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International Law and the 2003 Campaign against Iraq

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Introduction

When, on September 12, 2002, President George W. Bush called on the UN Security Council to enforce its binding resolutions on Iraq and indicated that the United States was willing to enforce them alone if need be,[2] one of the questions he put before the world had periodically come up in the preceding decade: was it lawful for a State or group of States to enforce the Security Council resolutions on Iraq without specific Security Council authorization in each case? Or, to put it another way, "who decides?"[3] The previous occasions when this question was raised involved the enforcement in the 1990s of the No-fly Zones by the United States, Britain, and, for part of the time, France or larger scale attacks on Iraqi military targets as in December 1998.[4] However one frames this constitutive question, in each case the answer is that those members of the Security Council decided.

Of course, actions are taken in context, and the lawfulness of an action cannot be assessed without examining its context. The circumstances of the speech, a year after the terrorist attacks of September 11, 2001, lent special urgency to the President's call. The effort by Iraq to mount terrorist attacks against the international coalition formed in response to the 1990 invasion of Kuwait, Iraqi support for Palestinian terrorist attacks against Israel, Saddam Hussein's applause for the September 11 attacks themselves, and Iraq's repeated efforts to obtain and then maintain

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

nuclear, chemical, and biological weapons programs and capabilities while defying obligations stemming from the 1991 Gulf War formed the political and legal environment of the 2003 military action.

On September 12, 2002, President Bush summarized the principal UN Security Council resolutions binding on Iraq and Iraq's failure to comply with them. He said "[t]he conduct of the Iraqi regime is a threat to the authority of the United Nations and a threat to peace. . . . Are Security Council resolutions to be honored and enforced or cast aside without consequence?"[5] He added that the United States had the right and indeed the obligation to enforce the law against Iraq and called on UN Member States to join in doing so.[6]

The US view of international law applicable to the Iraq case did not and does not now enjoy unanimous support. For example, Professor Thomas Franck argues that, in 2003, the United States, Britain, Australia, and others engaged in a use of force against Iraq not sanctioned under the UN Charter.[7] He disputes the idea that the campaign was a lawful exercise of the international use of force under existing UN Security Council resolutions and general principles of international law. In fact, the arguments Professor Franck disagrees with have merit and deserve elaboration before the invisible college of international lawyers renders its judgment.[8]

The Legal Basis for the 2003 Campaign against Saddam Hussein

The argument for the lawfulness of the 2003 campaign against Saddam Hussein's government of Iraq is rooted in the Persian Gulf situation after August 2, 1990. The argument concludes that, first, UN Security Council resolutions and statements from 1990 through 2002 provided legal authority for the 2003 campaign and demonstrated that, as a legal matter, the 1991 Gulf War had not ended, and, second, that, in any event, Iraq's material breaches of the 1991 cease-fire, which the Security Council repeatedly recognized as such, kept alive, if it were necessary to do so, the Security Council's 1990 authorization to use force to uphold and implement subsequent resolutions and restore regional peace and security. The terrorist attacks of September 11, 2001, transformed the context and analysis of Iraqi behavior and ended more than a decade's tolerance of Iraq's refusal to fulfill its obligations to the UN Security Council.[9]

UN Security Council Resolutions and Council Presidential Statements created the UN-based legal framework for the 2003 campaign.[10] Resolution 1441, which the Security Council adopted unanimously on November 8, 2002, recognized "the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security."[11] The operative section of Resolution 1441 commences with the finding

that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991)."[12] These words refer to the beginning of the 1990 Gulf Crisis, when Iraq invaded and purported to annex Kuwait, and acknowledge that the conflict thus begun had remained unresolved. They therefore put under the lens both the UN Security Council authorization to use force against Iraq because of the invasion of Kuwait and the resolution setting forth the terms for ending that conflict and authorization.

Material Breach of UN Security Council Resolution 687 (1991)

The Security Council was the forum through which the collective defense of Kuwait was managed in 1990.[13] On August 2, 1990, the Council condemned Iraq's invasion of Kuwait of the same day.[14] The Security Council then affirmed the right of collective self-defense in response to the invasion,[15] imposed an economic embargo,[16] authorized the ongoing maritime enforcement of the embargo,[17] carved out humanitarian exceptions to the embargo,[18] warned Iraq about the consequences of illegal hostage-taking,[19] and addressed other specific issues that arose during the first four months following the invasion.[20]

On November 29, 1990, the Security Council adopted Resolution 678 authorizing the use of force and giving Saddam Hussein until January 15, 1991, to fulfill his government's obligations to implement pre-existing Security Council resolutions beginning with Resolution 660, which had condemned the invasion and demanded an immediate, unconditional Iraqi withdrawal from Kuwait.[21] In the absence of Iraqi compliance with this ultimatum, the Resolution authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement Resolution 660 (1990) *and all subsequent relevant resolutions and to restore international peace and security in the area*."[22] Operation Desert Storm—the 1991 Gulf War to eject Iraq from Kuwait—began on January 16, 1991, by decision of the US-led Coalition, not of the Security Council, and ended with a cease-fire, also by decision of the US-led Coalition, which the Security Council subsequently endorsed as a "suspension of offensive combat operations" on March 2, 1991.[23] Then, on April 3, 1991, the Council adopted Resolution 687, codifying that cease-fire and imposing additional obligations on Iraq, "bearing in mind" the goal of securing international peace and security in the area.[24] In order to obtain a cease-fire, Iraq formally accepted the terms of Resolution 687 by letter dated April 6, 1991.[25]

Resolution 687 set forth the conditions for fulfilling the terms of Resolution 678 but did not rescind or provide for its termination. Since adopting Resolution 687 on April 3, 1991, the Security Council never found that Iraq has met its obligations thereunder or that Resolution 678, including its authorization to use force "to uphold and implement Resolution 660 (1990) and all subsequent relevant

resolutions," was no longer in effect or even that the war commenced by Iraq's invasion of Kuwait in August 1990 had ended. Indeed, UN Secretary-General Boutros Boutros-Ghali's introduction to the UN publication of documents on the Iraq-Kuwait conflict, 1990–96, states that, notwithstanding the adoption of Resolution 687, "enforcement measures remained in effect, including the sanctions regime and the Council's authorization to Member States to use 'all necessary means' to uphold Iraqi compliance."[26] As shown by the series of resolutions in 1990, which tried to manage the Iraq-Kuwait crisis, the Security Council is capable of taking decisions about mandates.

