

A Global State of Exception? The United States and World Order

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This is not a question of authority, this is a question of will.

George W. Bush¹

“We’re not inflicting pain on these fuckers [Aideed’s faction],” Clinton said, softly at first.

“When people kill us, they should be killed in greater numbers.” Then, his face reddening, his voice rising, and his fist pounding his thigh, he leaned into Tony [Lake], as if it was his fault. “I believe in killing people who try to hurt you.... And I can’t believe we are being pushed around by these two-bit pricks.”²

I. The Scourge of War

By the time this paper is published, victory will have been declared in Iraq, and while the country will be far from “pacified” (much as Afghanistan, 18 months after invasion, remains a theater of low-intensity conflict), the concentrated, devastating violence will be a distant memory. Daily news will move on to more immediate concerns (“How are Bush’s reelection prospects?,” “Is Iran developing weapons of mass destruction?”), and consigned to the memory hole will be any recollection of the “dozens of smashed corpses”³ left by a US cluster munitions attacks south of Baghdad or the thousands of underfed and ill-equipped soldiers of a Third World army killed by an overwhelmingly superior military force. Also fading will be attention to the traumas suffered by “allied” troops such as the anonymous marine who watched his fellow soldiers incinerated in the battle for Nasiriya: “Closer to the destroyed AAV [amphibious assault vehicle], another young marine was transfixed with fear and kept repeating: ‘Oh my God, I can’t believe this. Did you see his leg? It was blown off. It was blown off.’”⁴

It was a recognition of the inescapable brutality of modern warfare that led the drafters of the UN Charter to begin the treaty with the words, “We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind....” The Charter itself, discussed in detail below, outlawed war (‘the use of force’ in the terminology of international law) in all but narrowly defined circumstances. Anyone who has carefully followed the serious human and humanitarian toll of the invasion of Iraq thus far is compelled to ask, has this awesome destruction been adequately justified, both empirically and legally?

In the frenzied diplomacy and minute dissections of weapons inspectors’ reports that preceded the American attack, it was easy to overlook the extent to which UN-sponsored ‘disarmament’ was transparently – and often publicly – a sideshow for the Bush administration. Eight senior members of the current administration⁵ were among 18 signatories of an open letter to then-President Bill Clinton that called for the overthrow of Saddam Hussein by military force, and it is well known that Deputy Secretary of Defence Paul Wolfowitz has been a consistent advocate of ‘regime change’ in Iraq. In the immediate aftermath of the September 11 terrorist attacks, Wolfowitz argued that the US should immediately seize Basra and the oilfields of southern Iraq. He was rebuffed at that time, but other administration officials shared his sense that September 11 was a historic opportunity to change American doctrine and shape the world.⁶ By early 2002, it appeared that the die had been cast, and regime change decided upon. In the first half of 2002, when it seemed that there was a real chance that the UN might negotiate the return of weapons inspectors, the administration moved quickly to try to forestall the “nightmare scenario”⁷ of renewed inspections on terms other than its own. Inspections were disparaged as irrelevant or unlikely to succeed while Saddam Hussein remained in power,⁸ and in public

appearances President Bush reiterated the assertion that the Iraqi regime both possessed and continued to develop nuclear, biological, and chemical weapons.

Claims concerning the existence of a nuclear weapons program and the importation of uranium from Niger proved categorically false, while four months of inspections yielded no evidence of chemical or biological weapons production, or any concealed stocks of weapons. The government of Iraq had a long history of deception and obstruction of weapons inspections,⁹ but it is noteworthy that a UN panel reviewing the status of Iraqi disarmament in early 1999 concluded that “[i]n spite of well-known difficult circumstances, UNSCOM and IAEA have been effective in uncovering and destroying many elements of Iraq’s proscribed weapons programmes.... UNSCOM has achieved considerable progress in establishing material balances of Iraq’s proscribed weapons. Although important elements still have to be resolved, the *bulk of Iraq’s proscribed weapons programmes had been eliminated.*”¹⁰ The “important elements” to which the report referred were the unaccounted for biological weapons precursors (many supplied by US firms),¹¹ and a quantity of VX nerve gas that Iraq claimed to have unilaterally destroyed.¹² Before they were withdrawn due to the imminent Anglo-American invasion, inspectors from the United Nations Monitoring, Inspection, and Verification Commission (UNMOVIC) were beginning work that would have tested Iraq’s claim that substantial quantities of unaccounted for nerve gas and biological weapons precursors had been destroyed and buried at a disposal site. *Newsweek* reported in the week of March 3, 2003, that the senior Iraqi military officer who defected in 1995 had stated in his debriefing interviews with UN weapons inspectors and the CIA that he personally had ordered the destruction of chemical and biological weapons stocks:

Hussein Kamel, the highest-ranking Iraqi official ever to defect, told the CIA, British intelligence

officers and U.N. inspectors in 1995 that, after the gulf war, Iraq destroyed all its chemical and biological weapon stocks and the missiles to deliver them.

Kamel had direct knowledge of what he claimed: for 10 years he had run Iraq's nuclear, chemical, biological and missile programs. ... [H]is tale raises questions about whether the WMD stockpiles attributed to Iraq still exist.

Kamel said Iraq had not abandoned its WMD ambitions. The stocks had been destroyed, but Iraq had retained the design and engineering details of these weapons. ...

Kamel was interrogated in separate sessions by the CIA, by Britain's M.I.6 and by a trio from the U.N., led by the inspection team's head, Rolf Ekeus. NEWSWEEK has obtained the notes of Kamel's U.N. debrief, and verified that the document is authentic. NEWSWEEK has also learned that Kamel told the same story to the CIA and M.I.6.¹³

Security Council Resolution 1441 provided for an inspections regime imposing detailed obligations unprecedented in Security Council practice; any state less isolated and supine than Iraq would have balked at its terms. The resolution contained several provisions so affronting to the elementary principles of the sovereign equality of nations (such as the right of inspectors to take government and military officials and their families out of the country for questioning) that they could only have been intended to provoke confrontation. Indeed, it appears that the administration hoped that the terms would act as hair-triggers:

Several diplomats at the United Nations said American leaders were confident that Mr. Blix would either be rebuffed by the Iraqis or he would find evidence of weapons of mass destruction that would make it obvious that the only solution was war. ...

...American officials say they continue to respect Mr. Blix's standing, and many say that they should have figured out how to out-manuever him early on. But by the time they realized he was not going to help the United States cause it was too late.¹⁴

Within a week of the passing of Resolution 1441, senior administration officials were attempting to preempt the possibility that inspections may not yield a *casus belli*, confidently asserting that Iraq had chemical and biological weapons, and that if the inspections failed to discover them, it

would simply be evidence of Iraqi non-compliance.¹⁵ In a briefing to British MPs in November 2002, Richard Perle was reported to have said “I cannot see how Hans Blix can state more than he can know. All he can know is the results of his own investigations. And that does not prove that Saddam does not have weapons of mass destruction.”¹⁶ The existence of weapons of mass destruction was unfalsifiable, and hence, the logic for war irrefutable. On April 12, 2003, Hans Blix broke his silence in the Spanish daily *El Pais*. He observed that the war against Iraq was “planned well in advance” and accused Britain and the US of “fabricating” evidence to justify their campaign. The finding of weapons of mass destruction was subsidiary to the toppling of Saddam Hussein.¹⁷

II. The Gentle Civilizer of Nations

The legality of an armed attack against Iraq has not featured significantly in US debates about the war, and the Bush administration has not bothered to elaborate a serious legal argument justifying the use of force. In Australia and the UK, where the party of opposition or significant numbers of the party of government have vocally opposed the war, the legality of the invasion has been trenchantly contested. Indeed, in an effort to buttress the legitimacy of their decision to participate in the invasion, the governments of both countries took the highly unusual step of releasing internal legal memoranda outlining reasons by which the war could be deemed legal.

