REDISCOVERING INTERNATIONAL LAW THROUGH DIALOGUE RATHER THAN DIATRIBE: REFLECTIONS ON AN INTERNATIONAL LEGAL CONFERENCE IN THE AFTERMATH OF OPERATION IRAQI FREEDOM

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I. INTRODUCTION

The articles in this symposium were among the many presented by distinguished scholars and policymakers who attended the Ninth Annual Joint United States European Command and Federal Republic of Germany Ministry of Defense Legal Conference held in picturesque Garmisch, Germany. Entitled "The Rule of Law in Conflict and Post-Conflict Situations," the conference was hosted by the bi-national George C. Marshall Center and was attended by over sixty participants from twenty-five countries who were either senior attorneys or other government officials from their nation's defense and foreign ministries.[1] Most of the countries represented hailed from the Marshall Center's region of emphasis—East/Central Europe, the

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1. The George C. Marshall Center for Security Studies is a transatlantic defense educational and security studies institution, bilaterally supported by the United States and German governments and dedicated to the creation of a more stable security environment by advancing democratic defense institutions and relationships, promoting active peaceful engagement, and enhancing enduring partnerships among the nations of North America, Europe, and Eurasia. *See* Marshal Center Mission Statement, *at* http://www.marshallcenter.org/site-graphic/lang-en/page-mc-about-1/xdocs/mc/factsheets-about/03-mcmission.htm (last visited Aug. 4, 2004).

Balkans, and the States of the former Soviet Union.[2] As such, this mix of participants provided the catalyst for a frank, but always respectful, exchange of ideas and viewpoints on the state of international law following Operation Iraqi Freedom.

Although contentious debate is not uncommon at legal conferences, what was striking about the discourse during this multilateral conference was that the divide over the legality of United States' actions generally reflected two approaches to international law.[3] Specifically, those critical of Operation Iraqi Freedom or humanitarian intervention tended to focus on the war's alleged incompatibility with the U.N. Charter, customary law, or International Court of Justice (ICJ) precedent, thereby limiting their analysis to "internal" sources of law—those that can be traced to a manifestation of state consent.[4] In contrast, those more supportive of Operation Iraqi Freedom or humanitarian intervention tended to employ a more normative approach. They thereby allowed, in addition to traditional manifestations of sovereign consent, "external" references to enter into their legal calculus, whether directly or by way of interpreting traditional sources of sovereign consent. Providing some of these external reference points for the assembled attorneys were Dr. Martin L. Cook and Professor Michael Novak's presentations on Ethics, Just

2. Countries sending attendees to the conference include Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, Czech Republic, Estonia, Georgia, Germany, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Norway, Romania, Russian Federation, Slovak Republic, Slovenia, Swiss Confederation, Tajikistan, Ukraine, and the United Kingdom. Attendance Listing, 15-19 Sep 03 Contemporary Legal Issues Conference (Sept. 18, 2003) (on file in the offices of the Staff Judge Advocate, United States European Command, Stuttgart Germany).

3. For purposes of this article, "international law" refers to that body of rules or duties that binds a state's conduct or that states are obligated to follow. *See* Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1905-06 (2003); Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 290 (1999) (distinguishing between international obligations deriving from general and special international rules of conduct and those obligations imposed by international politics). This definition thus disregards the theoretical anxiety imbedded in John Austin's denial that international law is "law" because of the lack of a law-enforcing sovereign: "the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I already intimated, the law obtaining between nations is law (improperly so called) set by general opinion." Mark W. Janis, *Religion and Literature of International Law*, *in* RELIGION AND INTERNATIONAL LAW 121, 129 (Mark W. Janis & Carolyn Evans eds., 1999) (quoting JOHN AUSTIN, THE PROVIDENCE OF JURISPRUDENCE DETERMINED, at vii (1832)).

4. See, for example, the discussion of humanitarian intervention and "just war" in general in Professor Deinstein's article *Comments on War*, *supra* notes 132-44 and accompanying text.

War and Just Peace.[5] The conference, in short, was a prototypical example of what one academic, Professor David J. Bederman, astutely observed as today's "debate" in international law:

> [T]he issue is whether law for the international community is exclusively the product of consent by the participants in the system (however manifested) or also of enduring truths that somehow reflect the fundamental values of that community. Put another way, are all rules in a legal community internally generated by means and institutions chosen by the participants, or is there also a metaphysic of first principles that governs the system?[6]

The purpose of this article is to examine these two approaches through the illustrative use of the articles in this symposium issue, to highlight how this debate is fueled by increasingly normative judgments by States and NGOs, and to suggest a third approach to international law to better foster the rule of law, one consisting of recognizing the key values held on both sides of the debate.

II. TWO APPROACHES TO INTERNATIONAL LAW

For ease of discussion and analysis, this article refers to a positivist and a naturalist approach to international law in generic fashion, although there are many historical and modern variations within each approach, and other approaches to law have evolved from these approaches. Moreover, although seemingly mutually exclusive, positivism and natural law may not be as doctrinally incompatible as they appear at first glance. Nevertheless, as a general description, these two designations do signal a legal perspective or mindset that many times results in disparate analysis and conclusions regarding the lawfulness of international actions, and these terms are used in this Article to illustrate the divide.

A. *Positivism*

Those favoring the view that international rules are "internally" generated by a legal community's participants are essentially espousing a positivist approach to international law, founded on the binding force of expressed or implied state consent.[7] Rejecting any

5. *See infra* Part III.C.

6. David J. Bederman, *The New International Law in an Old Age of Indeterminacy*, 81 TEX. L. REV. 1521, 1537 (2003) (reviewing PHILIP BOBBIT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002)).

7. *See* Sean D. Magenis, Note, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L.J. 413, 415 & n.9 (2002); William R. Nifong, Note,

nexus between laws and morality, positivism injects sovereign law-making legitimacy into legal tradition.[8] The first international legal positivist might have been John Austin, whose nineteenth century attack on the existence of international law as "law" and his focus on the "fact" of obedience to a superior sovereign did away with what one legal expert, Professor Philip Bobbitt, described as "two of the core ideas that had shaped international law from its inception at the time of the birth of the modern state: natural law and the theory of the just war."[9] Thus, to a positivist, although "law might well be derived from moral precepts, such precepts become law only when commanded by a sovereign."[10] Positivists, faced with an international system consisting of independent sovereigns unanswerable to a higher authority, understandably emphasize tangible treaties and state customs as "the supreme sources of international norms."[11] Currently, these formal sources of international law are described in many sources, among them the *Restatement (Third) of the Foreign*

Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law, 49 DUKE L.J. 1077, 1083 (2000).