From 1991 onwards, the Security Council repeatedly concluded that Iraq's actions failed to correspond to Iraq's obligations. Iraq's refusal to implement Resolution 687, apparent within one month of the Resolution's adoption, caused the Security Council to find that Iraq was in "material breach" of the Resolution—that is, of the conditions for the 1991 cease-fire.[27] The term "material breach" was derived from the 1961 Vienna Convention on the Law of Treaties: [28] a material breach is a repudiation of the agreement or a violation of a provision or term essential to the accomplishment of the object or purpose of the agreement. Material breach of an international agreement by one of the parties entitles the other to invoke the breach as a ground for terminating or suspending the agreement in whole or in part.[29] In the circumstances of Iraq's failure to fulfill essential terms of the cease-fire agreement by submitting inaccurate and incomplete declarations of its holdings of prohibited weapons, weapons systems, and support structures, concealment of prohibited weapons and weapons programs, and obstruction of the inspection regime designed to monitor and verify Iraqi compliance with Resolution 687,[30] the United States and the United Kingdom and others, including Secretary-General Boutros-Ghali understood the finding of material breach to mean that the use of force was again permitted to compel Iraq to comply with its obligations or, as Boutros-Ghali wrote in 1996, "to uphold Iraqi compliance."[31] Iraq's failure to comply with core paragraphs of Resolution 687 violated the cease-fire and justified, as a matter of law, the resumption by the United States and its coalition partners of the use of force authorized under Resolution 678.[32]

Resolution 1441's use of the words "material breach" to characterize Iraq's repeated failures over more than a decade to implement the 1991 cease-fire agreement was the ninth such Security Council finding since the end of the Gulf War.[33] In addition, the Security Council also repeatedly found that Iraq was not complying with its obligations more generally. From 1991 to the end of 2002, the Council concluded three times that Iraq was in "flagrant violation" of its obligations,[34] 12 times that Iraq was not complying,[35] once that Iraq was in "clear-cut defiance" of its obligations,[36] three times that Iraq had committed a "clear violation,"[37] twice

that its violations were "clear and flagrant,"[38] and once that Iraq was in "gross violation" of Resolution 687.[39] In addition, from the cease-fire of 1991 through the adoption of Resolution 1441 in November 2002, the Security Council threatened Iraq with "serious consequences" 12 times as a result of its persistent non-compliance with essential terms of Resolution 687.[40] The different formulations used in the 1990s reflected the widening fissures among the Permanent Members of the Security Council with regard to Iraq.

While some, including Professor Franck, have argued that only the Security Council ought to determine when, after the cease-fire of 1991, it is permitted to invoke the authorization of Resolution 678 (1990),[41] the United States and others[42] have never shared that opinion. The United States consistently has argued that Resolution 678 remained in effect until the Security Council specifically rescinded it, that its reference to "all subsequent relevant resolutions" includes Security Council resolutions adopted subsequent to Resolution 678, and that no subsequent Security Council authorization was needed before the United States and others lawfully could use force against Iraq to compel compliance with Security Council resolutions, including Resolution 687, which codified the cease-fire.[43] The Security Council had neither included an expiration date for the authorization to use force in Resolution 678 nor provided for the termination of such authorization on Iraqi acceptance of Resolution 687 or for some other reason.[44] While Resolution 678 contained no time limit, succeeding resolutions, including 1441, contained no termination of the authorization to use force that was granted in previous Security Council resolutions. Whether they liked it or not, Security Council members understood that the United States, the United Kingdom, France for a time, and others would treat Resolution 678 as providing continuing authority. Indeed, although they justified the maintenance of No-fly Zones with reference to Security Council Resolution 688, the United States, the United Kingdom, and, during the period it participated in enforcing the No-fly Zones, France used their patrolling aircraft to keep pressure on Iraq to comply with Resolution 687.[45] In so doing, they arguably were acting on the continued authority of Resolution 678.

The British view, authoritatively expounded by the Attorney General, Lord Goldsmith, on March 17, 2003, stressed the significance of the finding of ongoing material breach by Iraq in Resolution 1441. Lord Goldsmith concluded that Security Council Resolution 687:

> [S]uspended but did not terminate the authority to use force under resolution 678. A material breach of resolution 687 revives the authority to use force under resolution 678. In resolution 1441 the Security Council determined that Iraq has been and

> remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution.[46]

Russia's then-UN Permanent Representative Ambassador Sergei Lavrov made one of the most comprehensive statements against the US and British view in December 1998, during Operation Desert Fox undertaken by the United States and United Kingdom.[47] Lavrov argued that the Security Council, which was "actively seized" of the matter:

> alone has the right to determine what steps should be taken in order to maintain or restore international peace and security. We reject outright the attempts made in the letters from the United States and the United Kingdom[48] to justify the use of force on the basis of a mandate that was previously issued by the Security Council. The resolutions of the Security Council provide no grounds whatsoever for such actions.[49]

He came back to these arguments in 2002, using the word "automaticity" as representing the view he opposed.[50]

Iraq's "Final Opportunity"

The second part of Resolution 1441 allowed Iraq a "final opportunity" to come into compliance with its obligations under Resolution 687, thus eliminating its material breach. In the words of the French Permanent Representative, Ambassador Jean-David Levitte, Resolution 1441 created a "last opportunity" "to avoid confrontation."[51] To ensure compliance, the Security Council established what was called in the negotiations "an enhanced inspection regime" of the UN Monitoring, Inspection and Verification Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA). "Enhanced inspection regime" meant that the Security Council had given UNMOVIC and the IAEA clearer, broader, and stronger instructions and powers than ever before.[52]

Resolution 1441 required that Iraq make a new declaration of all its weapons of mass destruction and associated agents and materials and support, research, development, and manufacturing facilities and structures. Iraqi material misstatements and/or omissions in this declaration *and* "failure to cooperate fully in the implementation shall constitute a further material breach and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below."[53] When Iraq submitted its declaration under this Resolution no Security Council Member or UNMOVIC or IAEA official defended it as complete within the meaning of the Resolution.[54] Indeed, they found material omissions.[55] The preliminary results of the post-war survey of evidence of Iraq's programs to develop weapons of mass destruction and their delivery

systems further illuminate the inadequacies of the December 2002 declaration; the final report confirmed this conclusion.[56]

Omissions and false statements in the declaration were not enough in the language of Resolution 1441 to constitute the "further material breach" defined in Resolution 1441. The second of the two requirements was "failure to cooperate fully in the implementation" of the Resolution. Iraq's derelictions in both respects were evident to the Council and reported by UNMOVIC and the IAEA.[57]