In his essay on “Perpetual Peace,” Kant expresses some bemusement that the word “law” is used at all in the discourse of war. He finds it surprising that the word “has not been entirely banned from the politics of war as pedantic, and that no state has been bold enough to declare itself publicly as of this opinion. For people in *justifying* an aggressive war still cite Hugo Grotius, Pufendorf, Vattel, and others (all of them miserable consolers).”¹⁸ Kant’s reflection on

states' repeated recourse to the language of "law" and "right" in order to justify the pursuit of power through violence nevertheless leads him to the sanguine conclusion that

there exists in man a greater moral quality ... to try and master the evil element in him ... and to hope for this in others. Otherwise the words *law* and *right* would never occur to states which intend to fight each other, unless it were for the purpose of mocking them...¹⁹

The sage of Königsberg's transcendental deduction of the foundations of an international legal order nevertheless carries with it the awareness that states frequently invoke international law – and international lawyers – to legitimate power political objectives. Not infrequently, it seems, international lawyers offer "miserable consolations" for interstate violence by cloaking *raison d'état* with portentous legal rationales. Thus, Grotius's celebrated treatise on a right of free innocent passage on the seas, *Mare Liberum*, developed as an apologia for Dutch efforts to wrest control of trade to the East Indies from the Portuguese.²⁰ Similarly, his concept of states' "right to punish" conduct against the "law of nature" for the sake of "vindicating the cause of the oppressed" – a concept within the genealogy of modern notions of obligations *erga omnes*, universal jurisdiction, and humanitarian intervention – coincided with Dutch imperial expansion. As Richard Tuck observes, "[t]he idea that foreign rulers can punish tyrants, cannibals, pirates, those who kill settlers, and those who are inhuman to their parents neatly legitimated a great deal of European action against native peoples around the world."²¹ The legal regulation of the use of force continues to be an area where the line between legal reasoning and audacious legitimation is frequently blurred. There persists, it seems, a role for international lawyers in subtly vindicating *raison d'état* by elaborating latter-day versions of a "right to punish." The 1989 US invasion of Panama – an unambiguous violation of the UN Charter and condemned by all other members of the Organization of American States – is thus defended as a "lawful response to

tyranny” based on a putative right to unilateral pro-democratic intervention.²²

Article 2(4) of the UN Charter proscribes the threat or use of force against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the United Nations, subject only to the inherent right of self-defence (preserved in Article 51 of the Charter). The Charter – which constitutes the supreme treaty obligation of every UN member state²³ – is recognized as inaugurating a new era in the legal regulation of the use of force, by which war was transformed from an acceptable instrument of relations between states²⁴ into *prima facie* illegal and illegitimate conduct.²⁵ Chapters VI and VII of the Charter confer primary (if not exclusive) authority to authorize non-defensive uses of force on the Security Council, which is charged with supervising the maintenance of international peace and security: unless defensive or authorized by the Security Council, an armed attack against a state’s territorial integrity or political sovereignty is prohibited. This reading of the plain words of the Charter was confirmed by the International Court of Justice in the *Corfu Channel* and *Nicaragua* cases. In *Corfu Channel*, the Court rejected any right of unilateral attack (even as a reprisal),²⁶ while in *Nicaragua* it opined that the prohibition on the use of force was a *jus cogens* norm.²⁷ A *jus cogens* norm is a rule so fundamental to international public order that it cannot be derogated from by the subjects of international law;²⁸ such norms represent “conspicuous common interests,”²⁹ and the obligation of any given state to observe such norms is owed to the international community as a whole (obligations *erga omnes*).³⁰

In accordance with the settled principles of treaty interpretation,³¹ it is permissible to have recourse to the intentions of the drafters of a treaty when interpreting its provisions. The *travaux préparatoires* of the UN Charter reveal that Article 2(4) was intended to operate as an “absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to insure

that there should be no loopholes.”³² The unilateral use of force or any other coercive measure of that kind “is neither authorized nor admitted.”³³ In an attempt to justify the 1989 invasion of Panama as a lawful use of force to “establish democracy,” State Department legal advisors argued that Article 2(4) does not proscribe the use of force which does not result in territorial conquest or political subjugation; hence, because US forces had not sought to annex Panamanian territory and intended to liberate its people from Manuel Noriega, the use of force was not against the “territorial integrity or political independence” of Panama. This argument was rightly dismissed as Orwellian.³⁴ The clear intention of the drafters of the UN Charter was that “territorial integrity and political independence” were to be read as “synonymous with ‘territorial inviolability’,”³⁵ consistent with a world order predicated on the sovereign equality and territorial integrity of states.

Article 51 of the UN Charter recognizes states’ inherent right of “individual or collective self-defense *if an armed attack occurs.*” A state (“the victim state”) can legally use force to defend itself against an armed attack where the attack leaves it with “no choice of means and no moment for deliberation” (“the necessity requirement”), and where the victim state uses only so much force as is necessary to repulse the attack (“the proportionality requirement”).³⁶ Any hostilities undertaken in self-defense must be reported to the Security Council, and must cease as soon as the Security Council assumes the task of remedying the aggression. Thus, a war commenced in due exercise of the right of self-defense does not give rise to an entitlement to occupy or annex the territory of the aggressor state, or pursue any other objectives not related to responding to the initial attack. A strict reading of Article 51 would require that an armed attack has actually occurred before the victim state can legally respond with force.³⁷ This requirement has been relaxed somewhat through the evolution of the notion of *anticipatory* (or *preemptive*)

self-defense, which – though not uncontroversial – has been propounded by a number of eminent jurists and certain states.³⁸ Due to the obvious risks of abuse of such a doctrine, the requirements of necessity and proportionality that govern the ordinary law of self-defence are applied *a fortiori* to any invocation of anticipatory self-defence.³⁹ There must be “solid and consistent evidence” that another state is about to engage in a “large-scale armed attack jeopardizing the very life” of a target state, and no peaceful means of resolving the dispute because of the imminence of the attack or the futility of the measures.⁴⁰

Whatever claims can be made about Iraq’s possession of weapons of mass destruction, it has never been asserted that it had the capacity to deliver them upon the territory of the United States, or that a military attack of any kind by Iraq against the United States was imminent or unavoidable. Nor have any of the states neighboring Iraq alleged that it was attacking or about to attack any one of them. In the aftermath of the first Gulf War and twelve years of sanctions limiting rearmament, it is difficult to characterize Iraq as a military threat to any regional state. Neither notion of self-defence set out above applies to the US and UK decision to attack Iraq; indeed, the only state that could plausibly have invoked the principle of anticipatory self-defence in March 2003 was Iraq itself, confronted as it was by hundreds of thousands of troops of a hostile power on its borders and unrelenting statements of an intention to attack by that power.

