DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 40 (1990).

135. *Id.*

136. BEDJAOUI, *supra* note 130, at 1 n.1.

137. *Id.* at 1.

maintained by the Royal Air Force in Great Britain but pushed out into the Atlantic and waged chiefly by German U-boats and their pursuers; and thirdly, the Mediterranean where the Germans and Italians were trying to win North Africa.¹³⁸

Then, on December 7, the air force of the Empire of Japan bombed the American fleet at Pearl Harbor. Under these circumstances, it is perhaps not surprising that, as George Schwarzenberger observed at the time, the “suggestion has been put forward which is as startling in its simplicity as in its fallacy: International Law has broken down.”¹³⁹ There was a break down, of course, but it was one of international organizations, not international law. At no other time in history was it more important to understand the distinction between the two, later drawn by Dulles, Kelsen, and Moynihan, than at the end of 1941. “The deniers of International Law put up a seemingly formidable barrage of arguments,” continued Schwarzenberger, yet it was crucial to resist “this destructive and defeatist thesis” a thesis or argument that “attempts to establish an equality of status between the defenders of International Law and . . . their deadliest foes.”¹⁴⁰ It was Schwarzenberger’s intention, in his brief lectures on the subject during 1940-1941 at University College, London, to “show what weapons International Law can put in the hands of its defenders.”¹⁴¹

As we know, among those weapons were the armed forces of the U.S., the Soviet Union, Great Britain, and the other Allied Powers.¹⁴² Without the sanction of any international organization, but on behalf of international law’s enforcement, even against the most formidable of outlaw states, the Allies not only won the Second World War, but they placed many of those responsible for having waged aggressive war on trial in Nuremberg at war’s end.¹⁴³ Just as the Soviet Union and Great Britain had been attacked by Germany, and responded with military force, the U.S. was attacked by Japan, and international law clearly authorized these nations to employ unilateral action—or “self-help”—to defeat the Axis powers.¹⁴⁴ Twenty years later,

138. PETER CALVOCORESSI ET AL., *TOTAL WAR: CAUSES AND COURSES OF THE SECOND WORLD WAR* 113 (2d rev. ed. 1989).

139. GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS* 10 (1943).

140. *Id.*

141. *Id.* at 11.

142. *See* CALVOCORESSI ET AL., *supra* note 138.

143. KELSEN, *supra* note 125, at 274.

144. *See, e.g.*, 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 115 (Arnold D. McNair ed., Longmans, Green & Co. Ltd. 1926) (1906). “A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and may then maintain that it

Schwarzenberger was somewhat less enthusiastic about the role of self-help within international law. "Although action of a State amounting to self-help may be within the law," Schwarzenberger wrote in 1962, "no certainty exists on the level of international customary law that it will keep within such limits."¹⁴⁵ This is, in a sense, a rather odd comment. While it is true of "action amounting to self-help," it is only true of self-help because it is actually true of all action in which states engage in the world. While state conduct may fall within the parameters of international law, there are no guarantees that states will confine their conduct within the limits of international law. In other words, Schwarzenberger's description of the nature of self-help would appear to be tautological. "In these circumstances," he adds, "the classification of intervention, reprisals, and war as measures of self-help or sanctions of international customary law is a euphemism. It provides a convenient legal cloak for action which more often than not belongs to the sphere of the rule of force."¹⁴⁶ Again, virtually every attempt to label state conduct, especially the deployment of military force, as justified by international law will amount to either a legal cloak (an intentional misrepresentation of the conduct) or a legal defense (an accurate characterization of law applied to facts). The only way to tell the difference between the two is by reference to the rules.