8. Arcangelo Travaglini, Note, *Reconciling Natural Law and Legal Positivism in the Deep Seabed Mining Provisions of the Convention on the Law of the Sea*, 15 TEMP. INT'L & COMP. L.J. 313, 320 (2001).

9. BOBBITT, *supra* note 6, at 565; *see also* Nifong, *supra* note 7, at 1083 n.29 (describing Austin as the "leading exponent of the statist view of international law"); Hilaire McCoubrey, *Natural Law, Religion, and the Development of International Law*, *in* RELIGION AND INTERNATIONAL LAW, *supra* note 3, at 177, 177 (quoting John Austin):

> Grotius, Puffendorf, and the other writers on the so-called law of nations, have fallen into a confusion of ideas: they have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as ought to be, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature.

See also *supra* note 3 for Austin's characterization of international law. Ironically, Henry Wheaton, responding to Austin's positivist attack on the existence of international law, deepened its divorce from natural law traditions. Responding to Austin's attack, Wheaton, authoring the first English language tract on international law, was compelled to posit the non-universality of international law in order to insist, contrary to Austin, that the particularly civilized Christian character of international law was sufficient to create real and efficacious "law" enforced by sanctions against all within its ambit. Janis, *supra* note 3, at 134-35.

10. BOBBITT, *supra* note 6, at 566.

11. Mark Searl, *Natural Law, International Law, and Nuclear Disarmament*, 33 OTTAWA L. REV. 271, 273 (2002); *see also* Nifong, *supra* note 7, at 1083 ("Statist conceptions of international law and legal positivism have asserted that the only legitimate basis for international law is the express or implied consent of states, as evidenced by treaties and other agreements, customary practice, and universally recognized, or peremptory, norms."); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999) (defining the classical positivist perspective on law as a "unified system of rules that, according to most variants, emanate from state will. This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be.'").

Relations Law of the United States, official U.S. government sources, and Article 38 of the Statute of the ICJ, which identifies sources of law as follows: treaties, customs as evidence of general practice, principles of law recognized by civilized nations, and as subsidiary sources, judicial decisions and the writings of jurists.[12]

B. Natural Law

In contrast to self-generating legal positivists, international legal practitioners and academics taking the other side of the debate, those that allow for the existence of a metaphysics of first principles in international law, can be characterized as naturalists, taking a natural law approach to international law. Natural law can be defined as a "system of deductive reasoning from which the natural rights of men and sovereign nations may be discovered," with its binding force resulting from "its adherence to reason."[13] Natural law in this sense serves both as "'a guide to individual conduct' and . . . 'as a standard for the laws enacted by the state.'"[14] Contrary to the positivist perspective, naturalists note that "[n]atural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment."[15] Historically, international law was first formulated by proponents of natural law theory, who provided the foundation of international law principles such as the peaceful resolution of disputes, self-defense, and the right of humanitarian intervention.[16] Although many, in the words of one writer, have attempted to describe the natural law approach as "relegated to the

12. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); S. Exec. Rep. No. 102-53, at 181-82 (1992) (Letter from U.S. Secretary of State identifying custom and international agreements among the sources of international law.); Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

13. *See* Magenis, *supra* note 7, at 415.

14. Robert John Araujo, *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 AVE MARIA L. REV. 159, 161 (2003) (quoting CHARLES E. RICE, FIFTY QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 33 (rev. ed. 1999)).

15. *Id.* (quoting GRATIAN, THE TREATISE ON LAWS (DECRETUM DD. 1-20) WITH THE ORDINARY GLOSS 6 (Augustine Thompson & James Gordley trans., Catholic Univ. Press 1993)).

16. Searl, *supra* note 11, at 273 (identifying natural law scholars Francisco Suárez, Alberico Gentili, and Hugo Grotius as providing the foundation of modern international law); *see also* John P. Doyle, *Francisco Suarez and the Law of Nations*, *in* RELIGION AND INTERNATIONAL LAW, *supra* note 3, at 103, 112 (observing that in Suarez, "one first encounters the modern concept of a society or community of sovereign states, tied together by a body of laws applying to their mutual relations").

yellowed annals of legal history,"[17] recent history, and the ongoing debate in international law that underlay the conference in Garmisch, indicates that it is the doctrine that "just will not die."[18]

C. A Crucial Aside

As noted earlier, positivism and natural law have variants within themselves, are not recent approaches to the international law, or law in general, and have spawned other approaches to law.[19] Although seemingly mutually exclusive, positivism and natural law at some level may not be as doctrinally incompatible as they appear at first glance.

D. Positivism and Natural Law As Approaches to the Nature of Law

As the confirmation debate over the Supreme Court nominations of Robert Bork and Justice Clarence Thomas illustrated, the debate between natural law and positivism is not a sterile modern equivalent of the medieval dispute over the number of angels that can dance on the head of a pin.[20] On the contrary, these approaches are embedded in many States' domestic law concepts. From the debate between Thrasymachus and Socrates over the nature of justice, continuing through the Roman era, and up to the present, those who believe in a natural law have clashed with positivists who deny that law is integrally laden with morals or values apart from personal preferences and choice.[21] Current approaches to law roughly reflect this division.

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17. Nifong, *supra* note 7, at 1083.

18. *Id.* at 1085; *see also* Philip Soper, *Some Natural Confusions about Natural Law*, 90 MICH. L. REV. 2393, 2393 (1992) (noting the resurgence of interest in natural legal theory illustrates the phenomenon of persistence, addressing "aspects of the human condition that change, if at all, too glacially to be noticed in the relatively short space of time that separates classical from modern views").

19. *See infra* note 22 and accompanying text.