Within the current framework of world order, the only entity that is empowered to authorize a non-defensive use of force is the Security Council. Under Chapter VII of the UN Charter, the authorization of force involves a two-step process: first, the Security Council must *determine* under Article 39 the existence of a threat to the peace, a breach of the peace, or an act of aggression; second, the Council must *decide* “what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Article 41

empowers the Council to impose measures not involving the use of armed force, including “complete or partial disruption of economic relations” and communications. Article 42 provides that, if non-military measures are deemed inadequate, the Council may take such action by air, sea, or land forces as may be necessary to restore or maintain international peace and security. In practice, and in the absence of a standing UN army, the decision to use armed force under Article 42 has been effected through an express Council resolution to use force, with the delegation of the implementation of that decision to a state or groups of states willing to do so.

The important conclusion that flows from the textual structure of the Charter is that a decision to use force must be – and, in the practice of the Council, generally has been – expressly made by the Council. Moreover, the wording of the articles clearly envisages situations where the Council will determine a threat to international peace and security under Article 39, but not authorize force as the appropriate means to respond to that situation. The Security Council’s monopoly on non-defensive uses of force reflects a philosophy of legalism that is deeply realistic about the behaviour of states. It assumes that if states were permitted to use force unilaterally based on claims about the “justness” of the intervention, there would be a proliferation of attacks and reprisals based on *raison d’état* masquerading as humanitarianism. This risk was identified by the eighteenth-century Lutheran scholar Pufendorf, who wrote:

[W]e are not to imagine that every Man ... hath a Right to correct and punish with War any Person who hath done another an Injury, barely upon Pretence that common Good requires, that such as oppress the Innocent ought not to escape Punishment, and that what toucheth one ought to affect all. For otherwise, since the Party we suppose to be unjustly invaded, is not deprived of the Liberty of using *equal* Force to repel his Enemy, whom he never injured; the Consequences *then* would be, that, instead of one *War*, the World must suffer the Miseries of two. Besides, it is, also, contrary to the natural *Equality* of Mankind, for a Man to force himself upon the World for a *Judge*, and *Decider of Controversies*. Not to say what dangerous Abuses this Liberty might be

perverted to, and that any Man might make War upon any Man upon such a Pretence.⁴¹

More recently, respected international jurist Louis Henkin has echoed Pufendorf's concern, noting that "the law against unilateral intervention may reflect, above all, the moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely [whether force should be used]."⁴² It should also be recalled that these limitations on the use of force exist within the context of an obligation to settle international disputes by peaceful means; to pursue war as a preferred policy outcome violates the fundamental rules of world order.⁴³

Confronted with the uncontroversial view that an invasion not authorized by the Security Council is illegal, "allied" governments have argued that the attack on Iraq is "implicitly" authorized by previous Security Council resolutions. The legal memoranda released by the Australian and UK governments assert that Iraq's failure to comply with the Security Council Resolution 687 revives the express authorization to use force contained in Security Council Resolution 678. Security Council Resolution 678 authorized UN member states "co-operating with the Government of Kuwait" to use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."⁴⁴ Resolution 660 determined that the Iraqi invasion of Kuwait constituted a breach of international peace and security, and demanded that Iraq unconditionally withdraw its forces from Kuwait.⁴⁵ Passed after the ejection of Iraqi forces from Kuwait in early 1991, Resolution 687 set out the terms upon which a formal ceasefire was declared. Included within these terms were the requirements that Iraq renounce the possession and development of weapons of mass destruction and certain kinds of missiles, and accept international verification of this process.⁴⁶ The contention of the states now attacking Iraq is that the finding in Security Council Resolution 1441 that Iraq was in "material breach" of its disarmament obligations under Resolution 687

resuscitates the entitlement of any member state to use force against Iraq in accordance with Resolution 678.

It is obvious from the foregoing that this is a highly contrived argument; it is also wrong, for a number of reasons. It is incorrect to assert that the formal ceasefire established by Resolution 687 was conditional upon the *performance* of any obligations by Iraq. Operative paragraph 33 of Resolution 687 clearly states that the formal cease-fire became effective upon Iraq's notifying the Security Council of its *acceptance* of the terms of the resolution; this can be contrasted with the terms of Security Council Resolution 686, which conditioned a provisional cease-fire upon Iraq's *performance* of a number of measures⁴⁷ and expressly recognized that the authorization to use force contained in Resolution 678 remained in force until compliance occurred. Resolution 687 superseded Resolution 686, and in Security Council discussions leading to the adoption of Resolution 687, several states observed that the *Council* would be responsible for responding to any violations of the final cease-fire terms.⁴⁸ Significantly, India and China, which had abstained from Resolution 686 because they disagreed with the continuation of the authorization to use force under the terms of Resolution 678,⁴⁹ voted in favour of Resolution 687 on the grounds that it contained no such authorization of unilateral action.

It is also distorting the meaning of Resolution 678 to interpret its authorization of force to "restore international peace and security in the region" as a mandate to take military action beyond that necessary to eject Iraqi forces from Kuwait. On this view, Resolution 678 becomes a "loaded weapon in the hands of any member state to use whenever it determined Iraq to be in material breach of the ceasefire."⁵⁰ In light of the objectives of minimizing the use of force and settling disputes by peaceful means that are central to the Charter framework, it is inappropriate

to interpret the resolution in a manner that presumes that the Security Council has authorized the greatest amount of violence that the language could imply. More decisively, such an interpretation finds no support in the statements of the nations that voted for Resolution 678 or in subsequent debates in the Security Council. Shortly after the end of the first Gulf War, US officials testified to Congress that the resolution provided no authority for an occupation of Iraq, and incursions into Iraqi territory were justified only “pursuant to the liberation of Kuwait, which was called for in the UN resolution.”⁵¹ When voting for Resolution 678, UK representative Douglas Hurd stated that its purpose was “the reversal of aggression – namely full compliance with previous resolutions [i.e., SC Res 660],” while the Soviet representative stated that the “purpose of the resolution ... is to put an end to aggression and make it clear to the world that aggression cannot be rewarded.”⁵² Once the war had commenced, several states participating in the use of force against Iraq emphasized that the sole purpose of the military action was to end the Iraqi occupation of Kuwait.⁵³ In December 1998, when the US and UK attacked Iraq for four days and nights (Operation Desert Fox), they asserted that Iraq’s breaches of Resolution 687 had revived their right to use force under Resolution 678; this argument was not accepted by any state on the Security Council except Japan. Russia and China both stated that the US-UK attacks were not justified by any existing Security Council resolution and contravened international law.⁵⁴ In 1998, renowned international lawyer Thomas Franck concluded:

After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 or under Resolution 678 ... total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 687, is to make a complete mockery of the entire system.⁵⁵

Finally, no support for the current invasion and occupation can be drawn from Security

Council Resolution 1441.⁵⁶ The resolution does not authorize unilateral force any more that Resolution 687 does, and in speeches upon the unanimous adoption of Resolution 1441, no representative except that of the United States contended that the resolution authorized unilateral force. In fact, 11 of the 15 representatives stated expressly that Resolution 1441 did not authorize force.⁵⁷ Immediately after the approval of the resolution, the representatives of China, France, and the Russian Federation took the highly unusual step of issuing a joint statement to the Security Council that stated:

Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. ... In the case of failure by Iraq to comply with its obligations, the provisions of paragraphs 4, 11 and 12 will apply. Such a failure will be reported to the Security Council by the Executive Chairman of UNMOVIC or by the Director General of IAEA. It will then be for the Council to take a position on the basis of that report.