Some "self-help arguments" will correspond to the canons of international law whereas others will not. For example, the Nuremberg War Crimes Trial established that the Nazi argument, cited earlier, was wrong to the effect that the German offensive action in World War II was merely anticipatory self-defense. The British argument that in bombing Germany, England was engaged in self-defense, was a much more compelling argument under international law. After all, it was Germany that attacked England, not the other way around. The different positions of Great Britain and Germany, at the end of the war, with respect to international law and criminal responsibility, hinged on a good deal more than the stark reality that Britain was among

exercises by war nothing else than legally recognised self-help." *Id.* "Again, the very nature of international law, resting as it does largely on customary rules built up as rationalizations by jurists and statesmen on historical precedents, permitted governments to assert that armed coercion was a procedural method sanctioned by customary international law." *THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES* 684 (Herbert W. Briggs ed., 1938). While Security Council voting on issues of war and peace is extremely contentious, there is little or no disagreement as to a state's fundamental legal right to self-defense. The factual issues are the ones most hotly debated. See GRAY, *supra* note 48, at 85. "In theory it should always be possible to determine whether there was an armed attack and who is acting in self-defence. But in practice the situation is more complex." *Id.*

145. GEORGE SCHWARTZBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 39 (1962).

146. *Id.*

the victorious. It is true that if Hitler had won the war, German leaders would not have been put on trial at Nuremberg. But that fact does not somehow reduce to naught the real content of international law. Again, in his treatise on the U.N., Hans Kelsen writes that if an “international organization abolishes or restricts the principle of self-help established by general international law, it must fulfil two requirements.”¹⁴⁷ The two requirements cited by Kelsen are that the organization itself must guarantee to settle the dispute between states that precipitates a use of force and must also enforce that settlement to the degree that an injured state’s ability to protect itself is limited by the organization.¹⁴⁸ The U.N., Kelsen candidly acknowledges, does not meet either of these requirements.¹⁴⁹ Any organization, including the U.N., which simultaneously attempts to limit a state’s ability to act in its own self-interest and yet does not satisfy the two requirements Kelsen outlines “constitutes, instead of an improvement, a dangerous deterioration of the legal status under general international law.”¹⁵⁰

THE RULE OF LAW

If the U.S. (or any other state) must choose between the legal right of self-defense and fidelity to the U.N. Charter, then national security dictates violation of the charter or at least a policy of indifference to the organization and its pretense to authority. The right to self-defense is worthless if its exercise hinges on the meaning given to that phrase by each of the five permanent members of the U.N. Security Council.¹⁵¹ Since the Bush administration disagreed with France, and probably China and Russia as well, over whether invading Iraq was a legitimate exercise of American self-defense (or anticipatory self-defense), what it finally comes down to is a choice between the U.N. on the one hand and, on the other, what much of the rest of the world saw as recourse to self-help.¹⁵² Following Dulles, Kelsen, Moynihan, and others, the U.S. may in fact be faced with a choice between self-help enforcement of international law and abandonment of international law altogether out of deference to the U.N. and its political process. It is virtually impossible to square that political process with the rule of law. Kelsen

147. KELSEN, *supra* note 125, at 270.

148. *Id.*

149. *Id.*

150. *Id.*

151. *But see contra*, Jorge Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?* 34 CAL. W. INT’L L.J. 1, 9 (2003).

152. *Id.* at 21–22.

makes two points tending to buttress such a conclusion.¹⁵³ First, he asserts that the “veto right of the five permanent members of the Security Council, which places the privileged powers above the law of the United Nations, establishes their legal hegemony over all the other members of the Organisation and thus stamps on it the mark of an autocratic or aristocratic regime.”¹⁵⁴ Kelsen argues that we cannot fail to see a contradiction between such a regime and the purported goals of the U.N. The veto, in Kelsen’s view, cannot be reconciled with an institution that “presents itself ideologically as the crowning of a war waged for victory not only of arms but of ideals, especially the ideal of democracy.”¹⁵⁵ But Alexis de Tocqueville demonstrated a century earlier, in *Democracy in America*, that the rule of law and democracy are not equivalent, that majorities can in fact impose their will in spite of and at the expense of the rule of law.¹⁵⁶ And this view represents, of course, a fundamental precept of America’s “anti-majoritarian” constitutionalism.