20. *See, e.g.*, Soper, *supra* note 18, at 2408 (discussing attacks on Judge Robert Bork for refusing to recognize natural law rights and attacks on Justice Clarence Thomas for supporting those rights); Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U. L. REV. 1, 23-24 (1989) (observing how Bork's positivist adherence to the "law as written" stirred concern at confirmation hearings, fueling debate over whether judges were required to temper the hard sharp edges of the law with compassion and how the application of compassion requires agreement on the applicable moral principles); Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29, 29 (1992) (dispelling some of the mystery of natural law, which, along with natural rights, "descended like a blue haze over the Senate Judiciary's confirmation hearings on Clarence Thomas").

21. For a brief historical sense of the debate between Thrasymachus and Socrates over

The New Haven, Neo-Realism, and Perspective schools, because they look toward something outside of the fact of the law itself to validate international law, have been described as developing from naturalism, while the Legal Process, Nominalism, and Consensualism schools have been characterized as developing from a positivist focus on the fact of a rule as law, irrespective of the content.[22]

E. The Mutuality of Natural Law and Positivism

Naturalism and positivism, as described above, are based on disparate conceptions of the legitimizing factors of international law. Nevertheless, despite the historical longevity of this debate, the separation of naturalism and positivism as mutually exclusive options in international theory developed only in the nineteenth century, and gained increased vitality in the twentieth century.[23] This division, according to at least one commentator, has been an unfortunate distraction in the development of a coherent and full theory of international law, one alien to past international legal theoreticians.[24] Both naturalism and positivism can encompass elements of their opposing theory, and studying this relationship could contribute to a fuller, more robust approach to international law.[25] Thus, with regard to positivist theory, some argue that when the nature of international consensus is assessed, the continuing role of naturalist analyses

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the nature of justice, see DONALD ATWELL ZOLL, REASON AND REBELLION: AN INFORMAL HISTORY OF POLITICAL IDEAS 12-14 (1963). Thrasymachus argued that justice was merely the will of the stronger, while Socrates asserted that justice is a virtue and that politics is ethics, indistinguishable from wisdom. Cicero, the noted Roman legal scholar and Senator, believed natural law was true law, right reason, "which is in accordance with nature, applicable to all men, and is unchangeable and eternal." *Id.* at 65. He was also the first to espouse the proposition that "just rule arises from the people who are governed." *Id.* at 67; *see also* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 8 (2000); Nifong, *supra* note 7, at 1086. For a review of the debate throughout history see generally McCoubrey, *supra* note 9.

22. BOBBITT, *supra* note 6, at 641-63. Of course, this is a rough description and does not argue that positivist derived theories do not prefer values at some level. For example, nominalists argue they find this "normative element in texts." *Id.* at 648. Another similar characterization of the legal schools of thought derived from naturalism and positivism can be found in Shen, *supra* note 3, at 291-341. For an in-depth historical review and categorization of positivism in US domestic law, see generally Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995).

23. *See* McCoubrey, *supra* note 9, at 185.

24. *Id.*

25. Drawing on Aquinas's observations that natural law and positive law needed to coexist and thus realizing natural law may prescribe moral conduct while positive law has a proactive nature capable of proscribing non-moral, deleterious behavior, one author has posited a common denominator between naturalism and positivism by asserting that natural law and positive law may dovetail with each other thanks to an administrative common denominator requiring their simultaneous application. Travaglini, *supra* note 8, at 329.

becomes apparent.[26] Others have asserted modern positivism recognizes that the law is not independent of its context, and some authors have commented that because secondary rules (those that determine the conditions under which particular acts give rise to legal obligations) are not validated by state consent, a State cannot meaningfully consent to the international legal system.[27] With regard to naturalism, some commentators have injected an element of positivist consent into this theory by arguing that natural law "evolves through time as a dialogue among legal theorists, philosophers, and others," and that, any given point in time, the "natural" within the legal order "will be that era's best approximation of natural justice."[28] Similarly, one author has opined that domestic natural law legal theory eventually collapses into positivism, with the judge's decision (reached utilizing a naturalist approach) becoming legally binding and serving as the sovereign in place of the legislature, an observation that can be applied to state international actions.[29] Accordingly, any description of the these two approaches to international law should be tempered with the knowledge that, ultimately, the best doctrine in international law that is not an "either-or approach," but rather a holistic approach, one that bridges the gap between the apparently dueling conceptions of international law that are becoming increasingly apparent in the actions and discourse of the international

26. *Id.* (noting that international law involves both norms of practical convenience and norms of self-evident ethical origin, and observing that brief, and in some respects incomplete, statements of the modern ethical base of international law may be found in the constitutions of the defining international organizations of the modern era). Indeed, the existence of these norms in constitutions defining international organizations could forge a common international approach between positivists and naturalists. As noted by one author with respect to the domestic divide between naturalist and positivists, the "difference between natural law and positivism will be undetectable in a system that happens (contingently) to have a fundamental morality clause in its basic Constitution . . . ." Soper, *supra* note 18, at 2411-12. This process could be assisted by the fact that some modern positivists recognize a "basic norm," labeled "Grundnorm," that values the "unity of primary and secondary sources." Simma & Paulus, *supra* note 11, at 306; *see also* BOBBITT, *supra* note 6, at 590.

27. *See* Simma & Paulus, *supra* note 11, at 306 (stating law is not independent of its context, as extreme positivism might suggest, and emphasizing its proximity to political reality, noting that if "norm perception in the international sphere now focuses on the will of the states less than previously, the sources of the law, and the interpretive tools to understand them, will also have to change"); *id.* at 304 n.11 (discussing Hart's denial of the existence of secondary rules in international law); Posner, *supra* note 3, at 1910-11 (arguing states cannot meaningfully refuse to consent to the international legal system).

28. Nifong, *supra* note 7, at 1083 n.28.

29. *See* Soper, *supra* note 18, at 2415. See also *infra* note 151 for an analogous comparison to international law, where deciding and promulgating a decision to use force by a State (even if reached by naturalist reasoning) is likely made via key elements of the positivist paradigm.

international community.[30]

III. THE CONFERENCE: ADVANCING THE DEBATE

During the conference, speakers and participants approached the topic of "The Rule of Law in Conflict and Post-Conflict Situations" from perspectives that reflected either an adherence to a naturalist or positivist template, or sometimes a combination of both. Using the articles in this symposium, this section illustrates how these various approaches may be manifested during this type of debate.