Therefore, the resolution fully respects the competences of the Security Council in the maintenance of international peace and security, in conformity with the Charter of the United Nations.⁵⁸

The failure of the US to bribe and bully six non-permanent members of the Security Council to adopt a second resolution authorizing force against Iraq thwarted its efforts to turn the Council into a “law-laundering service”⁵⁹ that can be relied upon to provide a legitimizing mandate to unilateral actions on demand. In comments after the swearing in of the first judges of the International Criminal Court on March 10, UN Secretary General Kofi Annan warned that a failure to obtain a Security Council resolution authorizing an invasion of Iraq meant that any subsequent invasion would be in violation of the UN Charter. As the lengthy argumentation above demonstrates, this is patently correct. Mr. Annan’s choice of the International Criminal Court as his forum for making this observation was appropriate: a unilateral invasion and occupation of another sovereign state in violation of the Charter is “prima facie evidence of an

act of aggression.”⁶⁰ As the International Military Tribunal at Nuremberg concluded, aggression is “not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁶¹

III. States of Exception – From *Großraum* to Preeminence

The statements and posture of the Bush administration imply a vision of international order where “law” is merely one policy consideration among others,⁶² not a binding obligation – except when applied to the enemy, with respect to whose illegal acts the notion of “legality” adopts a ferocious and uncompromising polemical content. The restraints of legality to which an enemy is subject have no application to the United States, whose power permits – and *can be shown to permit* – it to arrogate to itself the entitlement to determine the boundary between law as principle and law as coercion. The affinities here with Schmitt are obvious: the sovereign is that which determines (by virtue of its actual or potential defeat of any who would challenge it) the exception. Order is not a matter of authority, but a matter of will, and legality is derivative of the will of the sovereign. In the last instance, order is guaranteed by force, and international institutional restraints – Councils, Committees, Assemblies – are at best evasions of reality, and at worst “foolish examples of our loss of confidence in our justice and power.”⁶³

The indifference to international law where it conflicts with US interests is, of course, not new. Discussing the Cuban Missile Crisis in 1964, Secretary of State Dean Acheson concluded “that the propriety of the Cuban [naval] quarantine is not a legal issue. The power, prestige and position of the United States had been challenged by another state; and law simply does not deal with such questions of power – power that comes close to the sources of sovereignty.”⁶⁴ When the US marines invaded the Dominican Republic in 1965 to preempt the election of a leftist

government, the legal adviser to the State Department contended that the leftist electoral victory amounted to an “armed attack” under Article 51 of the UN Charter, and when that interpretation failed to convince, suggested that it was artificial to rely on “absolutes for judging and evaluating the events of our time. ... [F]undamentalist views on the nature of international legal obligation are not very useful as a means of achieving practical and just solutions of difficult political, economic and social problems.”⁶⁵ Columbia Law School’s Wolfgang Friedmann – who had been dismissed from his teaching positions in Germany by the Nazi government in 1934 – retorted that such logic came “close to the attempts by Nazi and Communist lawyers to justify the interventionist and aggressive actions of their respective governments in terms of the legal order of the future. Nazi lawyers spoke of the *Völkerrechtliche Großraumordnung*....”⁶⁶

Nevertheless, there seems to be a distinctive evangelism among key figures in the present administration for the creation of a world order that not only accommodates and benefits US power, but is decisively defined by it. Writing in *The Guardian* two days after the attack on Iraq commenced, Defence Policy Board member Richard Perle gleefully predicted that while the “chatterbox on the Hudson (*sic*) will continue to bleat,” “what will die is the fantasy of the UN as the foundation of a new world order. As we sift the debris, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions.”⁶⁷ Collective security must be recognized as a “dangerously wrong idea that leads inexorably to handing great moral and even existential politico-military decisions to the likes of Syria, Cameroon, Angola, Russia, China and France” – none of which, presumably, have the moral vision and civilizational fortitude to (as Heidegger wrote of Germany in 1935) stand “in the center of the Western world” and “take on its historical mission” to forestall “the peril of world darkening.”⁶⁸ In a biographical sketch of

Paul Wolfowitz, *Time* magazine noted the Straussian vision that pervades this disdain for international institutions: “Civilization and democracy hang by a thread; great beasts prowl the forest, ready to prey on those not tough enough to meet them in combat. At the same time ... the U.S. is endowed by Providence with the power to make the world better if it will only take the risks of leadership to do so.”⁶⁹ In its essence, international politics is dangerous, and to deny that the affirmation of power is the basic requirement of order is to invite not peace, but defeat. Where the Clinton administration’s relationship with the UN was opportunistic and ambivalent,⁷⁰ the ethos among circles influential in the present administration appears to be ideological hostility with a destructive intent.

Combine such a philosophy with the strategic doctrines that have been germinating over the last thirteen years, and a deeply troubling scenario presents itself. As Michael Klare has documented, the end of the Cold War provoked a need to construct a plausible rationale for maintaining a large military establishment in the absence of the Soviet threat.⁷¹ What resulted was the “two war” doctrine, predicated on the alleged need to fight two conflicts simultaneously against a diffuse spectrum of threats from Third World “rogue states” to terrorist narco-traffickers. Despite the collapse of the “Evil Empire,” “the world remains a dangerous place” with “threats and challenges” that potentially represent a threat of equal magnitude.⁷² To be able to meet these threats, the US military needed to have confidence in its capacity to project power into any area of turmoil that threatened US interests, and prevail against the resistance found there.⁷³ Nothing less than absolute military superiority would be adequate for such a task. The Defence Planning Guide, drafted in 1992 by Lewis Libby and Zalmay Khalilzad and withdrawn after it was leaked to the press, articulated the principal objective of this power projection capacity:

Our first objective is to prevent the re-emergence of a new rival. This is a dominant consideration underlying the new regional defense strategy and requires that we endeavor to prevent any hostile power from dominating a region whose resources would, under consolidated control, be sufficient to generate global power. These regions include Western Europe, East Asia, the territory of the former Soviet Union, and Southwest Asia.

There are three additional aspects to this objective: First the U.S. must show the leadership necessary to establish and protect a new order that holds the promise of convincing potential competitors that they need not aspire to a greater role or pursue a more aggressive posture to protect their legitimate interests. Second, in the non-defense areas, we must account sufficiently for the interests of the advanced industrial nations to discourage them from challenging our leadership or seeking to overturn the established political and economic order. Finally, we must maintain the mechanisms for deterring potential competitors from even aspiring to a larger regional or global role.⁷⁴

Military preeminence is instrumental to the achievement of these objectives, because it engenders the “sense that the world order is ultimately backed by the U.S.” Hence, despite the utility of ad hoc military coalitions in certain circumstances, the “United States should be postured to act independently when collective action cannot be orchestrated.”

