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### Iraq and the Law of Armed Conflict

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**T**he law of armed conflict is generally understood to pertain to the rules governing the conduct of war, the *jus in bello*. Superior, and antecedent to it, however, is the *jus ad bellum*, the law pertaining to the initiation of war. A war, even when fought in accordance with the letter of the *jus in bello*, will in no way be legitimate if the conflict was initiated in violation of the *jus ad bellum*. So, first things first. Was the war in Iraq undertaken in compliance with the law governing recourse to force? If, as I believe, the answer to that question is “probably not,” then the war could not have been fought in accordance with the law of armed conflict because the lawfulness of the conduct of hostilities is determined not only by the *way*, but also by *why*, a war is fought.

The United Nations Charter, a treaty consented to by the US Senate and ratified by the president and to which more than 190 States are parties, purports as its central undertaking to limit the grounds upon which States may lawfully have recourse to force. Article 2(4) stipulates that parties shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>2</sup> With this provision, the world, as it emerged in 1945 from history’s bloodiest war of aggression, sought forever to repudiate the principle attributed by Thucydides to the Athenians in their conduct towards the island-State of Melos during the Peloponnesian War that: “the strong do what they can and the weak suffer what they must.”<sup>3</sup>

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The conflict Thucydides describes is that initiated by a highly cultivated, relatively democratic Athenian State against the much smaller Melian State, which had sought to remain neutral in Athens' larger conflict with Sparta. Athens, the historian tells us, eventually destroyed itself in a futile effort to protect against every malignant eventuality by attacking and securing the submission of every place from which danger might emanate. Whether or not one perceives a modern parallel in these events, it is amply clear that the purpose of the world's most widely ratified treaty is to repeal the vestiges of the Melian principle, replacing it with a strong rule against the initiation of war.

The sole exception envisioned by the Charter is set out in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. . . ."<sup>4</sup>

Thus any examination of the lawfulness of US conduct in deploying force against Iraq in the spring of 2003 must begin by asking whether that action was congruent with the post-Melian requirements of the UN Charter. If the invasion of Iraq was nothing but an act of self-defense by the United States and the supporting coalition, or only an exercise of the collective police-power that had previously been approved by the UN Security Council, then the recourse to force would have been lawful. The Charter's Article 2(4) no-first-use pledge is clearly subordinate to the Article 51-based right of self-defense and also to the authority of the Security Council, set out in Chapter VII of the Charter, to initiate action against a threat to the peace. If the 2003 invasion of Iraq had previously been authorized by the Security Council, its legality would be beyond question.

It is possible to position the invasion of Iraq in either, or both, of these exculpatory contexts, but just barely. The argument that our armed forces, in occupying Iraq, have not violated the Charter is not easily or readily sustained, despite the best efforts of US and British government lawyers. Indeed, the deputy legal adviser of the British Foreign Office resigned rather than sign on to London's official legal position. As enunciated by US State Department Legal Adviser William Howard Taft IV, the argument has two prongs. The first is that the President may "of course, always use force under international law in self-defense."<sup>5</sup> The readily-apparent problem with that rationale is that, even if it were agreed (as it well might be) that the Article 51 right of self-defense has been interpreted in practice to include a right of action against an *imminent* armed attack, it is difficult to fit the facts of the situation existing in March 2003 within *any* plausible theory of imminence. This was a time, after all, when UN and International Atomic Energy inspectors were already actively conducting seemingly unimpeded searches for weapons of mass destruction with the full weight of Security Council resolutions to back them up. Nothing

in the inspectors' reports lends any credibility to the claim that Iraq, in the spring of 2003, posed any imminent threat of aggression to anyone.