The rest of Resolution 1441—the part that would determine what came next—reflected a compromise between those governments that did not want to require a second Security Council decision with respect to the use of force and those that did.[58] The result was agreement to meet "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."[59] Finally, Resolution 1441 ended by reminding Iraq that the Security Council had repeatedly warned that continued violations of its obligations would have "serious consequences." In the circumstances of Iraq's failure to fulfill essential terms of the cease-fire agreement, the finding of material breach, and the threat that serious consequences would follow non-compliance with Resolution 1441, everyone understood that the United States, Britain, and others were contemplating the use of force to compel Iraq to comply with its obligations if Iraq failed to fulfill them in response to Resolution 1441 although the Security Council was not unanimous on the legal interpretation of existing resolutions.[60] Nothing in Resolution 1441 required the Council to adopt another resolution as a prerequisite for military operations. And, between November 8, 2002, and March 19, 2003, when the United States and the United Kingdom launched their campaign against Saddam Hussein, the Security Council met some 47 times in public and in informal consultations considering the situation. The terms of Resolution 1441 therefore were met and the 2003 campaign against Iraq was lawful in accordance with UN Security Council resolutions and actions on Iraq after Operation Desert Storm in 1991.[61]

The Context: The Terrorist Attacks of September 11, 2001

Iraq's attack on Kuwait in 1990 thus launched the train of events leading to the 2003 campaign. Iraq's unwillingness to accept the outcome of Operation Desert Storm and comply with Security Council Resolution 687 meant that Iraq remained a threat to international peace and security after the 1991 Gulf War. Throughout the 1990s, the Iraq question stayed on the UN Security Council agenda, and UN Security Council sanctions against Iraq, imposed in the wake of the 1990 invasion of Kuwait, remained in place. The Security Council monitored application of the

sanctions, and the UN bureaucracy supervised Iraqi sales of oil and importation of goods, including foodstuffs and medicines.[62] Iraq was contained militarily and prevented from attacking the Kurds in the north and the Shia in the south by the American, British, and, for part of the time, French enforcement of the Northern and Southern No-fly Zones, beginning in 1991. UN inspections of Iraq's weapons programs had depended in substantial part on intelligence and defector reports, not on Iraqi cooperation and inspectors' skills, however great, for success.[63] Early in 2003, the United States, the United Kingdom, Spain, and others on the Security Council—perhaps more than the nine needed to adopt a resolution absent a veto—concluded that every effort to obtain the compliance of Saddam Hussein's government with Security Council resolutions stipulating the conditions for ending the 1990 Gulf conflict had failed. Why, if Saddam's Iraq was contained and watched and the economy supervised, did the United States and Great Britain decide to launch the campaign that removed Saddam Hussein from power in 2003?

The answer, as President Bush said on March 6, 2003, lay in the impact of the terrorist attacks on September 11, 2001. The repeated failure by Saddam Hussein's Iraq throughout the 1990's to comply with Resolution 687, and the repeated failure within the Security Council to agree about what to do in response, was no longer tolerable for the United States, the United Kingdom, Spain, and others. "September 11th changed the strategic thinking, at least as far as I was concerned, for how to protect our country," President Bush said. "It used to be that we could think that you could contain a person like Saddam Hussein, that oceans would protect us from his type of terror."[64] Saddam Hussein's statements about the September 11 attacks could give no assurance about his attitude,[65] and his record of continued material breach of Security Council Resolution 687, despite economic sanctions, diplomacy, low intensity military pressure, and repeated Security Council demands, combined to support the view that there would never be voluntary Iraqi compliance with Resolution 1441 and that changing the regime by force was proportional and lawful and, after September 11, 2001, necessary.

All Security Council member governments believed that Saddam Hussein's Iraq had not complied with Resolution 687 and at least had programs to develop or obtain nuclear, biological, or chemical weapons of mass destruction, even if some of them questioned whether Iraq actually possessed such weapons at that moment.[66] In this connection, one should weigh the assessment of Rolf Ekeus, the first head of the UN inspection effort in Iraq, and, in the view of a former British Ambassador to the United Nations, "the most-clear sighted and by far the most successful" of them:[67]

> [Iraq's policy since 1991 was not to produce warfare agents, but rather to concentrate on design and engineering] with the purpose of activating production and shipping of

> agents and munitions directly to the battlefield in the event of war. Many hundreds of chemical engineers and production and process engineers worked to develop nerve agents, especially VX, with the primary task being to stabilize the warfare agents in order to optimize facilities and activities, e.g., for agricultural purposes, where batches of nerve agents could be produced during short interruptions of the production of ordinary chemicals. This combination of researchers, engineers, know-how, precursors, batch production techniques and testing is what constituted Iraq's chemical threat—its chemical weapon. The rather bizarre political focus on the search for rusting drums and pieces of munitions containing low-quality chemicals has tended to distort the important question of WMD in Iraq and exposed the American and British administrations to unjustified criticism. The real chemical warfare threat from Iraq has had two components. One has been the capability to bring potent chemical agents to the battlefield to be used against a poorly equipped and poorly trained enemy. The other is the chance that Iraqi chemical weapons specialists would sign up with terrorist networks such as al Qaeda—with which they are likely to have far more affinity than do the unemployed Russian scientists the United States worries about. . . . While biological weapons are not easily adapted for battlefield use, they are potentially the more devastating as a means for massive terrorist onslaught on civilian targets. As with chemical weapons, Iraq's policy on biological weapons was to develop and improve the quality of the warfare agents. It is possible that Iraq, in spite of its denials, retained some anthrax in storage. But it could be more problematic and dangerous if Iraq secretly maintained a research and development capability, as well as a production capability, run by the biologists involved in its earlier programs. Again, such a complete program would in itself constitute a more important biological weapon than some stored agents of doubtful quality. It is understandable that the U.N. inspectors and even more, the military search teams, have had difficulty penetrating the sophisticated, well-rehearsed and protected WMD program in Iraq. . . . The Iraqi nuclear projects lacked access to fissile material but were advanced with regard to weapon design. . . . This is enough to justify the international military intervention undertaken by the United States and Britain. To accept the alternative—letting Hussein remain in power—would have been to tolerate a continuing destabilizing arms race in the Gulf, including future nuclearization of the region, threats to the world's energy supplies, leakage of WMD technology and expertise to terrorist networks, systematic sabotage of efforts to create and sustain a process of peace between the Israelis and the Palestinians and the continued terrorizing of the Iraqi people.[68]