As the reporter that received the leaked document comments, what was “insensitive” about the Defense Planning Guide was that “it talked about, not only Russia, but Germany, Japan, India, all as potential regional hegemony that could rise up to challenge the United States. . . . They said that their number one mission is to quash that.”⁷⁵ Gellman observes that the document also referred to the need to “preempt” the use of weapons of mass destruction by any other nation, even where US interests were otherwise not engaged. He notes the document’s “strong overlap” with the National Security Strategy released in September 2002: “you simply have to lay the documents side by side and you will see huge areas in which they’re the same.” The NSS reflects a strategic worldview “substantially similar” to the DPG, but “this time, they think they can pull it off.” Released in September 2002, the NSS reiterates two themes from the

DPG: the maintenance of unrivaled military power, and the necessity of undertaking preventive wars against incipient threats to US strategic interests. The notion of prevention (far removed from the legal principle of anticipatory self-defense outlined above) was introduced as early as January 2002, when Defence Secretary Donald Rumsfeld delivered a speech to the National Defence University in Washington, DC: “Defending the US requires prevention, self-defence and sometimes pre-emption. Defending against terrorism and other emerging 21st-century threats may well require that we take the war to the enemy.”⁷⁶ In January 2003, the administration released the Nuclear Posture Review, which openly recommends that “tactical” nuclear weapons be considered for use in certain circumstances. These circumstances include penetrating reinforced bunkers housing chemical or biological weapons, leaving “the door open to using nuclear weapons for a pre-emptive attack on a foreign country.”⁷⁷

What amounts to an “enduring national interest” to be defended against these threats is nebulous and indeterminate. The most recent Quadrennial Defense Review defines national interests to include the maintenance of preeminence, the vitality of the global economy, and access to key markets and strategic resources.⁷⁸ The “self” of self-defense is thus impossibly bloated, and “the distinction between offense and defense blurs hopelessly. ... Security can be as insatiable an appetite as acquisitiveness – there may never be enough buffers.”⁷⁹ Parallels with Rome’s self-image can be drawn from Schumpeter’s essay on “The Sociology of Imperialisms”:

There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome’s allies; and if Rome had no allies, then allies would be invented. When it was utterly impossible to contrive such an interest – why, then it was the national honor that had been insulted. ... Rome was always being attacked by evil-minded neighbors, always fighting for breathing space. The whole world was pervaded by a host of enemies, and it was manifestly Rome’s duty to guard against their indubitably aggressive designs.⁸⁰

Viewed in the context of these strategic doctrines, the invasion of Iraq is more than just the trial run for preventive war. It is the initial confrontation of what Klare has termed “the war for US supremacy,”⁸¹ and an attempt to promote a *norm* of excusable preventive war outside the existing principles of world order. The latter objective has been thwarted by the unexpectedly determined opposition of powerful European states, but it appears that the US administration has calculated that “facts on the ground can change that consensus, or ... make that initial consensus much less relevant. In effect, the Bush administration believes that it can do what it sees as vital to American interests, and the rest of the world will get over it.”⁸² Or at least, some countries will be encouraged to get over it, and others invited to keep the image of a decisive victory against Iraq firmly in their minds. On April 6, the *New York Times* reported the administration’s hope that attack on Iraq would have a “demonstration effect” on other states: “‘Iraq is not just about Iraq,’ a senior administration official who played a crucial role in putting the strategy together said in an interview last week. It was ‘a unique case,’ the official said. But in Mr. Bush’s mind, the official added, ‘It is of a type.’”⁸³ But the lessons that another rogue state might draw from the attack on Iraq are ambiguous. Iraq was amenable to a successful preventive war due to its military weakness and its inability to actually threaten the US with weapons of mass destruction. Neither North Korea nor Iran present a viable military option because in North Korea “the consequences would be awful, to South Korea primarily, possibly to Japan. In Iran, it would be enormously difficult to wage that kind of fight.”⁸⁴ The lesson drawn from this expedition could well be that articulated by Indian nationalist Prime Minister Atul Bihari Vajpayee in the wake of the Kosovo intervention: “Who is safe in this world? ... In this situation, we cannot let our defenses slip. Nuclear weapons are the only way to maintain peace.”⁸⁵ On 6 April 2003, the Permanent Representative of the Democratic People’s Republic of North Korea transmitted a

letter to the President of the Security Council, in which it stated that the “Iraqi war shows that to allow disarming through inspection does not help avert a war but rather sparks it. ... Only ... [a] tremendous military deterrent force powerful enough to decisively beat back an attack supported by ultra-modern weapons, can avert war and protect the security of the country and the nation. This is a lesson drawn from the Iraqi war.”⁸⁶

IV. Conclusion

In the wake of (all too brief) scenes of jubilation among Iraqis at the end of Ba’athist rule in Baghdad, it will no doubt be asked whether we ought not simply embrace “America’s new willingness to do what it thinks right – international law notwithstanding.”⁸⁷ If international law cannot restrain power, then perhaps it should just clean up after it, providing concepts and catch phrases for educated opinion to rationalize the war *post facto*.⁸⁸ There will be no shortage of international lawyers volunteering for this task, as on every other previous occasion. There may also persist, however, some parts of the world that are not enthused about having one judge, jury, and executioner protecting world peace, and which are recalcitrant in their doubts about the extent to which US dominance is axiomatically benevolent. The record of US-initiated regime change in engendering democratic stability is uniformly bad,⁸⁹ and the circumstances in Iraq do not remotely approximate its two great “successes” in West Germany and Japan.⁹⁰ By the beginning of the twentieth century it was obvious even to international lawyers that the great powers had neither secured the peace nor protected the weak; there seems to me to be little reason to believe that the contemporary great power will do so either. Few of us outside the US would like to live with the logic of the state of exception.

Towards the conclusion of his insightful history of international law, Finnish jurist Martti

Koskenniemi recounts a debate over the 1965 Dominican invasion that occurred between Wolfgang Friedmann and former US Assistant Secretary of State Adolf A. Berle.⁹¹ In response to Friedmann's critique of the legality of the intervention, Berle asserted impatiently, "We here deal with international affairs, where life and death are at stake and not with interminable Byzantine legalistics. ... [I]n international crises, do you want action, or do you want merely words?" Friedmann responded, "I think that as a legal argument this is perilous, because whether we like it or not, law is based on words, words formulated in statutes, in treaties, in conventions, in customary law."

Koskenniemi observes that Friedmann's perplexed response reflects not just a defense of a culture of formalism, but an implicit view that forcing states to account for their conduct in terms of existing legal standards amounts to an insistence on "accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it." In other words, it forces states to run the risk of committing a performative contradiction by ensnaring them within the idealizing presuppositions of a legal discourse; this, in turn, provides a toehold for criticism that cannot be brushed aside as mere words without a certain cognitive dissonance. What does this really amount to? Nothing more, and nothing less, than an essential principle of democratic politics:

To put it simply, and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power ... and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community ... allowing a meaningful distinction between lawful constraint and the application of naked power.⁹²

The author thanks Jeremy Farrall, Friedrich Soltau, Julian Sempill, and Joo Cheong Tham for their comments.

¹ Address to the Nation, 17 March 2003.

² George Stephanopoulos, *All Too Human* (Boston : Little Brown, 1999), 214. The deaths of 18 US special forces in a failed “snatch” raid in Somalia was a traumatic event that has been frequently referred to in the debate about the war against Iraq. Less well known – and clearly, less important – is the trauma suffered by Somalis. In the course of the hostilities, US forces bombed a hospital and a UN compound, and killed between 500 and 1000 Somali civilians; casualty estimates range from 6000 to 10 000 Somali civilians. Despised by Somalis in Mogadishu, the UN mission collapsed. Other peacekeeping forces, such as the Belgians, Canadians, and Italians, also committed gross human rights abuses against Somali civilians, including torture, rape, and murder. See generally Alex de Waal, “US War Crimes in Somalia,” *New Left Review* 230 (1998): 131; Scott Peterson, *Me against My Brother: At War in Somalia, Sudan and Rwanda – A Journalist Reports from the Battlefields of Africa* (2000) chs. 4-5, esp. 88 for civilian casualty figures.

³ Roland Huguenin-Benjamin, International Committee for the Red Cross spokesman in Baghdad, AFP Newsfeed, 1 April 2003. Huguenin-Benjamin continued: “Our four-member team went to Hilla hospital south of Baghdad, and what it saw there was a horror. ... We’re asking about the type of weapons used in these air strikes ... There were women and children. All of them are civilians, farmers and their families who were on their fields or at home.”