It is Kelsen’s second point, however, which has such great import for the argument advanced here. He asserts that at the level of international relations,

the principle of equality must refer to the states as members of the community. This is the reason why the Charter proclaims as its first principle the sovereign equality of all its members. There is an open contradiction between the political ideology of the United Nations and its legal constitution.¹⁵⁷

The determination of international law, with reference not to law at all but to the votes of Security Council members, places the Council above the law. And the veto privilege held by five permanent members of the Council violates the very first principle of the rule of law: the sovereign equality of all citizens (in this instance states) before the law. The U.N. is thus, as Kelsen makes transparent, an Orwellian institution in which some states are more equal than others.¹⁵⁸ All law stands or falls with the credibility and effectiveness of the rule of law itself and even when equality before the law seems to mask a persistent inequality of social and economic power, formal juridical equality, nevertheless, constitutes a great advance over regimes of aristocracy, autocracy, serfdom, slavery, and terror.

153. KELSEN, *supra* note 125, at 274.

154. *Id.* at 276.

155. *Id.* at 277.

156. *Id.* at 276–77.

157. KELSEN, *supra* note 125, at 277.

158. *Id.*

Confirming this point from the philosophical side of things, Hegel had already warned, Franz Neumann reminds us, that though legal equality is purely formal, that is negative, it should not for that reason be discarded.¹⁵⁹ And from the historical side, reflecting on those inequalities that ultimately limit justice through legal formality, Edward Thompson adds:

But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggle of the seventeenth century to the eighteenth, and a true and important cultural achievement¹⁶⁰

The reader may or may not agree with Sir Henry Maine's conclusion that since "all the modern progress of society seem[s] to be intimately connected with the completest freedom of contract, and in some way almost mysteriously dependent upon it, [we] should shrink from tampering with so powerful an instrument of civilisation."¹⁶¹ But the transition from status to contract, whose historical description made Maine famous, constitutes a real advance in the direction of both liberty and equality. In subordinating international law and the progressive regime of rules and values it represents to the archaic power politics of status voting on the Security Council, nations take a great leap backward in their foreign relations.

"By the middle of 1998," Blakesley, Firmage, Scott and Williams point out, "the Security Council has applied Chapter VII to authorize the collective use of force in Korea, and the Gulf War."¹⁶² It is frequently suggested that in San Francisco, in 1945, no one would have predicted that U.N. authorization of the use of force to keep or restore world peace would have taken place only twice in the next fifty years, and, in the event, separated by forty years. But in fact, such authorization might not have occurred at all. Only because the Soviets were boycotting the Security Council in 1950 did authorization of the use of force in Korea escape permanent member veto. And the authorization of force in the Gulf in 1990-1991 was nearly as strange. Like Korea, "[t]he 1990 Iraq/Kuwait conflict was another exceptional case," according to Christine Gray, "seen by many as marking a new role for the Security Coun-

159. See HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1941); FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY* (1957).

160. E.P. THOMPSON, *WHIGS AND HUNTERS* 265 (1976).

161. SIR M.E. GRANT DUFF, *SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE* 90 (J. & J. Harper 1969) (1892).

162. CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1070 (5th ed. 2001).

cil and the start of a new legal order.”¹⁶³ With the return to American deployment of force without first seeking Security Council permission, first in Yugoslavia, then in Afghanistan and Iraq, the “new legal order[’s]” bright and shining moment faded quickly.¹⁶⁴ The U.N. use of force in Korea was a fluke, the Gulf War use of force was an “exceptional case” which, if a beginning at all, was merely the beginning of a war in Iraq which would end, a decade later, with the demise of the U.N. itself. Even during the Security Council’s debate over whether to authorize force in the Gulf in 1990, the Cuban representative pointed out that the U.N. could only authorize force under a multinational command structure. And once the bombs began falling on Baghdad, it was obvious that the Cubans had been right: the U.S., not the U.N., was calling the shots. And the war would end only when the Americans said it was over.