The Iraq Survey Group responsible for searching for prohibited Iraqi weapons and weapons programs in the wake of the 2003 Iraq campaign confirmed the existence of such programs.[69]

Security Council unity about Iraq's ambitions did not extend to wanting to join a use of force to obtain compliance and bring an end to the programs—that is, to overthrow Saddam Hussein's regime. Therefore, the Council's unanimity in adopting Resolution 1441 expressed more solidarity than existed, as, for example, the French and Russian statements explaining their votes made clear and the

French-Russian-Chinese Joint Statement of November 8, 2002, reinforced.[70] Security Council members, Secretariat officials, and others agreed that the build-up of US military forces in Kuwait had persuaded Saddam Hussein to cooperate to the degree he did with UNMOVIC and the IAEA, but they did not agree that time had run-out for non-military solutions to the threat posed by Iraq.[71] For example, Russia's Permanent Representative pulled back from the dire message of Resolution 1441:

> Implementation of the resolution [1441] will require goodwill on the part of all those involved in the process of seeking a settlement of the Iraq question. They must have the willingness to concentrate on moving forward towards the declared common goals, not yielding to the temptation of unilateral interpretation of the resolution's provisions and preserving the consensus and unity of all members of the Security Council.[72]

France's Ambassador Levitte said that "the Security Council would maintain control of the process."[73] He did not acknowledge that any one besides the heads of UNMOVIC or the IAEA might report to the Security Council on Iraqi compliance with Resolution 1441. The fact that Resolution 1441 contemplated reports from sources other than the IAEA or UNMOVIC ought not to have needed saying but did because Ambassador Levitte only referred to reports from those sources as causing the Security Council to meet. Some commentators have seen economic motives behind Russian and French Iraq policies throughout the 1990s: "By 2000, Iraq's trade was worth roughly $17 billion, and other countries were determined to get a piece of it. Iraq carefully awarded contracts to those who echoed its propaganda and voted its way in the Security Council."[74] Perhaps more importantly, Abassador Lavrov's and Ambassador Levitte's statements revealed again the divergence of perspectives about international threats in the wake of the terrorist attacks of September 11, 2001.[75]

The importance of those attacks for the United States cannot be exaggerated. They have exerted hydraulic pressure on US officials, sending them to bed each night worried that they have again failed to understand bits and pieces of intelligence about terrorist plots, and causing them to look out on the world through a prism formed by the September 11 attacks. Thus, acceptance of Iraq's unwillingness to abide by the result of the 1991 Gulf War no longer appeared to be a sensible policy option.

Conclusion

The legal foundation for the 2003 campaign against Iraq is not the less important for being well known. The aspiration that international society operate according

to law is inseparable from the aspiration for international peace. On September 24, 2003, Security Council members joined in emphasizing this point.[76] While there have been periods of peace, enforced by a balance of power, these periods historically have ended in great wars. Whether an international system of independent States, even one that includes international institutions to which States delegate important powers, can live according to law and even whether that law can be enforced so as to strengthen peace within the international society, is a question whose answer we are still fashioning.

One of the most important and therefore one of the most controversial elements of the 2003 campaign against Iraq involved enforcement of international law by a group of States motivated by the attacks of September 11, 2001, without being able to prove a connection between Iraq and those attacks. Unlike the Afghanistan campaign, which was directed against the apparent source of those attacks, the Iraq campaign involved a response to a previously defined but ongoing threat, which acquired new seriousness as a result the terrorist attacks. Security Council actions on Iraq, including the authorization to use force and the repeated findings of Iraq's failure to carry out its cease-fire obligations, raised the stakes for all States, especially after September 11, 2001, because of the Council's primary responsibility for the maintenance of international peace and security. Those same actions created a compelling legal foundation for the 2003 campaign. Critics may choose to ignore it. They cannot rebut it.

Notes

1. Professor Nicholas Rostow is General Counsel, US Mission to the United Nations. He is a former Charles H. Stockton Professor of International Law at the Naval War College. The views expressed are those of the author and do not necessarily represent the views of the Department of State or the United States. A version of this paper appeared in the 2004 Israel Yearbook on Human Rights as "Determining the lawfulness of the 2003 Campaign against Iraq."
2. UN Doc. A/57/PV.2 6–9 (Sept. 12, 2003).
3. See the symposium on this question in 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY (1995), including Nicholas Rostow, "*Who Decides" and World Public Order,* at 577–83.
4. *See* text, *infra* at notes 41–45.
5. *Supra* note 2, at 8. Most of the relevant Security Council resolutions on Iraq represent "decisions" binding under Article 25 of the UN Charter ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.") The use of the word "decides" in Security Council resolutions is significant as a legal matter. British practice is to insist that a paragraph in a resolution is binding on States as a matter of law only if the preamble states that the Council is determining that the situation in question is a threat to the peace, breach of the peace, or act of aggression, and that the Council is acting under Chapter VII of the UN Charter. Other Permanent Members have gone along with the British in

this connection although their prior practice indicates tolerance of less formality than is characteristic nowadays. Whether formalists or not, all other Permanent Members agree that the word "decides" creates a binding obligation.

6. *Id.*

7. *See* Thomas M. Franck, *Iraq and the Law of Armed Conflict*, which is Chapter II in this volume, at 15. *See also* Thomas M. Franck, *What Happens Now? The United Nations After Iraq,* 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 607 (2003).

8. The Legal Adviser of the US Department of State published the authoritative US Government analysis. *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 557 (2003) (the legality of the use of force against Iraq derives from UN Security Council resolutions). This article appeared with other comments on the lawfulness of the war against Iraq, some of which defend it on different grounds: John Yoo, *International Law and the War in Iraq*, *id.* at 563–76 (the lawfulness of the war derives from UN Security Council resolutions and customary law of self-defense); Richard N. Gardner, *Neither Bush Nor the "Jurisprudes," id.* at 585–90 (the Bush Administration did not need the self-defense rationale because legally sufficient justification lay within UN Security Council Resolutions); and Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, *id.* at 576–85 (the UN Charter system must adapt to changing security concerns). Others reject these arguments: Richard A. Falk, *What Future for the UN Charter System of War Prevention, id.* at 590–98 (the UN Charter system required prior Security Council authorization, and US interests would have been well served by waiting until it was forthcoming); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, *id.* at 599–607 (the 2003 campaign against Iraq was unlawful under the international law of anticipatory self-defense); and Franck, *What Happens Now? The United Nations After Iraq, supra* note 7, at 607–620. Two other authors address related issues: Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 621–28 (2003) (the United States ought to accommodate to others' preferences in order to achieve its own), and Jane Stromseth, *Law and Force After Iraq: A Transitional Moment*, *id.* at 628–42 (UN Charter system not dead). *See also* Carsten Stahn, *Enforcement of the Collective Will After Iraq, id.* at 804 (US-UK action formally breached UN Charter but Charter law intact); Andru E. Wall, *The Legal Case for Invading and Toppling Hussein*, 32 ISRAEL YEAR BOOK ON HUMAN RIGHTS 165 (2002) and Paul Schott Stevens, Andru E. Wall, and Ata Dinlenc, The Just Demands of Peace and Security: International Law and the Case Against Iraq, The Federalist Society for Law & Public Policy Studies (2002); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (1999) (absence of, or ambiguity in connection with, question of Security Council authority). *See also* Prime Minister Blair, The Threat of Global Terrorism, Mar. 5, 2003 ("The lawyers continue to divide over it—with their legal opinions bearing a remarkable similarity to their political view of the war."), *available at* www.ukun.org.