⁴ Mark Franchetti, “US Marines Turn Fire on Civilians at the Bridge of Death,” *The Times* (London), 30 March 2003. The author goes on to report that, in the wake of US casualties suffered in Nasiriya, marines were given permission to “kill the vehicles” on an approaching road. The policy was to “shoot anything that moved on wheels.” The following morning, the author counted 12 dead civilians, whose mistake had been to “flee over a bridge that is crucial to the coalition’s supply lines and to run into a group of shell-shocked young American marines with orders to shoot anything that moved.”

⁵ Elliot Abrams, Richard Armitage, John Bolton, Douglas Feith, Zalmay Khalizad, Donald Rumsfeld, Paul Wolfowitz, and Richard Perle.

⁶ Nicholas Lemann, “The Next World Order,” *New Yorker*, 1 April 2002, 42-48.

⁷ *Washington Post*, 15 April 2002, A1.

⁸ Condoleeza Rice was quoted as saying that Saddam Hussein is “not likely to ever convince the world, in a reliable way, that he is going to live at peace with his neighbours, that he will not seek weapons of mass destruction, and that he will not repress his own people.” B. Whitaker, “US wants to oust Saddam even if he makes concessions,” BBC News, 6 May 2002. In the same report, Colin Powell was quoted as saying, “US policy is that, regardless of what inspectors do, the people of the region would be better off with a different regime in Baghdad. The United States reserves its option to do whatever it believes might be appropriate to see if there can be a regime change.”

⁹ Vividly described in Patrick Cockburn and Andrew Cockburn, *Out of the Ashes: The Resurrection of Saddam Hussein* (New York: Harper Collins, 1999).

¹⁰ Report Of The First Panel Established Pursuant To The Note By The President Of The Security Council On 30 January 1999 (S/1999/100), Concerning Disarmament And Current And Future Ongoing Monitoring And Verification Issues, S/1999/356, 27 March 1999, para. 25 (emphasis added).

Canadian diplomat David Malone, who represented Canada in various capacities on the Security Council, observes that deteriorating Iraqi cooperation with UNSCOM in 1998, terminating in the withdrawal of UNSCOM inspectors at the request of the US Ambassador to the UN, was a partially a consequence of “the United States’ single minded determination to remove Saddam from power.” It was apparent from 1997 that the US and UK were “taking a view of the sanctions that was directly at odds with the wording of Resolution 687,” a “unilaterally defined” policy that “was seen by many at the United Nations as ‘moving the goal posts’ and as a representing a situation in which these two states were imposing their own political agendas on the United Nations, its sanctions regime, and UNSCOM itself. ... Saddam must have realized that no degree of compliance would lead the United States either to support the lifting of the sanctions, or to otherwise relent in its efforts to isolate him and Iraq from the rest of the world.” David Malone, “Iraq: No Easy Response to ‘the Greatest Threat’,” *American Journal of International Law* 95 (2001): 235.

¹¹ See Philip Shenon, “Iraq Links Germs for Weapons to U.S. and France,” *The New York Times*, 16 March 2003, 18; Andreas Zumach, “Iraq’s Top Secret Weapons Report: US Companies sold WMDs to Iraq,” *Global Outlook* (Spring 2003): 9; Eric Rouleau, “US-Iraq weapons sales: the dossier,” *Le Monde Diplomatique*, February 2003; William Blum, “Chemical Weapons, the US and Iraq: What the New York Times Left Out,” *Counterpunch*, 20 August 2002. Declassified documents reveal that the US government was aware that US companies were supplying chemical weapons precursors to Iraq in the 1980s, but did not seek to prevent it: see United States Department of State Information Memorandum, from Jonathon T. Howe to Secretary of State George Schultz, 1 November 1983, declassified document, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/iraq24.pdf>.

¹² *Report Of The First Panel*.

¹³ John Barry, "A Defector's Secret," *Newsweek*, 3 March 2003, 2.

¹⁴ Steven R. Weisman, "A Long, Winding Road to a Diplomatic Dead End," *The New York Times*, 17 March 2003, A12.

¹⁵ Donald Rumsfeld: "Well, we know that Saddam Hussein has chemical and biological weapons. And we know he has an active program for the development of nuclear weapons. I suppose what it would prove would be that the inspections process had been successfully defeated by the Iraqis if they find nothing. That's what one would know if that turned out to be the case." Interview with Donald Rumsfeld, 15 November 2002, Federal News Service; see also Bret Stephens and others, "So Is It War?," *The Jerusalem Post*, 15 November 2002, B15;

¹⁶ Paul Gilfeather, "Bush Aide: Inspections or Not, We'll Attack Iraq," *The Mirror* (London), 21 November 2002.

¹⁷ Nicholas Watt, "Blix: US was bent on war," *The Guardian*, 12 April 2003.

¹⁸ Immanuel Kant, "Eternal Peace," *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings*, tr. Carl Friedrich, 3e (New York: Modern Library, 1993), 475.

¹⁹ *Ibid.*, 489 (emphasis in original).

²⁰ Hugo Grotius, *The Freedom of the Seas; Or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, tr. R.V.D. Magoffin (1916). Where the Portuguese had insisted on their "ownership" of sea routes to the Indies as a ground to debar Dutch commercial ships, Grotius distinguished between "ownership" and "jurisdiction," denying that the former could subsist where occupation was impossible. On this view, a state cannot exercise rights characteristic of private property – such as exclusion – over the sea. Grotius's cousins were among the directors of the United East India Company, while his father, as burgomaster of Delft, was responsible for nominating one of the seats on the company's board. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford & New York: Oxford University Press, 1999), 79.

²¹ *Ibid.*, 103. In the introduction to his work, Tuck notes that "It cannot be a coincidence ... that the modern idea of natural rights arose in the period in which the European nations were engaged in their dramatic competition for the domination of the world, and in which there were urgent questions about how both states and individuals adrift in a stateless world behave to one another and to newly encountered peoples" (14).

²² See, e.g., Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," *American Journal of International Law* 84 (1990): 516; Abraham Sofaer, "The Legality of United States Action in Panama," *Columbia Journal of Transnational Law* 29 (1991): 281. Apart from the obvious difficulties of reconciling a right to unilateral military intervention to "promote democracy" with the UN Charter's prohibition on the use of force, the premise that the Panama invasion was genuinely a "response to tyranny" is grotesquely propagandist. On the background to the United States' financial and political support for General Manuel Noriega from 1967 (including efforts which enabled him to fraudulently claim victory in the 1984 general elections), see Peter Scott and Jonathan Marshall, *Cocaine Politics: Drugs, Armies, and the CIA in Central America*, 2e (Berkeley: University of California Press, 1998), 65-73. On Noriega's fall from favor, and the overriding importance of the 1 January 1990 deadline for the commencement of negotiations regarding the reversion of the Panama Canal, see James Dunkerley, *The Pacification of Central America* (1994), 31-36. The new government installed by the United States after the invasion proved no more 'democratic' than that of Noriega; see Noam Chomsky, *Deterring Democracy* (London & New York: Verso, 1992), 163-72.

²³ UN Charter, Art. 103. Simma refers to the Charter as "an instrument of singular legal weight, something akin to a 'constitution' of the international community." Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *European Journal of International Law* 10 (1999): 1, 18.