A. Kosovo

The U.S.-led military action in Kosovo, where the North Atlantic Treaty Organization (NATO) bombing campaign stopped Slobodan Milosovic's murderous campaign against civilian Albanian Kosovars and ultimately lead to his indictment and trial before the UN's International Criminal Court for the Former Yugoslavia, provided recent history's first dramatic example of the gap between positivist and naturalist conceptions of international *jus ad bellum* law.[31] As such, this humanitarian intervention captured the attention of the conference participants, and formed the backdrop for Professor A.P.V. Rogers's article, *Humanitarian Intervention and International Law*.[32] His article, by surveying the reaction of international scholars to the concept of humanitarian intervention, provides a roadmap of this divergence and conflict, and notes that this subject produces "an explosive mixture of ethics, politics, and law."[33]

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30. See *infra* note 45 and accompanying text for a discussion of normative motivations of the United States and other state actions and strategies.

31. *See* Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1748 (2000) (detailing the humanitarian and human rights disaster prior to the NATO bombing campaign in Kosovo). A copy of the International Criminal Tribunal for the Former Yugoslavia's (ICCTFY) indictment of Milosovic can be found at the ICCTFY website, *at* http://www.un.org/icty/indictment/english/gal-ii011102e.htm. The *jus in bellum* aspects of the Kosovo bombing campaign were addressed by Mr. William Fenrick, a prosecutor for International Criminal Tribunal for the former Yugoslavia, who discussed the *Final Report to the Prosecutor by the Commission Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (2000)*, which found no merit to pursue complaints that NATO tactics and methods of warfare had amounted to violations of the laws of war. *See* William Fenrick, Remarks at the Ninth Annual Joint United States European Command and Federal Republic of Germany Ministry of Defense Legal Conference (Sept. 14, 2003) (presentation on file with the Offices of the United States European Command Judge Advocate, Stuttgart, Germany).

32. A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725 (2004).

33. *Id.* at 725.

Professor Rogers provides the classical positivist perspective on humanitarian intervention by sketching how both the text of the U.N. Charter and its interpretation by the ICJ cabins the use of force to *only* individual or collective self-defense or as a result of a U.N. mandate.[34] Indeed, with respect to the ICJ, he notes that the Court "has said the respect for territorial integrity is an essential foundation of international relations," and is "skeptical about the use of force as an appropriate method to monitor or ensure respect for human rights."[35] His survey of asserted, non-strictly charter-based permissible uses of force nonetheless includes preventing "an overwhelming humanitarian disaster."[36] This approach, according to Professor Rogers, views international law as "not set in concrete," but as having to "adopt to meet new situations," including legitimating state intervention until the U.N. takes control "to prevent genocide or widespread crimes against humanity."[37] Professor Rogers observes an open question created by such an approach: whether such law would sit "alongside the U.N. Charter to deal with situations not envisaged, or not adequately dealt with in the Charter," or whether it would effectively modify the Charter.[38]

Delving into more specifics, Professor Rogers' survey of six legal approaches by international commentators to humanitarian intervention effectively provides a gradation of views from strictly positivist to more naturalistic.[39] The third position he identifies regarding humanitarian intervention contains a naturalist bent, as it brings an external principle into the analysis: "there is an ethical imperative for law to permit humanitarian intervention in certain limited circumstances."[40] He also identifies an approach to humanitarian intervention that hearkens back to the naturalist Cicero: "that authority to govern must be based on the will of the people," thus, where "a government does not have support of the population of or loses control over significant parts of its territory, such government

34. *Id.*

35. *Id.* at 735.

36. *Id.* at 726.

37. *Id.*

38. *Id.* at 730.

39. These six positions as identified by Professor Rogers are that humanitarian intervention is unlawful, unlawful but maybe lawful in the future, lukewarm acceptance to save a large number of lives, acceptable in collapsed states and to incorporate a more flexible view of legitimacy, acknowledged as a emerging right, and legally recognized as a matter of last resort. *Id.* at 730-33.

40. *Id.* at 732.

has no power to represent that population or area."[41] In a positivist move, Professor Rogers surveys state practice regarding humanitarian intervention, and concludes that States have started to follow a naturalist approach; he sees that a trend towards humanitarian intervention "has at least begun in the past ten years."[42] This trend is not clearly identified as such in state practice, since, as Professor Rogers notes, only the U.K. set forth a clearly humanitarian reason for intervening in Kosovo, claiming that "it was the only means to avert an immediate and overwhelming humanitarian catastrophe."[43] Professor Rogers concludes on a naturalist note, observing that "states cannot, on moral and policy grounds, simply sit back and watch the commission of genocide or persistent crimes against humanity."[44] But he softens this conclusion by listing ten proposed limitations on humanitarian interventions.[45]

41. *Id.* at 733. See *supra* note 21 for Cicero's view of "just rule."

42. *Id.* In contrast, many positivists, separating "law" from "morality," are paralyzed in the face of humanitarian disasters met by U.N. inaction, such as occurred in Kosovo. This paralysis is exemplified by one author, who dismissed the argument that "when people in other nations are subjected to intolerable atrocities, decent countries cannot just 'pass by' but are morally obliged to do what they can to help . . . claims of moral necessity must prevail over claims of law and expediency," as one with mere "surface moral appeal." Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J.TRANSNAT'L L. & POL'Y 153, 160-62 (1999). Bilder countered with a relativist argument: "who is to be the judge of the 'moral necessity' and of what it requires?" Upon close inspection, although disclaiming "law's" moral content, this positivist dismissal of the potential legality of humanitarian intervention merely substitutes one value (tangibly stopping atrocities and genocide) with another (defending the alleged theoretical stability of the positivist approach to international law, founded on primacy of the U.N. Security Council). *See id.* at 165; *see also* BOBBITT, *supra* note 6, at 648 (stating that nominalism values total fidelity to texts for the normative reasons that this approach best restrains States). For a similar critique decrying both the pressure Operation Iraqi Freedom placed on the U.N. Charter's procedures and restraining rules, as well as the characterizations of the Global War on Terror in terms of good and evil, see Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 594 (2003) (arguing that a moral argument "works even against constraints based on calculations of self-interest and prudence," and rejecting, absent U.N. Security Council support, both regime changes of criminal governments as part of humanitarian intervention or using American values or strategic goals to validate uses of force to meet novel security needs).