9. A separate argument concerns humanitarian intervention. Some argue that the brutality of the Hussein government, its demonstrated slaughter of thousands—perhaps as many as 300,000 or more (*see, e.g.,* Simon de Bruxelles, *Britons Find Graves of 300,000 Victims,* TIMES (London), June 4, 2003; WILLIAMS SHAWCROSS, ALLIES: THE US, BRITAIN, EUROPE, AND THE WAR IN IRAQ 160–61 (2004))—of Iraqis, including with chemical weapons, itself justified the campaign as a matter of international law. Under this view, States have the right—some would say the duty—to intervene to prevent or stop widespread human rights abuses. Publications of the human rights non-governmental organizations on the widespread and systematic violations of human rights by Saddam Hussein's government provide a basis for considering that humanitarian

intervention was not only justifiable, but also over-due. As Professor Franck does not address this point, I do not pursue it here. In this connection, see Taft & Buchwald, *supra* note 8, at 559; Stevens, Wall, & Dinlenc, *supra* note 8, at 11–12; UK Foreign & Commonwealth Office, Saddam Hussein: Crimes and Human Rights Abuses (November 2002); Thomas L. Friedman, *Presidents Remade by War*, NEW YORK TIMES, Dec. 7, 2003, *available at* www.nytimes.com/2003/12/07/opinion/07FRIE.html. On the arguments for and against humanitarian intervention see, e.g., Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Theodor Meron, *Commentary on Humanitarian Intervention*, *id*. at 212–14; Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, *id*. at 215–23; Louis Henkin, *The Use of Force: Law and US Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37–69 (Louis Henkin et al. eds., 1989); Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in id.* at 19–36; and Falk, *supra* note 8, at 500–98 and citations therein. *See also* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Gareth Evans & Mohamed Sahnoun co-chairs, 2001). The political, legal, and moral issues raised by the idea of humanitarian intervention and the history of external interference in countries to uphold human rights or try to protect individuals or groups against oppression are complex. They involve conflicting policy and emotional impulses. Among the issues are the principle of the sovereign equality and independence of States, the prohibition on the use of force, the German murder of the European Jews in World War II, which frames responses to massive and, particularly, genocidal killings whatever the specifiable international impact, and the difficulty of defining tripwires. The last involves the questions, among others, of how many deaths justify or require intervention and who will bear the burdens and risks of intervention.

10. Security Council Presidential Statements are delivered on behalf of the entire Security Council by the President. They are adopted by consensus, not a vote.

11. UNSCR 1441 (Nov. 8, 2002).

12. *Id.* ¶ 1.

13. *See generally*, Nicholas Rostow, *The International Use of Force after the Cold War,* 32 HARVARD INTERNATIONAL LAW JOURNAL 411 (1991).

14. UNSCR 660 (Aug. 2, 1990).

15. UNSCR 661 (Aug. 6, 1990).

16. *Id.*

17. UNSCR 665 (Aug. 25, 1990). The US Navy's enforcement of the embargo began in the first weeks after the invasion, prior to the adoption of Resolution 665. President George H.W. Bush's letter to the Speaker of the House of Representatives and President pro tempore of the Senate, August 9, 1990, explained the US response to the invasion as "in exercise of our inherent right of individual and collective self-defense." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GEORGE BUSH, Vol. II at 1116 (1991). See also the letter of August 16, 1990 from the US charge d'affaires to the President of the Security Council (S/21537) (US interception of vessels at request of government of Kuwait).

18. UNSCR 666 (Sept. 13, 1990).

19. UNSCR 664 (Aug. 18, 1990).

20. *E.g.*, UNSCR 669 (Sept. 24, 1990) (addressing "increasing number of requests for assistance" under Article 50 of the UN Charter).

21. UNSCR 678 (Nov. 29, 1990).

22. *Id.* ¶ 2 [emphasis added].