²⁴ An eminent jurist, and former President of the International Criminal Tribunal for the Former Yugoslavia, Antonio Cassese writes: "[T]he law applicable before the First World War did not place any sweeping restraints on the use of force. ... States were only to respect certain modalities: if they decided to engage in war, they were to express their *animus belligerandi* ... in some way, with the consequence that all the rules on war and neutrality became applicable." A. Cassese, *International Law in a Divided World* (Oxford: Clarendon, 1986), 215.

²⁵ See I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963).

²⁶ *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 35.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 100; Restatement (Third) of Foreign Relations Law of the United States, sec. 102, comment k (1987). The case was brought by Nicaragua in an attempt to require the US to desist from attempting to overthrow the Sandinista government through sponsorship of terrorist attacks against the Nicaraguan population. The US responded by withdrawing its recognition of the jurisdiction of the Court and ignoring its judgment; it also vetoed a Security Council resolution that would otherwise have passed, calling on it to comply with the judgment of the Court.

²⁸ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), 5.

²⁹ M. Byers, *Custom, Power and the Power of Rules* (1999), 162.

³⁰ *Barcelona Traction, Light and Power Co. Ltd (Belgium v Spain)* 1970 ICJ Repts 1, 33.

³¹ Article 31 of the Vienna Convention of the Law of Treaties.

³² Delegate of the United States to the San Francisco Conference, 6 UNCIO 334-5 (Summary of Eleventh Report of Committee I/1, 4 June 1945).

³³ 6 UNCIO 400 (Report of Rapporteur of Committee 1 to Commission I, 9 June 1945).

³⁴ Oscar Schacter, "The Legality of Pro-Democratic Invasion," *American Journal of International Law* 78 (1984): 645, 649; Rudolf Bernhardt, *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 1995), vol. 2, 927.

³⁵ Lassa Francis Lawrence Oppenheim, *International Law*, ed. Hersch Lauterpacht, 7e (London: Longman, 1952), vol. 2, 154; see also *Declaration on Friendly Relations*, GA Res 2625(xxv) (1970) (adopted unanimously). The *Friendly Relations Declaration* is considered a codification of customary international law: see *Nicaragua v US* [1986] ICJ Rep 1.

³⁶ Letter from US Secretary of State Daniel Webster to Lord Ashburton, 6 August 1842, quoted in Moore, *A Digest of International Law*, vol. II (1906), 412; *Nicaragua*, ICJ Reports (1986), 14, 94, and 103; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), para. 41.

³⁷ Cassese, *International Law in a Divided World*, 230.

³⁸ H. Waldock, "Regulation of the Use of Force by Individual States in International Law," Hague *Recueil* 81 (1952II), 495ff; D. Bowett, *Self-Defence in International Law* (Manchester, 1958), 187ff; S. Schwebel, "Aggression, Intervention, and Self-Defence in Modern International Law," Hague *Recueil* 136 (1972II) 479ff; for a discussion of these arguments, see T. McCormack, *Self-Defence in International Law* (Hebrew University, 1989).

³⁹ M. Lachs, "The Development of General Trends of International Law in Our Time," Hague *Recueil* 169 (1980IV), 163 (Lachs was President of the International Court of Justice).

⁴⁰ Cassese, *International Law in a Divided World*, 233.

⁴¹ Samuel Pufendorf, *The Law of Nature and Nations*, tr. Basil Kennet, 5e (1749), bk. 8, 847.

⁴² Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'," *American Journal of International Law* 93 (1999): 824, 825.

⁴³ *UN Charter*, Art. 2(3).

⁴⁴ SC Res 678 (1990) operative para. 2.

⁴⁵ SC Res 660 (1990), preambular para. 2, operative para. 2.

⁴⁶ SC Res 687 (1991), operative paras. 8-14.

⁴⁷ SC Res 686, operative para. 4. The conditions were: recission of the purported annexation of Kuwait; acceptance of liability for damages suffered by Kuwait and third states; release of all prisoners; return of Kuwaiti property; cease hostile or provocative acts; and provide information on mines and chemical and biological weapons in Kuwait and areas of Iraq temporarily occupied by allied forces pursuant to SC Res 678 (operative paras. 2-3).

⁴⁸ See S/PV.2981 (1991) 78 (India), 101 (USSR), 113 (UK).

⁴⁹ S/PV.2978 (1991) 51 (China), 76 (India). Moreover, in the post-Charter context, there is no basis for the view that a violation of an armistice agreement (not amounting to an armed attack giving rise to a right of self-defence) can be a ground for the other party to revive hostilities. David Morris, "From War to Peace: A Study of Cease-fire Agreements and the Evolving Role of the United Nations," *Virginia Journal of International Law* 36 (1996): 802, 822-23.

⁵⁰ Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime," *American Journal of International Law* 93 (1999): 124.

⁵¹ Assistant Secretary of State John Kelley and Assistant Secretary of Defence Henry Rowen, Europe and Middle East Subcommittee of the House Committee on Foreign Affairs, Federal News Service, 26 June 1991.

⁵² UN Doc. S/PV.2963 at 82 (Hurd), 94-5 (Shevardnadze).

⁵³ See statements of UK, USSR, Australian, and Malaysian delegates, reprinted in Marc Weller, ed., *Iraq and Kuwait: The Hostilities and their Aftermath* (1993), 39-55.

⁵⁴ 3955th meeting of the Security Council, cited in Christine Gray, "From Unity to Polarization: International Law and the Use of Force against Iraq," *European Journal of International Law* 13 (2002): 1.

⁵⁵ T. Franck, "Legal Authority for the Possible Use of Force Against Iraq," ASIL Proceedings (1998), 139.

⁵⁶ SC Res 1441 (2002).

⁵⁷ S/PV.4644, 1-13.

⁵⁸ Letter dated 8 November 2002 from the representatives of China, France, and the Russian Federation to the United Nations, addressed to the President of the Security Council, S/2002/1236.

⁵⁹ Richard Falk, "The United Nations and the Rule of Law," *Transnational Law and Contemporary Problems* 4 (1994): 611, 628.

⁶⁰ Resolution on the Definition of Aggression, GA Res 3314, 14 December 1974, UN Doc. A/9615 (1974), Art 1, 3 (adopted by consensus); see generally K Kittichaisaree, *International Criminal Law* (2001) Ch 7.

⁶¹ 6 FRD 69, 109. It is noteworthy that during the Security Council debate (open to Security Council members as well as non-members) convened on 26 and 27 March, the "overwhelming majority" of states condemned the US attack as illegal and called on the Security Council to "end the illegal aggression" UN Press Release SC/7705, 4726th meeting, 26 March 2003.

⁶² See, e.g., the statement of Ari Fleischer, 11 March 2003: "If the United Nations fails to act, that means that the United Nations will not be the international body that disarms Saddam Hussein. Another international body will disarm Saddam Hussein. There are many ways to form international coalitions. The United Nations Security Council is but one of them." Cited in "U.S. Says U.N. Could Repeat Errors of 90s," *New York Times*, 11 March 2003, A1. This approach is not entirely new. It was much in evidence during the Kosovo intervention, and the subsequent redrafting of NATO's strategic concept, when high-level United States officials insisted that "[w]e should avoid language in the Concept which would require NATO to have a UN or other mandate" (William Cohen, then Secretary of Defense) and that the strategic concept "does not suggest that NATO must have permission from the United Nations or any other outside body before it can act" (Walter Slocombe, then Under Secretary of Defense for Policy). John Borawski and Thomas-Durrell Young, *NATO after 2000: The Future of the Euro-Atlantic Alliance* (Westport, CN: Praeger, 2001), 48-49.