Still, in January 2004, Massachusetts Senator and Democratic Presidential contender John Kerry, appearing on the CBS News program, *Face the Nation*, contrasted Bush the Younger’s war in Iraq with that of Bush the Elder, emphasizing that President George Herbert Walker Bush, unlike his son, went to the U.N. with his war plan, secured the affirmative votes of Security Council permanent members (with China abstaining), and deployed a multinational fighting force under the aegis of the U.N.¹⁶⁵ It was actually more complicated than that. Iraq invaded Kuwait on August 2, 1990. Even prior to President Bush’s famous “[t]his will not stand, this aggression against Kuwait” statement to reporters on the South Lawn of the White House on August 5th,¹⁶⁶ Brent Scowcroft recalls a conversation he had with the President aboard a C-20 Gulfstream flight to Aspen, Colorado: “It was in discussion on the changes in his speech that it became obvious to me that the President was prepared to use force to evict Saddam from Kuwait if it became necessary”¹⁶⁷ Note that Scowcroft did not say the President was prepared to go the U.N.; he said the President was prepared to use force to evict Saddam Hussein from Kuwait.¹⁶⁸ In fact, under first the Reagan-Bush administration and then the Bush-Quayle administration, the United States considered withdrawing from the United Nations because its view of the United Nations had sunk so low.¹⁶⁹

163. GRAY, *supra* note 48, at 85.

164. *Id.*

165. *Face the Nation* (CBS News television broadcast, Jan. 4, 2004).

166. GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 333 (1998).

167. *Id.* at 318.

168. *See id.*

169. *See* DAVID ARMSTRONG ET AL., *FROM VERSAILLES TO MAASTRICHT: INTERNATIONAL ORGANISATION IN THE TWENTIETH CENTURY* (1996).

America's patience with the snapping and snarling underdogs in the General Assembly had run out. . . . This contributed hugely to the Reagan administration's tendency to regard the UN at best as 'a troublesome sideshow.' At worst, the US attitude came perilously close to the right-wing Heritage Foundation's belief that 'a world without the United Nations would be a better world'. [sic]¹⁷⁰

The President, however, was far from confident that the U.S. Congress would endorse his decision to send U.S. troops to Kuwait.¹⁷¹ He later recalled that after ordering the deployment of troops and equipment to the Gulf,

[t]he news of the troop increase, particularly its size, whipped up a new outcry in Congress and furious attacks on me that I had changed policy and decided to go to war without consultation. . . . The pundits and congressmen on the morning talk shows and the op-eds averred that I was wrecking my presidency.¹⁷²

Senator Patrick Moynihan, a personal friend of the President, was especially critical and warned Bush he would need both U.N. and Congressional approval before going to war.¹⁷³ Scowcroft had already determined that a Congressional vote in favor of war was too much to hope for.¹⁷⁴

Although we did explore options for the involvement of Congress, we never seriously contemplated invoking the War Powers Resolution.

We were confident that the Constitution was on our side when it came to the president's discretion to use force if necessary: If we sought congressional involvement, it would not be authority we were after, but support.¹⁷⁵

So where would authority for war come from?

"While I was prepared to deal with this crisis unilaterally if necessary," Bush candidly acknowledges, "I wanted the United Nations involved as part of our first response, starting with a strong condemnation of Iraq's attack on

170. *Id.* at 114.

171. BUSH & SOWCRAFT, *supra* note 166, at 396-97.

172. *Id.* at 396.

173. *Id.*

174. *Id.* at 397.

175. *Id.* at 398; *see also* HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 138 (4th ed. 1994).

a fellow member.”¹⁷⁶ “UN action would [not only] be important in rallying international opposition to the invasion and reversing it,” but also the Security Council endorsement of the use of force could provide legal authority which the engagement of American military forces abroad otherwise would lack.¹⁷⁷ Although “the Cold War caused stalemate in the Security Council,” Bush admitted, “our improving relations with Moscow and our satisfactory ones with China offered the possibility that we could get their cooperation in forging international unity to oppose Iraq.”¹⁷⁸ Carefully playing their cards, Bush and Scowcroft managed to get from the U.N. Security Council the sort of official approval for war that they believed was beyond their reach in the Congress of the U.S.