23. UNSCR 686 (Mar. 2, 1991), preambular ¶ 5. *See* Taft & Buchwald, *supra* note 8, at 558.

24. UNSCR 687 (Apr. 3, 1991), preambular ¶ 25.
25. Letter dated April 6, 1991 from the Permanent Representative of Iraq to the UN Secretary General and to the President of the Security Council, UN Doc. S/22456 (Apr. 6, 1991). Security Council Resolution 687, paragraph 33, required such notice for a "formal cease-fire" to take effect.
26. Boutros Boutros-Ghali, *Introduction*, *in* UNITED NATIONS BLUE BOOK SERIES, VOLUME IX: THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT, 1990–1996, at 29 (1996). The Secretary-General's view in 1996 was the same as it had been in 1993. See Taft & Buchwald, *supra* note 8, at 559, *quoting* UN Press Release SG/SM/4902/Rev. 1 at 1 (Jan. 15, 1993). ("Q: Do you approve of yesterday's raid against Iraq? The Secretary General: The raid was carried out in accordance with a mandate from the Security Council under resolution 678 (1991 [sic]), and the motive for the raid was Iraq's violation of the resolution, which concerns the cease-fire. As Secretary-General of the United Nations, I can tell you that the action was in accordance with the resolutions of the Security Council and the Charter of the United Nations.")
27. UNSCR 707 (Aug. 15, 1991), preambular ¶¶ 7 and 11 (failure to report weapons and concealment of activities "constitute a material breach of its acceptance of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region." *Id.* at preambular ¶ 11).
28. Convention on the Law of Treaties, Vienna, May 23, 1969, art. 60, 1155 U.N.T.S. 331. Article 60(1): "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." Article 60(2): "A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty." The United States is not a party to this Convention but regards most provisions as generally accurate restatements of the binding customary international law of treaties.
29. *Id.*
30. US Department of State, Historic[al] Review of UNMOVIC's Report of Unresolved Disarmament Issues, Mar. 10, 2003, *available at* www.state.gov/r/pa/prs/ps/2003/18513.htm.
31. Boutros-Ghali, *supra* note 26. In one case, the United States and Britain launched air attacks against Iraq a week after the Security Council found Iraq to be in material breach. *See id.* at 132–33 (Jan. 11 and 18, 1993).
32. *See* Michael J. Matheson, *Legal Authority for the Possible use of Force Against Iraq*, 98 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 136, 142 (1998). An armistice suspends military operation by mutual agreement. A party can resume hostilities if there is a "serious violation" of the armistice. Regulations Annexed to Convention (IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, art. 36, 36 Stat. 2277, 2305. *See* Taft & Buchwald, *supra* note 8, at 559; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 50 (3d ed. 2001) ("A labeling of Resolution 687 as a permanent cease-fire is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement.")
33. UNSCR 707 (Aug. 15, 1991); Security Council Presidential Statements (PRST) UN Doc. S/23609 (Feb. 19, 1992); UN Doc. S/23663 (Feb. 28, 1992); UN Doc. S/23699 (Mar. 11, 1992); UN Doc. S/24240 (July 6, 1992); UN Doc. S/25081 (Jan. 8, 1993); UN Doc. S/25091 (Jan. 11, 1993);

UN Doc. S/25970 (June 18, 1993); and UNSCR 1441 (Nov. 8, 2002). After 1993 and until 2002, the Security Council would not agree to the use of the words "material breach" because Council Members understood them explicitly to justify a use of force, and France and Russia would not concur. As a result, lesser characterizations such as "clear" or "flagrant" "violations" were used. *See, e.g.*, UNSCR 1115 (June 21, 1997).

34. UN Doc. S/22746 (June 28, 1991); UN Doc. S/PRST/1994/58 (June 14, 1996); UNSCR 1134 (Oct. 23, 1997).

35. UN Doc. S/23517 (Feb. 5, 1992); UN Doc. S/23709 (Mar. 12, 1992); UNSCR 778 (Oct. 2, 1992); UN Doc. S/PRST/1994/58 (Oct. 8, 1994); UNSCR 1051 (Mar. 27, 1996); UN Doc. S/PRST/1996/49 (Dec. 30, 1996); UN Doc. S/PRST/1994/33 (June 13, 1997); UNSCR 1137 (Nov. 12, 1997); UN Doc. S/PRST/1997/54 (Dec. 3, 1997); UN Doc. S/1998/820 (Sept. 9, 1998); UNSCR 1284 (Dec. 17, 1999).

36. UN Doc. S/25091 (Jan. 11, 1993).

37. UN Doc. S/PRST/1996/11 (Mar. 19, 1996); UNSCR 1060 (June 12, 1996); UN Doc. S/PRST/1997/56 (Dec. 22, 1997).

38. UN Doc. S/PRST/1994/58 (June 14, 1996); UNSCR 1115 (June 21, 1997).

39. UN Doc. S/PRST/1996/36 (Aug. 23, 1996).

40. UN Doc. S/22746 (June 28, 1991); UN Doc. S/23609 (Feb. 19, 1992); UN Doc. S/23663 (Feb. 28, 1992); UN Doc. S/23803 (Apr. 10, 1992); UN Doc. S/25081 (Jan. 8, 1993); UN Doc. S/25091 (Jan. 11, 1993); UN Doc. S/25970 (June 18, 1993); UN Doc. S/26006 (June 28, 1993); UNSCR 949 (Oct. 15, 1994); UN Doc. S/PRST/1997/49 (Oct. 29, 1997); UN Doc. S/PRST/1997/51 (Nov. 13, 1997); UNSCR 1441 (Nov. 8, 2002). Iraq's record during 1991–96 is summarized in Boutros-Ghali, *supra* note 26, at 74–98. Uses of force against Iraq by US and other forces sometimes followed these Council actions.

41. *See, e.g.*, Franck, *What Happens Now? The United Nations After Iraq, supra* note 7, at 613; Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE JOURNAL OF INTERNATIONAL LAW 233, 249 (2003) (paragraph 34 of UNSCR 6897 (1991) ("Decides to remain seized of the matter and to take such further steps as may be required for implementation of the present resolution and to secure peace and security in the region") meant the Security Council alone could decide when the authorization in Resolution 678 (1990) could be invoked); Lobel & Ratner, *supra* note 8.

42. Including France and Boutros-Ghali. *See* Taft & Buchwald, *supra* note 8, at 559 n.10; Boutros-Ghali, *supra* note 26.

43. *See* Matheson, *supra* note 32, at 137, 139, 141–42, 146. At that time, Mr. Matheson was Principal Deputy Legal Adviser, US Department of State. Professor Franck was one of the participants in the discussion at that meeting of the American Society of International Law and disagreed with Matheson. *Id.* at 143, 144, 145 (noting, among other things, the usefulness, admitted by all, of the threat to use force to enforce the Security Council resolutions on Iraq and arguing that the threat itself was unlawful).

44. *Cf.* UNSCR 929 (June 22, 1994) (stating that the mission in Rwanda will be limited to a period of two months following the adopting of the present resolution); UNSCR 1031 (Dec. 15, 1995) (terminating the authority for States to take certain action in Bosnia).

45. See the exchanges on October 17, 2002, and June 8, 2000, between US and UK representatives on one side and the Russian representative on the other regarding the No-fly Zones for representative expressions of position. S/PV.4625 (Resumption 3) at 22 (Oct. 17, 2002 (Russia)), S/PV.4152, at 3–4, 5–6 (June 8, 2000 (Russia, UK, US)). In April 1991, the United States, the United Kingdom, and France established a "No-fly Zone" over northern Iraq in which Iraqi aircraft were not permitted to fly. The immediate cause of the decision to establish this No-

Fly Zone was the commencement of new attacks on Iraqi Kurds in the spring of 1991 and a resulting exodus of a large number of refugees to Turkey, which threatened to ignite a new conflict. In August 1992, a similar No-fly Zone was established for southern Iraq to protect Iraq's Shiites from attack by Saddam Hussein's forces. The US Government defended the creation and enforcement of the No-fly Zones by reference to UN Security Council Resolution 688, which for the first time in UN Security Council history condemned internal repression as a threat to international peace and security, insisted on immediate access by international humanitarian organizations to all those in need of assistance in Iraq, and appealed to all UN Members to contribute to such humanitarian relief efforts. The enforcement of the No-fly Zones required thousands of individual sorties. US and other aircraft periodically fired on Iraqi air defenses when they appeared to threaten patrolling planes. These forces, as well as other forces in the region, engaged in periodic attacks on Iraqi military or intelligence targets during the 1990s as a result of Iraqi actions, such as the attempt on the life of President George H.W. Bush in 1993. Stevens, Wall & Dilenc, *supra* note 8, at 9–11; KENNETH M. POLLACK, THE THREATENING STORM: THE CASE FOR INVADING IRAQ 66–67 (2002). *See also* The History Guy: "The No-Fly Zone War" (US/UK-Iraq Conflict) 1991–2003, www.historyguy.com/no-fly_zone_war.html.