⁶³ Mark Blitz, "Government Practice and the School of Strauss" in K Deutsch and J Murley, eds., *Leo Strauss, the Straussians and the American Regime* (Lanham, MD: Rowman & Littlefield, 1999), 440 (the author was a director of USIA under Reagan).

⁶⁴ Dean Acheson, cited in *New York Times*, 10 December 1964.

⁶⁵ Cited in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge & New York: Cambridge University Press, 2002), 414.

⁶⁶ Wolfgang Friedmann, "United States Policy and the Crisis of International Law: Some Reflections on the State of International Law in 'International Co-operation Year'," *American Journal of International Law* 59 (1965): 868, cited in *ibid.*, 414. In fact, as has been noted by scholars of Schmitt, the idea of *Grossraumordnung* was inspired by the Monroe doctrine and the concept of single-power supremacy in a given hemisphere: see Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London & New York: Verso, 2000), 235; Jean-François Kervégan, "Carl Schmitt and World Unity" in Chantal Mouffe, ed., *The Challenge of Carl Schmitt* (London & New York: Verso, 1999), 54, 62-3.

⁶⁷ Richard Perle, "Thank God for the death of the UN," *The Guardian*, 21 March 2003.

⁶⁸ Heidegger, cited in Noam Chomsky, *American Power and the New Mandarins* (New York: Vintage, 1969), 287n59.

⁶⁹ Elliott and Carney.

⁷⁰ See Susan B. Sewall (former Assistant Secretary of Defence for Peacekeeping operations), "Multilateral Peace Operations" in S. Patrick and S. Forman, eds, *Multilateralism and U.S. Foreign Policy* (Boulder: Lynne Rienner, 2002), 191-224; Barbara Crossette (New York Times UN bureau chief, 1994-2001), "Killing One's Progeny," *World Policy Journal* 19 (2002): 55.

⁷¹ Michael Klare, *Rogue States and Nuclear Outlaws* (New York: Hill & Wang, 1995), 97-129; Lorna Jaffe, *The Development of the Base Force 1989-1992*, Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, July 1993.

⁷² Lt. Gen. Patrick Hughes, "Global Threats and Challenges," statement to the Senate Armed Services Committee, 2 February 1999, Federal News Service.

⁷³ US Department of Defence, Annual Report, 1999, 17. In the aftermath of September 11, US troops are forwardly deployed in over ??? countries around the world, indicating that global reach has become a reality. W. Hartung, F. Berrigan, and M. Ciarrocca, "Operation Endless Deployment," *The Nation*, 21 October 2002.

⁷⁴ "Defence Planning Guide," excerpts available at www.pbs.org/wgbh/frontline/shows/iraq/etc/wolf.html. At the time, Libby and Khalilzad were aides to the Defense Secretary Dick Cheney. Libby is currently Vice President Cheney's Chief of Staff and Khalilzad is the administration's envoy on Iraq. Steven Weisman, "Pre-emption: Idea with a lineage whose time has come," *The New York Times*, 23 March 2003, B1.

⁷⁵ Interview with Barton Gellman of the *Washington Post*, 29 January 2003.

⁷⁶ Fort McNair, Washington DC, 31 January 2002.

⁷⁷ W. Pincus, "Low-yield nuclear arms plan revived," *The Guardian Weekly*, February 27-March 5, 2003, 32. The other situations referred to in the document are: to respond to an attack (not necessarily on the US or its allies) with non-conventional weapons, and, mysteriously, "in the case of surprising military developments." The famous Doomsday Clock of the Bulletin of Atomic Scientists – which marks the proximity to a war in which nuclear weapons are used – has crept from 17 minutes to midnight in the 1990s to 7 minutes to midnight.

⁷⁸ Department of Defense, *Quadrennial Defense Review*, 30 September 2001, 2, 30, 62.

⁷⁹ Richard K. Betts, *Surprise Attack: Lessons for Defense Planning* (Washington DC: Brookings, 1982) 14, 43. The concern that anything may become an interest, and everything a threat, is heightened when one considers that those in now powerful positions in the White House were the masters of "threat inflation" in the late 1970s and early 1980s. See Philip S. Golub, "United States: Inventing Demons," *Le Monde Diplomatique*, March 2003.

⁸⁰ Joseph Schumpeter, *Imperialism and Social Classes*, ed. Paul Sweezy (New York : A.M. Kelley, 1951), 66. The rehabilitation of the notion of imperialism among conservatives and liberals (such as Ignatieff) in the US has been remarked upon in Philip S. Golub, "Westward the Course of Empire," *Le Monde Diplomatique*, September 2002, and John Bellamy Foster, "The Rediscovery of Imperialism," *Monthly Review* (November 2002): 1.

None of this is to suggest that US military dominance will *actually result* in a new hegemony in Gramsci's sense. It is equally plausible to read current doctrines as a futile nostalgia for a Pax Americana that dissolved with the 1973 Nixon Shocks, and the collapse of important client states in the 1970s (Iran, Nicaragua, Vietnam). Cyrus Bina, talk at the New School, 11 April 2003.

⁸¹ Michael Klare, "United States: Energy and Strategy," *Le Monde Diplomatique*, November 2002.

⁸² Interview with Barton Gellman of the *Washington Post*, 29 January 2003.

⁸³ David Sanger, "Viewing the War as a Lesson to the World," *The New York Times*, 6 April 2003.

⁸⁴ Interview with Barton Gellman of the *Washington Post*, 29 January 2003.

⁸⁵ Cited in Stanley Kober, "Setting Dangerous International Precedents" in Ted Carpenter, ed., *NATO's Empty Victory: A Postmortem on the Balkan War* (Washington DC: Cato, 2000), 107, 115-16.

⁸⁶ Letter from H.E. Pak Gil Yon, Permanent Representative of the Democratic People's Republic of Korea ('DPRK') to the United Nations, to H.E. Adolfo Aguilar Zinser, Permanent Representative of the United Mexican States to the United Nations and President of the Security Council, dated 6 April 2003 and enclosing a statement of the Ministry of Foreign Affairs of the DPRK.

⁸⁷ Michael Glennon, "The New Interventionism: The Search for a Just International Law," *Foreign Affairs* 78, no. 3 (1999): 2.

⁸⁸ This seems to be the implication of Anne-Marie Slaughter's op-ed in the *New York Times* on the eve of the war, Anne-Maire Slaughter, "Good Reasons for Going Around the U.N.," *The New York Times*, 18 March 2003. Slaughter is currently President of the American Society of International Law.

⁸⁹ Consider the cases of Cuba, the Philippines, Haiti (more than once), Iran, Guatemala, Dominican Republic, Nicaragua, Indonesia, Chile, Zaire, and Panama.

⁹⁰ See Andrew Arato, "The Occupation of Iraq and the Difficult Transition from Dictatorship" in this issue.

⁹¹ Koskenniemi, *The Gentle Civilizer of Nations*, 496-509.

⁹² *Ibid.*, 503. It is noteworthy that the intellectual father of American realism in international relations, Hans Morgenthau, would have been unsympathetic to the contention that law should simply accommodate American dominance. He was critical of a legal order "appropriate to the globalism of American foreign policy" because it would negate an essential condition for a relatively stable and peaceful world order – a pluralistic, relativistic conception of the state system in which each state exercises power within certain limits. See Hans Morgenthau, "Emergent Problems of United States Foreign Policy" in Karl Deutsch and Stanley Hoffman, eds., *The Relevance of International Law: Essays in Honor of Leo Gross* (Cambridge MA: Schenkman, 1968), 55.