After the President’s post-November election troop deployment, providing “an adequate offensive military option,”¹⁷⁹ and Secretary of Defense Dick Cheney’s statement to the Senate Armed Services Committee that he did “not believe the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf,”¹⁸⁰ some members of Congress filed a suit in federal court seeking to enjoin the President from initiating an offensive attack against Iraq without first “securing a declaration of war or other explicit congressional authorization” for such action.¹⁸¹ And, in fact, on November 30, at a meeting of bipartisan congressional leaders, “President Bush made a pitch for a resolution backing the UN vote—which avoided the problem of asking Congress for authorization.”¹⁸² The plaintiffs, according to the court, alleged “in light of the President’s obtaining the support of the United Nations Security Council in a resolution allowing for the use of force against Iraq, that he is planning for an offensive military attack on Iraqi forces.”¹⁸³ That, of course, is exactly what the President was planning and, as it turned out, on January 12, 1991, the U.S. Congress—by a vote of 52-47 in the Senate and 250-183 in the House—managed to sign on to the war, after the decision-making was over and just in time for the bombs to start falling on Baghdad four days later.¹⁸⁴ Whether the Gulf War of 1990-1991 comported with either international law or America’s national interest is an important question, but one quite sepa-

176. BUSH & SCOWCROFT, *supra* note 166, at 303.

177. *Id.*

178. *Id.*

179. *Dellums v. Bush*, 752 F. Supp. 1141, 1143 (D.D.C. 1990).

180. *Id.* at 1151 n.31.

181. STEINER ET AL., *supra* note 175.

182. BUSH & SCOWCROFT, *supra* note 166, at 421.

183. *Dellums*, 752 F. Supp. at 1146.

184. BUSH & SCOWCROFT, *supra* note 166, at 446.

rate from the process by which the U.S. decided to go to war. The U.N. was used to provide a rubber stamp for a war fought without genuine congressional authorization. If this is the kind of political process Senator Kerry envisions as a model for decision-making in a Kerry or otherwise Democrat-White House, voters may wish to think twice about ever returning the party of Roosevelt and Kennedy to power.

KOREA

Finally, there is that other “exceptional case:” the Korean War. The war was exceptional for a reason with which everyone is familiar. In the summer of 1950, when the Korean War began, the Soviet Union was boycotting the Security Council and, as a consequence, when the Security Council voted to authorize the use of force in Korea to repel communist aggression, the Soviets were not there to veto the use of force resolution. By the time the Gulf War rolled around forty years later, it was the Russia of Gorbachev rather than Stalin that sat on the Security Council.

But the Korean War Security Council vote was exceptional for another reason, one which was not unrelated to the Soviet boycott in 1950. David Armstrong, Lorna Lloyd, and John Redmond write that “[a]n important legacy of the Korean War, and another consequence of US dominance of the Cold War UN, was the parody of Taiwan continuing to sit in China’s Security Council seat for 22 years after the establishment of the (Communist) People’s Republic of China (PRC) in 1949.”¹⁸⁵ Indeed, it was this “parody” or political charade that had caused the Soviets to boycott the Security Council in the first place. So, not only were the Russians not present to veto the use of force resolution in Korea, but the crucial Chinese vote was not cast on behalf of the Chinese people. China’s vote was not even cast on behalf of the Taiwanese. Fairbank, Reischauer, and Craig describe the arrival on Taiwan of a defeated Kuomintang, only a few years prior to the U.N. Korea vote:

Relations between the ruling minority from the mainland and the Taiwan-Chinese majority met an initial disaster in March 1947. The flagrant corruption of the Nationalist take-over authorities, before the arrival of most of their compatriots, provoked widespread demonstrations that were countered by the systematic killing of several thousand leading Taiwanese.¹⁸⁶

185. DAVID ARMSTRONG ET AL., *supra* note 169, at 72.

186. FAIRBANK ET AL., *supra* note 43, at 927.

So, the Chinese “Nationalists” in the Security Council did not represent China, nor did they even represent Taiwan, which was not, of course, a member of the U.N. On what theory of the rule of law could the Kuomintang-in-exile, a reactionary force that had only just invaded Taiwan, be placed in a position to approve or disapprove, veto or authorize, a use of force by the U.N.? What could this have to do with international law?