46. The Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq, March 17, 2003 (UK Foreign and Commonwealth Office), ¶¶ 2–4. *See also* the opinion of Christopher Greenwood, CMG, QC, October 24, 2002, *available at* www.parliament.the-stationery-office.co.uk..

47. December 16–20, 1998, involving some 30,000 troops, 37 warships, and 348 aircraft. *See* Stevens, Wall, & Dilenc, *supra* note 8, at 18–19.

48. Letters from US and UK representatives, dated December 16, 1998, UN Docs. S/1998/1191, S/1998/1182.

49. UN Doc. S/PV.3955 at 4 (Dec. 16, 1998). On the legal significance of the paragraph in Security Council resolutions referring to remaining seized of the matter, see THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 287–98 (Bruno Simma et al. eds., 2d ed. 2002); LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 129–33 (3d ed. 1969); SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 473 (3d ed. 1998) (language regarding being seized with a matter pertains to Article 12 and relations between the Security Council and General Assembly).

50. *See, e.g., infra* note 60.

51. UN Doc. S/PV.4644 (Nov. 8, 2002), at 5 (Levitte).

52. UNMOVIC had been established pursuant to UN Security Council Resolution 1284 of December 17, 1999, to undertake "the responsibilities mandated to the Special Commission" (UNSCOM). UNSCR 1284 (Dec. 17, 1999) at ¶ 2. *See* POLLACK, *supra* note 45, at 100 on the adoption of UNSCR 1284.

53. UNSCR 1441 (Nov. 8, 2002), at ¶ 4.

54. Hans Blix, Executive Chairman of UNMOVIC, told the Security Council in informal consultations on January 9, 2003, that Iraq's Declaration "is rich in volume but poor in new information about weapons issues and practically devoid of new evidence on such issues." Briefing the Security Council, January 9, 2003, *available at* www.un.orgs/Depts/unmovic/new/pages/security_council_briefings.asp. *See also* UNMOVIC's 12th quarterly report, Feb. 28, 2003, ¶¶ 6–11 (S/2003/232). In public Security Council meetings and in informal consultations of the Council, Blix and ElBaradei offered the same message. Blix reported increasing Iraqi cooperation with inspections as the threat of the use of force became more intense. On February 14, 2003, ElBaradei, the Director General of the IAEA, told the Security Council that "We have

to date found no evidence of ongoing prohibited nuclear or nuclear-related activities in Iraq." S/PV.4707 at 9 (Feb. 14, 2003). The only records of informal consultations are those notes taken by delegation or UN staffs because, technically, informal consultations are just that; they are not meetings of the Security Council. One transcript of private Security Council meetings is made and preserved in the Office of the Secretary-General. Provisional Rules of Procedure of the Security Council (Dec. 1982), S/96/Rev. 7, art. 51. A communiqué is issued after each private meeting. *Id.,* art. 55.

55. For example, on January 9, 2003, Blix and ElBaradei reported examples of missing weapons-related materials for which Iraq provided no explanation or an inadequate explanation in its declaration of December 7, 2002. The text of those reports is available at www.un.orgs/Depts/unmovic/new/pages/security_council_briefings.asp. *See also* Taft & Buchwald, *supra* note 8, at 562 n.21.

56. David Kay, Statement before the House Permanent Select Committee on Intelligence, et al., On the Interim Progress Report on the Activities of the Iraq Survey Group, Oct. 2, 2003; Colin L. Powell, *What Kay Found*, WASHINGTON POST, Oct. 7, 2003, at A7. *See also* Richard W. Stevenson, *Iraq Illicit Arms Gone Before War, Inspector States*, NEW YORK TIMES, Jan. 24, 2004, at A1. *See generally* the "Duelfer Report," the report of the Iraq Survey Group, Comprehensive Report of the Special Adviser to the DCI on Iraq's WMD (Sept. 30, 2004), *available at* http://www.cia.gov/cia/reports/iraq_wmd_2004/ [hereinafter the Duelfer Report].

57. At no time in public or in informal consultations, did any member of the Security Council agree that Iraq had fulfilled its obligations under Resolution 1441.

58. *See* Stromseth, *supra* note 8, at 630–31.

59. UNSCR 1441, at ¶ 12.

60. This conclusion is drawn from the public record only, including, such statements as those of then-French Ambassador to the United Nations, Jean-David Levitte, and his Russian counterpart, Sergei Lavrov, who participated in the negotiation of Security Council Resolution 1441. UN Doc. S/PV.4644, at 5 (Levitte: "The rules of the game spelled out by the Security Council are clear and demanding and require the unfailing cooperation of Iraqi leaders. If Iraq wants to avoid confrontation it must understand that this is its last opportunity."); *Id*. at 8–9 (Lavrov: "As a result of intensive negotiations, the resolution just adopted contains no provisions for the automatic use of force. . . . What is most important is that the resolution deflects the direct threat of war and that it opens the road towards further work in the interests of a political diplomatic settlement.") *See also* Stromseth, *supra* note 8, at 629–31 (reviewing the public record of the diplomacy leading to the adoption of Resolution 1441 and quoting Levitte, by then Ambassador to the United States: "I went to the State Department and to the White House to say, don't do it [seek a new resolution]. First, because you'll split the Council and second, because you don't need it. Let's agree to disagree between gentlemen, as we did on Kosovo, before the war in Kosovo." *Id.* at 630–31.) *See also* Matheson, *supra* note 32, at 139 (severe consequences refer to possible use of force).

61. *See also* Lord Goldsmith's opinion, *supra* note 45, at background document paragraph 11 (requirement that Iraq be given a final opportunity and that the Security Council consider any failure meant that Resolution 1441 did not automatically authorize the 2003 campaign).