The second prong of justification is more sophisticated, averring that the attack on Iraq by the United States and Britain had already been pre-authorized by the Security Council. To sustain this assertion, the United States produced a creative, but ultimately unsustainable reading of three previous Security Council Resolutions: 678, 687 and 1441.<sup>6</sup> According to Taft,<sup>7</sup> Resolution 678, with which the Council had authorized the use of force to oust Iraq from Kuwait in January of 1991, was kept in force by Resolution 687 of April 1991, which ended the first Gulf War and imposed stringent disarmament conditions on Iraq. Taft maintained that, as Iraq had "materially breached" these obligations, the right to use force had revived "and force may again be used under UNSCR 678 to compel Iraqi compliance. . . ." Moreover, Taft said, the Security Council, in its Resolution 1441 of November 8, 2002, which had ordered the inspectors back into Iraq, "had unanimously decided that Iraq has been and remains in material breach of its obligation." According to the Legal Adviser, Resolution 1441 gave Baghdad a final opportunity to comply, which if disregarded, would constitute a further material breach. He concluded that "Iraq has clearly committed such violations and, accordingly, the authority to use force to address Iraq's material breaches is clear."<sup>8</sup> Taft's British counterpart also argued that Resolution 678 of November 29, 1991 was still effective to authorize "Member States to use all necessary means to restore international peace and security in the area" and that, while that authorization had been suspended at the end of hostilities in 1991 by Resolution 687, it was "revived by SCR 1441(2002)."<sup>9</sup>

Is this a fair reading of the resolution that, in 1991, first authorized the use of force by a coalition of the willing? Resolution 678 was itself the culmination of a series of earlier resolutions by which the Council had responded to Iraq's invasion of Kuwait. It called for the immediate withdrawal of the aggressor, imposed mandatory sanctions and declared the annexation of Kuwait null and void. In each instance, the Council's purpose, evidently, was to roll back the aggression committed by one member against another. Only after these measures failed to suffice did the Council, acting under Chapter VII of the Charter "authorize Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement [its earlier resolutions] and to restore international peace and security in the region. . . ."<sup>10</sup>

Obviously, it was the restoration of Kuwaiti sovereignty that had motivated the Council in 1990-91. That Resolution 678 incidentally makes reference to the restoration of "international peace and security in the region" does not connote some expansive additional mandate beyond that of Kuwaiti liberation. It does not contingently license the pursuit of quite different objectives such as "regime change" at

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the sole discretion of individual members of the coalition. President George Bush Sr. acknowledged as much in explaining why the American military had not pursued Saddam Hussein's forces all the way back to Baghdad. "The U.N. resolutions never called for the elimination of Saddam Hussein" he said. "It never called for taking the battle into downtown Baghdad."<sup>11</sup>

What Resolution 687 did do was to establish intrusive post-conflict controls over Iraq and to make these mandatory under Chapter VII of the Charter, subject to collective enforcement in the event of non-compliance. Compliance monitoring, however, was to be the domain of the Security Council and its inspectors. Baghdad was compelled to agree to the verified elimination of its weapons of mass destruction and of the industrial capacity to produce them, as well as of its medium- and long-range delivery systems.<sup>12</sup> To make sure this happened, the Council and the UN Secretary-General were made responsible for creating and supervising the inspectors and for deploying them,<sup>13</sup> and it was to the Council that Baghdad was required to certify "that it will not commit or support any act of terrorism or allow any organization directed toward commission of such acts to operate within its territory. . . ."<sup>14</sup> To clinch its continuing supervisory role, Resolution 687 stipulated that the Council was to "remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region."<sup>15</sup> *It is not individual States acting on their own information without authorization of the Council.*

This does not sound as if the Council then, or thereafter, intended to cede to the United States and Britain the right to determine when to use military force in the absence of an (imminent) armed attack. It does not appear to delegate to individual members of the Council authority to determine the existence of a material breach or to decide the appropriate response. To interpret Resolutions 687 and 1441 otherwise would be to imply, without further evidence, an intent of the Council to overturn the basic architecture of the Charter by authorizing individual members to effect an unprecedented and uncontrolled derogation from the requisites of Article 2(4). Without supporting evidence, it would be foolhardy to make such an assumption.

This difficulty for those arguing the legality of US recourse to force is not alleviated by reference to Resolution 1441 of November 2002, which effected the return of the inspectors to Iraq. While that resolution passed unanimously, it achieved that goal by resolutely refusing to delegate to individual States the authority to decide if and when its mandate was being violated, let alone what to do about it. Most members, in voting for Resolution 1441, may have hoped there would be no occasion to cross the bridge of enforcement. However, there is no evidence whatsoever

for the confident assertion that they intended to authorize individual States to decide whether the Council strictures had been violated and, if so, what to do about it.