43. Rogers, *supra* note 32, at 734; *see also* Mertus, *supra* note 31, at 1746-48 (lamenting the fact that an "array of justifications" were offered to justify intervention in Kosovo, thereby exposing the operation to criticism that NATO did not operate under any legal grounds at all). In addition to the United Kingdom, Czech President Vaclav Havel also offered a purely humanitarian rationale for Kosovo, stating that "the alliance acted out of respect for human rights" and that it was "probably the first war that has not been waged in the name of 'national interest,' but rather in the name of principle and values." *Id.* at 1746.

44. Rogers, supra note 32, at 735.

45. Rogers, *supra* note 32, at 736.

B. 9/11 and the Global War On Terrorism

Following the NATO military action in Kosovo, the dichotomy in discourse between the two approaches to international law was dramatically accelerated by the Bush administration's response to the September 11 terrorist attacks on the World Trade Center and the Pentagon. Indeed, President Bush's ethical emphasis in both his "Axis of Evil" 2002 State of the Union address and the *National Security Strategy of the United States of America* (NSS), with their unambiguous moral tone and description of security strategy in the Global War on Terror (GWOT), respectively, further focused the debate among conference participants.[46]

Professor Michael N. Schmitt's article, *US Security Strategies: A*

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46. In his 2002 State of the Union Speech, President Bush left no doubt that the GWOT was a moral conflict:

> States like [North Korea, Iran, Iraq] and their terrorist allies constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States.

President George W. Bush, State of the Union Address, 38 WEEKLY COMP. PRES. DOC. 133, 135 (Jan. 29, 2002). Additionally, the moral nomenclature of the NSS emphasizes that the United States views freedom and human dignity as universal and nonrelative, stating: "Freedom is the non-negotiable demand of human dignity; the birthright of every person—in every civilization," Pres. George W. Bush, *Introduction* to WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), as well as quoting an excerpt from President Bush's June 1, 2002 West Point Speech, "[S]ome worry that it is somehow undiplomatic or impolite to speak the language of right or wrong. I disagree. Different circumstances require different motives, but not different moralities." *Id.* at 3. Both the United Kingdom and Spain take similar positions regarding the GWOT and Operation Iraqi Freedom. *See, e.g.*, Prime Minister Tony Blair of the United Kingdom of Great Britain and Northern Ireland, Address to a Joint Session of the United States Congress, 149 CONG. REC. H7059-62 (June 18, 2003) (noting freedom, democracy, human rights, and the rule of law as universal values of the human spirit and stating the U.N. members who engage in the systematic and gross abuse of human rights in defiance of the U.N. Charter can not expect the same privileges as those that conform to it); President Jose Maria Aznar of the Government of Spain, Address to a Joint Session of the United States Congress, 150 CONG. REC. H312-13 (Feb. 4, 2004) (viewing the September 11 attacks as, *inter alia*, attacks on freedom and moral decency and noting the fact that strength is derived from the moral superiority of democratic systems). In contrast, those States opposing Operation Iraqi Freedom avoid the moral imperative, focusing instead on the procedural need for a U.N. Security Council decision. *See, e.g.*, Joschka Fischer, Minister for Foreign Affairs of the Federal Republic of Germany, Statement at the Public Meeting of the Security Council (Feb. 14, 2003), http://www.germany-info.org/relaunch/politics/speeches/021403.htm (noting that "[w]hatever decisions that need to be made must be taken by the Security Council alone," since "it remains the only body internationally authorized to do so"); Speech by Mr. Dominique de Villepin, Minister of Foreign Affairs, before the Security Council (Mar. 7, 2003), www.un.int/france/documents_anglais/030307_cs_villepin_irak.htm (stating that "no one underestimates the cruelty of his dictatorship and the need to do everything possible to promote human rights. That is not the objective of 1441" and that "and arguing that disarming Iraq through war involves "a concept of the role of the United Nations").

Legal Assessment, analyzes U.S. military actions during the GWOT, their doctrinal underpinnings, international precedent, and treaty law to answer five questions: when it is appropriate to use military force against terrorists; when it is legal to act without a mandate from the Security Council; when a State may act peremptorily in the face of future terrorism, Weapons of Mass Destruction (WMD) attack, or WMD transfer to terrorist; when counter-terrorist or counter-WMD operations can be conducted on foreign soil; and when a state sponsor of terrorism may be attacked.[47] His article concludes that "there is no aspect of U.S. security strategy that is objectively illegal under international law."[48] In reaching this result, Professor Schmitt uses a balanced and integrated approach to international law, utilizing an analysis that is both positivist and naturalist.

The naturalist approach manifests itself in his reasoned appeal to newly emergent facts in the GWOT and his call that all international legal practitioners account for "the constantly evolving security environment" in their interpretation of the applicable legal regime.[49] He does just this, as elaborated below, when discussing anticipatory strikes and urging a fair balance between U.N. Charter Article 2(4)'s right protecting a State's territorial integrity and Article 51's right of a State to exercise self-defense. The positivist aspect of his article is best seen in the use of state practice (including state reaction or the lack thereof) to U.S. actions, his lack of an explicit discussion of an ethical basis for his interpretative approach incorporating the new security environment, and the need for a standard of evidence for anticipatory strikes.

Professor Schmitt's naturalist approach is apparent specifically in his description of the United States' new strategic environment, noting the Joint Chief of Staff's pre-September 11 *Joint Vision 2020* prediction that opponents will counter the United States' "current conventional and nuclear advantages by adopting asymmetrical tactics and strategies,"[50] and how the NSS logically builds on this assumption by calling for disrupting and destroying terrorist networks by "direct and continuous action using all the elements" of power, thereby "taking the fight to the enemy by destroying the threat before

47. Michael N. Schmitt, *US Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737 (2004) symposium article citation.

48. *Id.* at 763.