Although President Truman informed the American people in June 1950 that Korea had been invaded by the Communists, the truth was that Korea had been invaded by Koreans.¹⁸⁷ “Korea was a unitary and independent monarchy,” observes Arnold Offner, “that had long governed itself largely by Confucian doctrine . . . After waging war against China and Russia, the Japanese annexed Korea in 1910.”¹⁸⁸ Not surprisingly, “virtually all Koreans loathed the Japanese and their Korean collaborators.”¹⁸⁹ Once Japan was defeated at the end of World War II, U.S. officials, including Colonel Dean Rusk, recommended that Korea be divided into American and Soviet zones at the thirty-eighth parallel.¹⁹⁰ Although Stalin agreed to this proposal, the Soviets “quickly replaced Japanese officials and collaborators with Koreans—including non-Communist, moderate nationalists as well as exiles from Siberia.”¹⁹¹ What took place between the end of the war and 1950 was pitched battle between various forces seeking to shape the new Korean political order. While Offner claims “historian Bruce Cumings has stretched a point by denying legitimacy to the question of who started the Korean War,”¹⁹² Cumings nevertheless answers an even more important question: was what the U.S. confronted in 1950 a civil war?¹⁹³ International law forbade “outside” intervention in civil wars. Summarizing the “duty of non-intervention” and other limits imposed by international law on the ability of outsiders to interfere in the civil strife of other nations, Christine Gray adds that “[t]he status of these rules on forcible intervention in civil wars is no longer controversial; it was their application that led to fundamental divisions during the Cold War when the superpowers and others waged proxy wars in Africa, Latin America, and Asia.”¹⁹⁴

187. See ARNOLD A. OFFNER, *ANOTHER SUCH VICTORY: PRESIDENT TRUMAN AND THE COLD WAR, 1945–1953*, 367 (2002); see also BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* (1997).

188. OFFNER, *supra* note 187, at 348.

189. *Id.*

190. *Id.* at 350.

191. *Id.*

192. *Id.* at 367.

193. See OFFNER, *supra* note 187, at 367–68.

194. GRAY, *supra* note 48, at 52.

So what the U.N. Security Council authorized in 1950, in voting to deploy military force in response to North Korea's "unprovoked aggression," was not peace keeping or peace restoration, but in reality, a violation of international law.¹⁹⁵ In 1952, while the Korean War was still going on, Hans Kelsen pointed out that "[i]n the case of Korea the Security Council recommended to the members to take enforcement action involving the use of armed force, against 'forces from North Korea' or the 'authorities of North Korea,' which the Security Council did not consider to be the government of a state."¹⁹⁶ Kelsen then drew the obvious conclusion: "This implies that the war between North Korea and South Korea was a civil war within the 'Republic of Korea,'" in which case "the 'armed attack' upon the Republic of Korea by forces from North Korea could not be—as the Security Council determined—a 'breach of the peace,' that is to say, a breach of international peace."¹⁹⁷ Years later, when President Lyndon Johnson was escalating the Vietnam War, Vice-President Hubert Humphrey advised him that "[i]n Korea we were moving under United Nations auspices to defend South Korea against dramatic, across-the-border, conventional aggression. Yet even with those advantages, we could not sustain American political support for fighting Chinese in Korea in 1952."¹⁹⁸ Humphrey's words of caution are surreal in their stupidity and incomprehension. Vietnam was, in fact, a replica of Korea. Within a few short years of the inconclusive end to the Korean War, the U.S. illegally intervened in a civil war within Vietnam, a war without borders, and a war in which the dead, counted in tens of thousands, were overwhelmingly American and Vietnamese. If a Korean Memorial was dedicated in Washington D.C., alongside the much-visited Vietnam Memorial, it would have about the same number of soldiers' names etched into its surface. If Americans had understood the Korean War the way Robert McNamara eventually understood the Vietnam War, then the Vietnam War would never have happened. The U.N., in 1950, played a key role in securing that particular obfuscation of history.

