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## Panel V

### Discussion—The Road Ahead

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#### *On Iraq*

#### **Yoram Dinstein**

The road ahead must surely go through Iraq, given recent statements issued by the administration in Washington and—even more significantly—Saddam Hussein’s continued breaches of Iraq’s undertakings under the cease-fire agreement of 1991. At the present moment, however, this is not a question of self-defense. Self-defense as an issue vis-à-vis Iraq arose—and was resolved—on 2 August 1990, when Iraq invaded Kuwait. At that point in time, the Security Council determined—in a binding resolution—that Iraq had committed a breach of the peace.<sup>1</sup> Ultimately, the Security Council did not directly impose military sanctions on Iraq, in accordance with Article 42 of the UN Charter, because the Security Council (which has no standing army) cannot activate Article 42 unless and until special agreements are included with states, as per Article 43. What the Security Council did instead was give its blessing to the use of force, in the exercise of collective self-defense (pursuant to Article 51 of the Charter), by an American-led coalition of states who came to the aid of Kuwait.<sup>2</sup> Legally speaking, the coalition invoking the collective right to self-defense could have acted on its own, without the blessing of the Security

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1. S. C. Res. 660, U.N. SCOR, 45th Sess., U.N. Doc S./660/(1990).

2. *Id.*; S. C. Res. 678 para. 2 authorized, in relevant part all “Member States co-operating with the Government of Kuwait. . . to use all necessary means to restore international peace and security in the area.” U.N. SCOR, 45th Sess., U.N. Doc. S/678/(1990).

Council (which is not envisaged as necessary by Article 51). However, from a practical-political standpoint, the blessing of the Security Council proved beneficent both domestically (in the United States) and internationally (in cementing the unusual coalition which emerged).

From a *jus ad bellum* viewpoint, the respective positions of Iraq (as the aggressor) and the coalition (fighting in collective self-defense) was fixed for the duration of the war on 2 August 1990. Contrary to what many laymen and even lawyers believe, that war has not yet come to an end. Hostilities were suspended in 1991 following a cease-fire concluded with the consent of all the parties, based on Security Council Resolution 687.<sup>3</sup> The cease-fire has since been punctuated by thousands of acts of hostilities, the latest of which occurred only last week (when American and British warplanes attacked Iraqi radar stations which tried to lock on to coalition aviation). There have been other, and more serious, rounds of hostilities in 1998 and 1999.

By dint of Iraq's continued violations of the 1991 cease-fire—especially, albeit not exclusively, insofar as the disarmament of weapons of mass destruction is concerned—if the United States opts to resume hostilities against Iraq tomorrow or the day after, it would not need a Security Council resolution. The fact that Iraq has systematically violated the cease-fire terms is indisputable, and it suffices to justify unilateral forcible action by the United States against Iraq. Should anyone wish to stop the United States, let him go to the Security Council and seek such a resolution (which would certainly be vetoed by the United States). Forcible action against Iraq at the present juncture does not commence a new armed conflict. It represents, purely and simply, a continuation of the ongoing armed conflict that began when Iraq invaded Kuwait on 2 August 1990. Therefore, the question of the imminence of any threat posed by Iraq today is irrelevant. All that need be said is that Iraq is in clear material breach of the cease-fire agreement. Under Article 60 of the 1969 Vienna Convention on the Law of Treaties, a material breach of any treaty (including a cease-fire agreement) justifies termination of the treaty by the aggrieved party.<sup>4</sup>

### **John Murphy**

Yoram Dinstein in his inimitable fashion has set forth a marvelous advocate's brief for further military action against Iraq. However, I do not quite see it as

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3. S. C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/687/(1991).

4. Vienna Convention on the Laws of Treaties, art. 30, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

iron tight. There are other positions to be considered, particularly since this is a very complex question. Clearly, the Security Council authorized the use of individual and collective self-defense in its Resolution 678.<sup>5</sup> It is also clear that this right existed in any event under the terms of Article 51 of the UN Charter. However, this right to self-defense was to drive Iraq out of Kuwait, not necessarily to re-engage Iraq more than a decade after the ceasefire was signed.