What, if anything, is to be learned from the consequences of this US decision to use force without the requisite Security Council authorization? This was certainly not the first time a State had chosen to pursue what it perceived to be its national interest by reverting to such unilateral action. France and Britain in Suez, India in Goa and Bangladesh, Tanzania in Uganda, Vietnam in Cambodia, and even NATO in Kosovo, are but a few of a plenitude of examples. Sometimes, the unlawful action was defended by lying about the facts, which, at least, exemplifies the compliment vice sometimes pays to virtue. In most instances, however, it was argued—not without reason—that, by violating the technical letter of the law, the initiator of the use of force was preventing the occurrence of some far greater wrong. Any legal system will take such an argument into account. But these are not the justifications Washington is producing now that the weapons of mass destruction have not been discovered and the link of Saddam Hussein to Al Qaida remains unproven. In the wake of these disappointments for those who sought to justify this war in traditional terms of self-defense, we are now being invited to draw more far-reaching conclusions about a need to reshape the ostensibly broken international system because of its obstinate refusal to endorse our recourse to force. Some call for the dismantling of the United Nations as a spent force vainly resisting the reality of American predominance. France, it is said, needs to be punished and Germany ignored.

But these are the wrong conclusions to draw from the Iraq experience. Drawing the right ones may have to await further clarifying events, but a few may be ventured tentatively. One is that the collective decision-making process of the Security Council should not be regarded as just a hobble on the sole superpower's discretion, but also as an important reality check, a way to get important perspective that may even sometimes save Washington from acting too hastily in over-reliance on its own imperfect and sometimes distorted vision. Another is that the United States needs the world, and that, without its support for projects important to our national interest, the successful pursuit of that interest may prove far more elusive and expensive.

A final lesson is that the rule of law is not a smorgasbord, where the sole superpower is entitled to pick and choose among its offerings. For example, the United Nations has put in place an extensive system for preventing and monitoring the flow of money to terrorists. To implement it, however, States must subordinate some of their sovereign prerogatives to an interstatal legal regime. Why should they? Very few countries feel as directly threatened by terrorism as do we: not most African and Asian States and not even the nations of Europe. If they support us in the war on terrorism, it is not necessarily in their national interest that they act in

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conformity with these new legal mechanisms, for to help the United States as, for example, the Government of Pakistan appears to be doing, is to invite the terrorists to extend their retributive reach. That the legal regime underpinning the war on terrorism nevertheless enjoys such broad support of governments testifies to the adherence of States of diverse races, religions, political persuasions and social outlooks to the rule of law that the Charter supremely exemplifies.

It would be a mistake to underestimate the cost to the culture of compliance were the United States to continue over-demonstrating its entitlement to exceptionalism. The war in Iraq was undertaken in what is almost universally perceived as a serious violation of international law and, thus, a weakening of all legal regimes' capacity to secure acquiescent compliance. This deterioration of the legal ethos cannot be to the longer-term advantage of the United States, whatever the short term temptations. If it is not, steps need to be taken to mitigate, not to magnify, the damage done. In the age of globalization, and globalized anti-governmental terror, Athens needs the Melians to be willingly on its side.

### *Notes*

1. Professor Franck is Professor Emeritus at New York University School of Law.
2. UN Charter, art. 2(4).
3. See THE LANDMARK THUCYDIDES, A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 352 (Robert B. Strassler ed., 1996).
4. UN Charter, art. 51.
5. William Howard Taft IV, An Address to the National Association of Attorneys General (Mar. 20, 2003).
6. UNSCR 678 (Nov. 29, 1990); UNSCR 687 (Apr. 3, 1991); UNSCR 1441 (Nov. 8, 2002).
7. See Taft, *supra* note 5.
8. *Id.*
9. See Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq, Mar. 17, 2003 (UK Foreign and Commonwealth Office, ¶¶ 2-4).
10. UNSCR 687, *supra* note 6.
11. PUBLIC PAPERS OF THE PRESIDENTS, GEORGE BUSH, 1992-93, Vol. I, at 568 (1993).
12. UNSCR 687, *supra* note 6, at ¶ 33.
13. *Id.*, ¶¶ 9, 10 and 13.
14. *Id.*, ¶ 32.
15. *Id.*