But Korea was—except for the Gulf War—the one thing the U.N. Security Council supposedly did right, its one achievement. It was in fact an outlaw's enterprise. Adding insult to injury, or perhaps "delict" in the sense of a

195. See also BLAKESKY ET AL, *supra* note 162, at 1190–1205 (civil war in international law).

196. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 55 n.29 (Robert W. Tucker ed., 2d ed. 1966) (1952).

197. *Id.*

198. See ROBERT DALLEK, *HAIL TO THE CHIEF: THE MAKING AND UNMAKING OF AMERICAN PRESIDENTS* 122 (1996); see also ROBERT MCNAMARA, *IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM* (1996).

criminal wrong, there was one further way in which the U.N. Security Council vote on Korea was exceptional. Without the Russians present and with one of Chiang Kai-shek's henchmen voting for China, the permanent membership of the Security Council was delivered to the "Korea invaded!" lobby. But that was not enough. Recall that the U.N. Charter, in 1950, required seven votes, including the concurring votes of all five Security Council permanent members (or, perhaps, four members if one was absent) for a resolution to be adopted. Security Council Resolution 83 of June 27, 1950, which called on U.N. members to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area" had received the votes of four permanent members, plus those of Ecuador and Norway.¹⁹⁹ Egypt and India abstained, and Yugoslavia had voted against the resolution.²⁰⁰ With one member of the Security Council remaining, the resolution still required a seventh affirmative vote to be adopted.²⁰¹ In an odd way, in a sense, a non-permanent member of the Security Council held a veto on this one particular vote. The seventh member was Cuba.

In the summer of 1950, the Cuban government's executive branch was under the leadership of Carlos Prío Socarrás, who had been elected President in 1948. He would serve in that capacity until 1952 when he was removed from office in a coup d'état, engineered by Fulgencia Batista.²⁰² The 1952 Cuban elections were cancelled, including the congressional race of Orthodox Party candidate Fidel Castro Ruz.²⁰³ Prío relocated to Miami after his ouster from office in Cuba and, in 1955, according to Robert Levine, Director of the Center for Latin American Studies at the University of Miami, "[a]nti-Batista exiles in Florida, led by former President Carlos Prío Socarrás," sent Fidel Castro and his compatriots in Mexico "enough money to purchase a barely seaworthy yacht, the *Granma*."²⁰⁴ Near the end of 1956, the soon-to-be legendary *Granma* arrived on Cuba's southern coast and was immediately fired upon.²⁰⁵ Of the eighty-two rebels aboard, only twenty survived, including Fidel Castro, his brother Raúl, and Ernesto "Che" Guevara.²⁰⁶ On October 14, 1957, U.S. Attorney General Herbert Brownell

199. U.N. SCOR, 4th Sess., 2d series, 474th mtg. at 5 (1950).

200. *Id.* at 5 n.12.

201. *Id.*; Global Policy Forum, *Elected Members of the Security Council 1946-Present*, <http://www.globalpolicy.org/security/membership/mem2.htm> (last visited Mar. 27, 2004).

202. ROBERT M. LEVINE, SECRET MISSIONS TO CUBA: FIDEL CASTRO, BERNARDO BENES, AND CUBAN MIAMI 17 (2002)

203. *Id.*

204. *Id.* at 19.