49. *Id.*

50. *Id.* at 741.

it reaches the United States."[51] Combined with the fact that the *National Strategy for Combating Terrorism* (NSCT) makes the point that "terrorism is no longer predominately secular and nationalistic or necessarily dependent on State-support . . . [making] traditional responses such as diplomacy or economic sanctions much less effective," and "some irresponsible governments—or extremist factions within them—seeking to further their own agenda may provide terrorists access to WMD," this new strategic environment is the foundation of his article's premise: "[t]hese changes in the nature of terrorism justify a new approach to the use of military force, preemption, and unilateral action."[52]

In a positivist vein, to the extent it relies on state practice, Professor Schmitt views as significant the fact that the international community has grown "more tolerant of forceful responses to terrorism," contrasting the rejection by most of the world community to the 1986 U.S. air strikes against Libya (in response to the terrorist attack on a Berlin discothèque) with the mixed reaction to the cruise missile strikes into Afghanistan and Sudan (in response to the 1998 terrorist bombings of its embassies in Nairobi and Dar-es-Salaam) and the acceptance by the world community (after September 11) in numerous U.N. resolutions, which "by definition implicitly acknowledg[ed] the acceptability of using military force against terrorists under the law of self-defense."[53] Professor Schmitt thus answers his first posed question: "[S]tate practice has unambiguously demonstrated that the use of military forces to combat terrorists, which the U.S. security strategy envisions, is no longer questionable as a matter of principle."[54]

His treatment of the second question, regarding when it is legal to act without a mandate from the Security Council, first recognizes the "post-World War II positivist use-of-force paradigm"[55] that admits only two U.N. Charter exceptions to the prohibition against the threat or use of force by any State: self-defense and action authorized by the Security Council under Chapter VII.[56] Illustrating, through use of the ICJ's opinion in *Military and Paramilitary Activities*, how the most violent attacks by transnational terrorists would meet the threshold for

51. *Id.* at 743.
52. *Id.* at 744.
53. *Id.* at 748
54. *Id.* at 749.
55. *Id.*
56. *See id.* at 749-50.

"armed attack," Professor Schmitt then notes that strikes against al Qaeda (a group "that has planned or executed terrorist attacks against the United States for over a decade") are neither anticipatory nor punitive, they are rather "defensive responses to an armed terrorist campaign that is currently underway," comporting with the law of self-defense and consistent with the requirements of necessity and proportionality.[57] He dismisses the question of whether it is appropriate to act, absent a U.S. Security mandate, as irrelevant in the context of Operation Iraqi Freedom, because the U.S. and the United Kingdom argue that Iraq's material breach of the cease-fire that ended the first Gulf War allowed them to use force pursuant to Security Council Resolution 678 authorizing military action by States cooperating with Kuwait following the Iraqi invasion. Nevertheless, in the absence of these prior Security Council resolutions, Professor Schmitt's discussion of self-defense establishes that the U.N. Charter right to self-defense permits the U.S. to act alone against terrorists and WMD "*if* the right to self-defense has matured," as in the case of al Qaeda's terrorist campaign against the U.S.[58]

Turning next to preemption, Professor Schmitt decries the language in the NSS which suggests this concept needed to be refashioned in light of the capabilities and objectives of today's adversaries.[59] Instead, he asserts, agreeing with Professor Novak's general approach discussed below, that preemption's legality turns on the "circumstances in which the preemptive strike is launched."[60] Preemption must therefore comply with necessity and proportionality, and be in response to an imminent attack. Rejecting the temporal element of imminence as nonsensical in the era of terrorist attacks launched without warning, Professor Schmitt instead illustrates how interpreting "imminence" in light of its underlying purpose (permitting States to effectively defend themselves against attack) results in a reasonable interpretation "that allows a State to act anticipatorily (preemptively) if it must strike immediately to defend itself in a meaningful way and the potential aggressor is irrevocably committed to attack."[61] When dealing with a terror group that has definite plans to conduct an attack, though the target, location, and exact timing is unknown, the use of anticipatory force to prevent these

57. Id. at 752.
58. *Id.* at 751.
59. *See id.* at 754.
60. *Id.*
61. *Id.* at 755.

scenarios is lawful, because the last opportunity a State may have to foil an attack could arise "weeks, even months, earlier" than the attack.[62]

One complicating factor raised by this conclusion is international law's failure to contain an express standard of proof regarding the quality of evidence necessary to justify an anticipatory strike. Although, as noted by Dr. Cook below, an ethical approach would sketch a justification for requiring a standard, this evidentiary justification was not specifically addressed by Professor Schmitt, though he does recommend a "clear and compelling standard," drawn from the United States' October 2001 self-defense notification to the Security Council regarding the attacks on al Qaeda and Taliban assets in Afghanistan, to fill this gap in positive law.[63] In any event, preemption is a moot issue with regard to the attacks on al Qaeda, Professor Schmitt writes, occurring as they do after al Qaeda attacked the US on September 11 in the course of an extended campaign.[64]

The final two questions discussed by Professor Schmitt involve when counter-terrorist and counter-WMD operations can be conducted on foreign soil, and when a state sponsor of terrorism may be attacked. The first question becomes problematic when counter-terrorist operations are conducted without the consent of the State where the terrorists are located, due to U.N. Charter Article 2(4)'s prohibition against the use of force against the territorial integrity of a state. Pointing out that the right to self-defense would be meaningless if terrorist found sanctuary in a sympathetic State following an attack, Professor Schmitt reasons that a "fair balance" between these conflicting textual rights "must be sought."[65] Regarding the question of when a state sponsor of terrorism may be attacked, he noted that the ICJ's judgment in *Military and Paramilitary Activities* setting the threshold of State involvement constituting an involvement in an armed attack[66] has been lowered by state practice in the aftermath of

62. *Id.* at 756.

63. *Id.* at 757.

64. *See id.*

65. *Id.* at 759. An appropriate balance, opines Professor Schmitt, would "require States exercising their right to self-defense to first demand that the State in which the terrorist are located to police their own territory," and if they do not, "the defending State may non-consensually cross the border for the sole purpose of conducting counterterrorist operations, withdrawing as soon as it eradicates the terrorist threat." *Id.* at 760.

66. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (functionally defining such actions as an armed attack when they are "of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein").

the outpouring of support for Operation Enduring Freedom against the Taliban.[67] What remains unclear, Professor Schmitt observes, is the exact level of support that meets the lower threshold.