62. UNSCRs 986 (Apr. 14, 1995), 1111 (June 4, 1997), 1129 (Sept. 12, 1997), 1143 (Dec. 4, 1997), 1153 (Feb. 20, 1998), 1158 (Mar. 25, 1998), 1175 (June 19, 1998), 1242 (May 21, 1999), 1266 (Oct. 4, 1999), 1275 (Nov. 19, 1999), 1280 (Dec. 3, 1999), 1293 (Mar. 31, 2000), 1302 (June 8, 2000), 1330 (Dec. 5, 2000), 1352 (June 1, 2001), 1360 (July 3, 2001), 1382 (Nov. 29, 2001), 1409 (May 14, 2002), 1447 (Dec. 4, 2002), 1454 (Dec. 30, 2002), 1472 (Mar. 29, 2003), and 1476 (Apr. 24, 2003).

63. Boutros-Ghali, *supra* note 26, at 93; POLLACK, *supra* note 45, at 71–80, 87–94, 232–36.
64. Transcript of President George W. Bush News Conference on Iraq, March 6, 2003, *available at* http://cnn.usnews.com, at 5.
65. On September 12, 2001, Saddam Hussein said on Iraq Television in Arabic that "the United States reaps the thorns that its rules have planted in the world." FBIS, Sept. 12, 2001; Open Letter to the American Peoples, Sept. 11, 2001. *See also* SHAWCROSS, *supra* note 9, at 109 (On September 11, 2002, an Iraqi government paper calls attacks of September 11, 2001, "God's Punishment").
66. Blair, *supra* note 8.
67. David Hannay, *Before and After*, TIMES LITERARY SUPPLEMENT, Feb. 13, 2004, at 6 (review of WILLIAM SHAWCROSS, ALLIES: THE U.S., BRITAIN, AND EUROPE, AND THE WAR IN IRAQ (2004) and TOBY DODGE, INVENTING IRAQ (2004). Lord Hannay was British Ambassador to the United Nations, 1990–95.
68. WASHINGTON POST, June 29, 2003, at B7. The material in square brackets is Hannay's. Hannay, *supra* note 67.
69. SHAWCROSS, *supra* note 9, at 189–93 ("The Kay report did not show that Iraq had been an immediate threat. But it did provide irrefutable evidence that Saddam's WMD [weapons of mass destruction] ambitions were an inevitable threat."); Blair, *supra* note 8 ("Actually, it is now apparent from the Survey Group that Iraq was indeed in breach of UN Resolution 1441. It did not disclose laboratories and facilities it should have; nor the teams of scientists kept together to retain their WMD including nuclear expertise; nor its continuing research relevant to CW [chemical weapons] and BW [biological weapons]. As Dr. Kay, the former head of the ISG [Iraq Survey Group] who is now quoted as a critic of the war has said: 'Iraq was in clear violation of the terms of Resolution 1441'. And 'I actually think this [Iraq] may be one of those cases where it was even more dangerous than we thought.' . . . It's just worth pointing out that the search is being conducted in a country twice the land mass of the UK, which David Kay's interim report in October 2003 noted, contains 130 ammunition storage areas, some covering an area of 50 square miles, including some 600,000 tons of artillery shells, rockets and other ordnance, of which only a small proportion have as yet been searched in the difficult security environment that exists.")
70. S/PV.4644, at 5, 8–9 (Nov. 8, 2002) (Levitte, Lavrov); UN Doc. S/2002/1236 (Nov. 8, 2002) (Joint Statement of China, France, and Russia). *See also* the Duelfer Report, *supra* note 56, vol. I, at 1 (key findings) ("[Saddam Husayn sought to balance the need to cooperate with UN inspectors—to gain support for lifting sanctions—with his intention to preserve Iraq's intellectual capital for WMD with a minimum of foreign intrusiveness and loss of face."); *also id*. at 68 ("Asked by a US interviewer in 2004, why he had not used WMD against the Coalition during Desert Storm [1991], Saddam replied, 'Do you think we are mad? What would the world have thought of us? We would have completely discredited those who had supported us.'") The Duelfer Report was not completed at the time this article originally went to press. It bears close scrutiny as it makes clear the scope of Iraq's ambitions with respect to the development and delivery of WMD and its existing programs although the Iraq Survey Group did not find caches of WMD, which so many people expected it to do. Although not a model of clarity, the Report suggests the existence of biological weapons materials. See *id.*, vol. III at 18 *et seq.* on the findings by the Iraq Survey Group with respect to Iraq's biological weapons research and development. *See also id*. at 58 ("An ISG [Iraq Survey Group] team obtained two vials of *C.[l]ostridium] perfringens* [causative agent of gas gangreene] as well as one vial of *C.botulinum* type B [causative agent of the disease botulism], from a mid-level scientist who formerly worked in the BW [biological warfare] program."), and 2 (ISG recovery of biological warfare-related seed stocks after Operation Iraqi Freedom).

71. *E.g.,* UN Doc. S/PV.4707, at 16 (Spain), 17 (United Kingdom), 28 (Bulgaria) (Feb. 14, 2003); Franck, *supra* note 43, at 145.
72. UN Doc. S/PV.4644, at 9 (Nov 8, 2002).
73. *Id.* at 5.
74. POLLACK, *supra* note 45, at 100–01.
75. *See, e.g.,* Robert Kagan, *A Tougher War for the US is One of Legitimacy*, NEW YORK TIMES, Jan. 24, 2004, at B7 ("Today, most Europeans believe that the United States exaggerates the dangers in the world. After Sept. 11, most Americans fear that they haven't taken those dangers seriously enough." *Id.* at B9). Carl Bildt, former Prime Minister of Sweden, noted that, for Europe, the most important recent historical date was 1989 when the Berlin Wall fell, whereas for the United States, the most important recent date was September 11, 2001: "While we talk of peace, they talk of security. While we talk of sharing sovereignty, they talk about exercising sovereign power. When we talk about a region, they talk about the world." Adam Nicolson, *U.S. Thinks Europeans are Cockroaches*, LONDON DAILY TELEGRAPH, electronic edition, Nov. 4, 2003; SHAWCROSS, *supra* note 9, at 50 (Prime Minister Blair told the House of Commons in March 2003 that "September 11 changed the psychology of America. It should have changed the psychology of the world.").
76. UN Doc. S/PV.4833 ("Justice and the Rule of Law: the United Nations Role," Sept. 24, 2003).