205. *Id.*

206. *Id.*

held a meeting in his office with officials from Immigration and Naturalization, Department of Justice, the Treasury Department, the F.B.I, and the State Department to discuss a letter Brownell had received from Secretary of State, John Foster Dulles, expressing “concern over the activities of ex-President Prío based on reports received from time to time from the Cuban Government as well as from other sources.”²⁰⁷ The Attorney General stated at the meeting that “Prío’s activities must indeed represent a serious issue between our Government and the Cuban Government for Secretary Dulles to devote his personal attention to it in this manner.”²⁰⁸ Brownell further “raised the possibility of a conspiracy charge” against Prío and it was agreed at the meeting that such an investigation should be seriously considered.²⁰⁹ Prío had “financed conspiracies, using Miami Beach’s Lucerne Hotel and his own home in South Miami for meetings.”²¹⁰ For his trouble in financing the anti-Batista rebels, Prío was indicted by the U.S. Justice Department in 1958.²¹¹ Perhaps in part to atone for earlier sins, Prío became intensely anti-Castro during the 1960s and, in 1968, along with Emilio Núñez Portuondo, a former president of the U.N. Security Council, attended the ““Forum for the Liberation of Cuba”” at the Kings Bay Yacht and Country Club near Coral Gables, Florida.²¹² Prío, thus, entered that murky underworld of anti-Castro paramilitary and intelligence operatives whose existence subsequently assured conspiracy theorists a thriving market for their books and movies. Former BBC journalist, Anthony Summers, claims that Prío was a “friend of top Mafia leaders” and “has been linked in testimony with both Jack Ruby and anti-Castro militant Frank Sturgis.”²¹³ The latter, a former CIA-employee living in Miami and veteran of the Bay of Pigs operation, was one of the infamous Watergate burglars. In one of those, “too weird to be true” footnotes, Summers adds that Prío “was found shot dead in 1977 . . . seated in a chair, with a pistol beside him, outside the garage of his Miami home.”²¹⁴

207. Memorandum from the Deputy Assistant Secretary of State for Inter-American Affairs (Snow), for the Files (Oct. 22, 1957), <http://www.rose-hulman.edu/~delacova/cable/cable-10-22-57.htm>.

208. *Id.*

209. *Id.*

210. LEVINE, *supra* note 202, at 39.

211. Werner Wiskari, *U.S. Embargo Set on Arms to Cuba*, N.Y. TIMES, Apr. 3, 1958, <http://www.rose-hulman.edu/~delacova/cuban-rebels/4-3-58-embargo.htm>.

212. LEVINE, *supra* note 202, at 178.

213. ANTHONY SUMMERS, CONSPIRACY 500 (1980); *see also*, ANN LOUISE BAVDACH, CUBA CONFIDENTIAL (2002).

214. *Id.*

BRINGING LAW BACK IN

Whatever additional job experience and training might be included in Prío's extraordinary resume, international lawyer and treatise writer are not among them. And even if they were, they would only qualify him to argue before an international tribunal, not sit on one, let alone decide for millions of Koreans and Americans whether, under the terms of international law, the conflict that broke out in northeast Asia, in 1950, along the thirty-eighth parallel was or was not a civil war. The votes of politicians and dictators, their ministers or agents, sitting from time to time on the Security Council of the U.N., have been, and always will be, a poor substitute for legal reasoning based upon the customary rules of law that have evolved over time and the conventional sources of international law indexed in the charter of the World Court. The more the U.S.—or any nation, for that matter—elaborates a “grand strategy” that conforms to the parameters of international law, regardless of the politics and propaganda that invariably hold the U.N. Security Council in a vice-like grip,²¹⁵ the closer they will be to formulating a foreign policy that genuinely promotes both justice (at least that limited form of justice law standing alone can deliver) and the rule of law. The propriety of unilateralism, the legality of unilateral action on the international plane, raises questions of law—questions that cannot be answered in advance by Security Council resolutions. Within the canons of the law of nations, arguments can be identified both for and against the legality of recent American military action in Afghanistan and Iraq. It is time that debate, however, gets beyond the bogus issues of preemptive war and U.N. Security Council decision making. Too much is at stake for the law itself to be indefinitely excluded.

215. See Steven R. Weisman & John H. Cushman, Jr., *U.S. Joins Iraqis to Seek U.N. Role in Interim Rule*, N.Y. TIMES, Jan. 16, 2004, at A1. The U.S. government, having essentially dismissed the U.N. going into the Iraq War, seems to be reconsidering its relationship to the organization:

The Bush administration, trying to rescue its troubled plan to restore sovereignty to Iraq, is joining Iraqi leaders to press the United Nations to play a role in choosing an interim government in Baghdad, administration officials said Thursday The new move involved yet another change in strategy for an administration under pressure from shifting events in Iraq. From the start of planning the war to oust Saddam Hussein, the administration has had an ambivalent attitude toward the United Nations.

Id.