Professor Robert Turner's article, *Operation Iraqi Freedom: Legal and Policy Considerations*, like Professor Schmitt's contribution, utilizes both a naturalist and positivist approach to international law.[68] Before doing so, however, Professor Turner also addresses perhaps the most perplexing question raised for non-legal specialists in the debate over Operation Enduring Freedom's legality: how can both sides in the debate base their position on "their preference for peace and their respect for the rule of law?"[69] For Professor Turner, the answer is summed up in one word at the beginning of his article: "credibility." He explains up front that

> it is only when the rule of law is *credible*—that is, when international actors otherwise favorably disposed to resorting to aggression or other unlawful activity that threatens the peace perceive that the law will be *enforced*—that it has any chance of playing a serious role in keeping the peace.[70]

Turning towards the "law" that needs to be "enforced," Professor Turner keys in on the relevant international legal principles related to "peace" by pointing out several principles embedded in the U.N. Charter relevant to the legality of state actions. First, the authors of the Charter vowed "remove 'threats to the peace'" even before aggression could occur, and that very vow finds expression in Article 1 of the U.N. Charter.[71] Second, the Security Council has primary, not exclusive, responsibility for maintaining international peace and security.[72] Finally, not every use of force by sovereign states in the absence of Security Council authorization is unlawful due to the Article 2(4) prohibition on threats or use of force against the territorial integrity or political independence of any state.[73] Quoting Professor Phillip C. Jessup, a distinguished international scholar and ICJ judge, in support of his assertion that Article 2(4) does not prohibit force not aimed against territorial integrity or political

67. *See* Schmitt, *supra* note 46, at 762.

68. Robert F. Turner, *Operation Iraqi Freedom; Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL'Y 765 (2004).

69. Id. at 766.

70. *Id.*

71. *Id.* at 767.

72. *See id.* at 768.

73. *See id.*

independence of a state, Professor Turner finds Operation Iraqi Freedom thereby not prohibited by that section of the U.N. Charter.[74]

Additionally, Article 2(4)'s reservation of "individual or collective self-defence," observes Dr. Turner, recognizes the legitimacy of state self defense, either individually or collectively, in the face of U.N. Security Council paralysis.[75] Indeed, he notes, a senior member of the US delegation to the San Francisco conference that produced the U.N. Charter, Senator Arthur Vandenberg recognized this very scenario: "If the Security Council fails to act—or is stopped from acting, for example, by a veto—Article 51 continues to confound aggression. The United Nations is thus saved from final impotence. So is righteous peace."[76] As recounted by Professor Turner, Operation Iraqi Freedom played out this scenario in reality. Describing in excruciating detail the futile attempts by the U.N. Security Council to convince Saddam that their Chapter VII threat of "severe consequences" was credible should he continue to flout U.N. resolutions, and noting the threatened Security Council vetoes by France and Russia, Professor Turner concludes that Operation Iraqi Freedom was thereby expressly permitted as an exercise of self defense to remove what the Security Council had recognized for "more than a dozen years" as a threat to peace.[77]

Professor Turner's aforementioned discussion of the "purposes" of the U.N. Charter delves behind the text of that document, and this is where his naturalist approach to law is most evident. His long list of horrific humanitarian abuses by Saddam Hussein serves to illustrate his point that the U.N. Charter article 2(7) general prohibition against U.N. action in matters within the domestic jurisdiction of a state does not place these and similar perpetrators of terror beyond the reach of the law: "[I]f international law were so corrupt or wrong-headed that

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74. *Id.* Specifically, Professor Turner notes:

> Obviously, since the Iraqi regime of Saddam Hussein was repeatedly determined by the Security Council to be a "threat to the peace," and the very first purpose set forth in Article 1 of the Charter is to "remove" threats to the peace, one can not with a straight face argue that the "purpose" of Operation Iraqi Freedom was inconsistent with the purposes of the Charter. Nor did the states involved in the liberation of Iraq have designs on its "territorial integrity" or "political independence."

Id.

75. *Id.* at 769-70.

76. *Id.* at 770.

77. *Id.* at 772. Professor Turner notes the similarity of Operation Iraqi Freedom to NATO's Kosovo operation to remove Milosevic, who was declared by the Security Council to be a threat to peace, but whose removal by U.N. forces was blocked by the threat of a Russian veto. *See id.* at 775.

it immunized the slaughters of Stalin, Hitler, Mao, or Pol Pot from effective action by the world community, it would neither be worth studying nor supporting."[78] By complementing his conclusion that Operation Iraqi Freedom was legal from a positivist perspective with his conclusion that Operation Iraqi Freedom was also ethically appropriate, Professor Turner provides international law with needed "credibility" while discerning its solid ethical basis. In short, by bringing to the debate a discussion of how Operation Iraqi Freedom comports not only with the text, but also the purpose, of the U.N. Charter, as well as international legal precedent, Professor Turner's article provides one example of how ethical considerations are brought to bear in international legal analysis.

C. *Capturing the Ethical Reality*

Dr. Martin L. Cook's piece, *The Ethical and Legal Dimensions of the Bush 'Preemption' Strategy*, makes the case for ethics as an unapologetic element of international law.[79] Urging international lawyers to view international law as kind of "stop-motion photograph of a much older and varied ethical tradition of reflection on the justifications for the use of military force," Dr. Cook posits that the "older ethical traditions [may well] provide useful insights and fundamental principles to guide the development of our thinking in times of change."[80] After describing the current framework of international affairs that resulted from the Westphalian settlement, including a description of Michael Walzer's legalist paradigm, he notes that the Westphalian international system's concept of peace, the absence of aggression among those states, is essentially a positivist one, focusing exclusively on state-to-state interactions.[81]

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78. *Id.* at 777.

79. Martin Cook, *The Ethical and Legal Dimensions of the Bush 'Preemption' Strategy*, 27 HARV. J.L. & PUB. POL'Y 797 (2004).

80. *Id.* at 799.

81. *Id.* at 801. Dr. Cook's describes Michael Walzer's realist paradigm as follows:

> There exists an international society of independent states.
>
> This international society has a law that establishes the rights of its members—above all, the rights of territorial integrity and political sovereignty.
>
> Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
>
> Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society
>
> Nothing but aggression can justify war.
>
> Once the aggressor state has been military repulsed, it can be punished.