Security Council Resolution 687 recognizes the restoration of the territorial integrity of Kuwait and imposes a number of significant obligations upon Iraq. These obligations include everything from desisting from the practice of terrorism, the involuntary disarmament of weapons of mass destruction, and the accompanying inspectors to prove this disarmament.<sup>6</sup> Clearly, Saddam Hussein and his regime supporting thugs have violated this resolution. The key question though is who gets to decide what happens about these violations? Who decides whether the cease-fire has been broken? Who decides, if there has been a material breach, whether this breach is justification for the continuing use of force? It strikes me that such a decision is properly taken before the same organization that authorized the initial use of force, the Security Council. Accepting Yoram Dinstein's argument that no additional authority is needed from the Security Council to re-engage Iraq stretches the very nature of the previous resolutions. I believe there is language in these resolutions to the contrary and I also believe that there is negotiating history to the contrary. Yoram Dinstein's case is a nice work of advocacy. But there is at least as strong an argument on the other side of his position.

### **James Terry**

President George Herbert Walker Bush was very clear in his view that Resolution 678 provided the authority to do very specific things. This essentially was to remove Iraqi forces from Kuwait and restore the territorial integrity of Kuwait, nothing more. To take the position now that Resolution 687, which interprets the original authority of Resolution 678, would allow the United States to do such things as Yoram Dinstein suggests must be studied very carefully. Pragmatic action must prevail as we consider the world community, the other permanent members of the Security Council, and our friends and allies. It would be dangerous, in my view, to act on the position advocated by Yoram Dinstein.

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5. S. C. Res 678, *supra* note 2.

6. S. C. Res. 687, *supra* note 4.

*On Terrorism*

**Chris Greenwood**

It is very important to recognize that terrorism is a habit and that one of the most serious of the many moral and practical arguments against terrorism is that it becomes rapidly endemic and has done so in many parts of the world in the course of the twentieth century. Because the major problem of terrorism is that it is endemic, it is important not to have illusions that the complete elimination of terrorism can be achieved in any short measure of time for as soon as one proclaims terrorism has been eliminated, every subsequent terrorist bomb becomes a victory for the terrorists and a defeat for those claiming elimination. Accordingly, there is a need in pursuing this campaign against terrorism to keep the rhetoric careful and limited and not to raise false expectations.

Secondly, there is a need for humility and caution in the matter of military operations in response to terrorist acts. Sometimes they may be extremely effective as they have been so far in Afghanistan. In other cases, they may not be. It is sobering to remember that World War I began as an Austrian attempt to wipe out what Vienna perceived as the hornet's nest of terrorists in Serbia. The most difficult issue in dealing with terrorism is not the legal basis for action but the prudential judgment as to whether a particular course of action is wise and will be supported by the international community. This must be a continuing criterion, discussed and analyzed, before action is taken. A large part of this battle as has been reflected by numerous conference participants, is for that of ideas. For in many respects, this is a battle to de-legitimize terrorism and to gain international support, recognizing that gaining such support on the international stage often requires a large number of compromises.

Finally, it is important to study how terrorist campaigns end. Sometimes they run out of steam, sometimes because of the very extreme character of their actions—and this may well be true ultimately of al Qaeda—they become discredited. Sometimes as we all know, compromises, political compromises of various kinds are reached with terrorist groups. We must remember that some terrorists sometimes do act in the name of a larger public cause. Such public causes may have serious elements of legitimacy that must be considered even if the means by which they are pursued cannot be defended. Often, very difficult decisions have to be made as we see that have occurred in Israel regarding Palestine. In other words, there is no substitute in the whole of the campaign against terrorism for the continuous exercise of historically informed political judgment.

**Nick Rostow**

The United States has long based its national security policy on the validity of anticipatory self-defense. Perhaps not articulated quite as sharply as President George Walker Bush articulated it but anticipatory self-defense nonetheless. I do not believe that President Bush changed much in his policy from the US historical approach to protecting itself and its citizens.