This particular approach to international law, he implies, sits uneasily beside our moral sense:

> [N]ormative legal and ethical thought has needed to accommodate exceptions to the paradigm to capture our considered moral intuitions about justified use of force precisely because some cases that do not fit the paradigm are clearly necessary and justified . . . .
>
> From a normative ethical perspective, however—as distinct from the legal perspective—there was always something deeply dissatisfying about the Westphalian compromise.[82]

Dr. Cook identifies this "sharp dichotomy" between an international system built on equal states and their rights on one hand and the rights of actual human beings on the other, and how the Hague and Geneva movements, followed by international humanitarian law, were attempts to recognize the value and rights of human persons not "subsumed into their identity as members of the state."[83] The NSS' suggestion that "sovereignty will not be a cloak beneath which terrorism and the development of Weapons of Mass Destruction can be developed" is not a "dramatic departure," Dr. Cook observed, from "the conceptual framework for overriding state sovereignty in the name of internationally agreed goals [that] has been in place for half a century."[84] He opines that the NSS reduces the justification of preemption and self-defense to "a single test: capability," and as such, due to the State's self-judgment regarding this test, it "threatens to "destabilize the entire structure of restraint for use of force and respect for national sovereignty that lies at the foundation of the modern international system."[85] This result disturbs Dr. Cook, for he envisions a "real and fundamental realignment" that apparently embraces a naturalist approach to international law, one in which "universalizing concerns with human rights and liberties, combined with the exigencies of the Global War on Terror," shifts the

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Id.

82. *Id.* at 801-02.

83. *Id.* at 803.

84. *Id.* at 805. In this regard, Dr. Cook notes that states, NGOs, and "ordinary people have recognized the moral and political deficiencies of an international system focused exclusively on states and their sovereignty." *Id.* at 806. During the conference, in fact, the Global Director of Freedom House's Rule of Law and Human Rights Program, Ms. Lisa Davis, highlighted the role NGOs have had on the creation of international human rights standards the institutions to enforce them, while Harvard Business School Professor Ms. Debora L. Spar gave a presentation on entitled *Power of Activism Assessing the Impact of NGOs on Global Business*, exploring the factors involves in the interaction between international firms and activist groups. These presentations are on file in the offices of the Staff Judge Advocate, United States European Command, Stuttgart Germany.

85. *Id.* at 810-11.

positivist foundation to a system that "rather than starting with state sovereignty as the bedrock, would instead start with the shared values and concerns of (for lack of a better word) the 'civilized' world."[86] Dethroned from its privileged position in a positivist approach to international law, sovereignty would instead be "contingent on a state's willingness and ability to protect and preserve the lives and rights of its citizens and to participate meaningful in the struggle for the maintenance of global order against fundamental threats against it such as the aspirations of al Qaeda."[87] Likening the current conflict with al Qaeda to the situation faced by Augustine, with both involving a foe committed to the collapse of the existing global civilization, Dr. Cook concludes by placing the responsibility for defense of the world's fundamental and shared concerns directly on the United States. He cautions the "sole remaining superpower" that its defense "transcends conventional issues of national interest of sovereign states."[88] Instead, Dr. Cook views the critical defensive struggle as how to forge "a new, commonly understood, and generally embraced set of normative principles for the action of states in the international arena."[89]

Professor Michael Novak, in his article, *Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters,* agrees with Dr. Cook's observation that the GWOT is a challenge to our civilization; "[o]ur concern," Prof Novak notes, "is the military threat to our nation and our civilization, and all the civilizations based upon law and rights, the threat quite starkly thrust upon us by Islamicist terrorists on September 11, 2001."[90] Rather than directly urging ethics' inclusion in international law, as Dr. Cook did, Professor Novak instead makes ethics' role in international law self-evident by highlighting the current ethical and political context of the GWOT and providing an insightful historical discussion on the peculiar problems of asymmetrical warfare.

Drawing a sharp distinction between the religion of Islam and the political sect of Islamicism, Professor Novak identifies the latter as the West's enemy, willing "to use a distorted, anti-intellectual, and

86. *Id.* at 813.
87. *Id.*
88. *Id.* at 814-15.
89. *Id.* at 815.
90. Michael Novak, *Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters*, 27 HARV. J.L. & PUB. POL'Y 817, 825 (2004).

narrow version of religion to achieve their political purposes."[91] The war in which the West is engaged is "not a war against the religion of Islam;"[92] rather, notes Professor Novak, it is against Islamicism, whose leaders have "studied intensely the organizational methods and the political uses of terror perfected during twentieth-century political movements, such as those led by Lenin, Mussolini, Hitler, and Stalin," in order to fuse these into a distorted, secular version of primitive Islam.[93] Describing the source of Islamicisim as resentment, and not transcendent religion, Professor Novak reminds the reader what one seldom finds in the popular media: "the sheer secular misuse of Islam by extremists is so severe that a great many Muslims around the world are prepared to give their lives rather than to accept them as rulers."[94] In the GWOT, Professor Novak identifies three areas challenged by clandestine terror: first, just war concepts, second, political legitimacy, and third, military tactics. He devotes his article to the first two areas.

Drawing on just war tradition, Professor Novak notes that "[w]hen waged for the right purposes, with the right means, and in the right way, war may be an act required by justice."[95] Rejecting the new mantra by "glib thinkers" that there is always a "presumption against war," Professor Novak notes that "justice sometimes requires the waging of war," for example,

> to come to the defense of one's own nation or of a weak nation under unjust attack by a stronger, to restore international order so that the rule of law and the protection of the rights of the people can flourish, to punish terrorists and others who destroy civil order or employ violence to drive peoples apart, and the like.[96]

Professor Novak then reminds the reader that these *ad bellum* reasons have been used to justify past wars on terror, such as those against "organizations of pirates preying upon international shipping lanes,"[97] and identifies what is new in the current GWOT: "both the vulnerability of the modern city to clandestine terrorism and the

91. *Id.* at 820.
92. *Id.* at 823.
93. *Id.* at 820.
94. *Id.* at 823. Professor Novak notes that experts estimate the number of Muslims supporting the Islamicist politicalization of Islam at 10-15 percent, with indications that the proportion of actual supporters is at the lower end of that range, or even fewer. *Id.* at 824.
95. *Id.* at 826.
96. *Id.* at 827.
97. *Id.* at 828.

terrible destructiveness of even small packages of modern weaponry."[98] Thus, Professor Novak concludes that

> [u]nder today's conditions of war, there is no such lead time, not at least when the destruction is wrought in such seemingly innocent events as a car driving into a hotel driveway . . . or a small briefcase being carried onto a train for explosion in a tunnel . . . . [S]ure knowledge that an aggressive attack is already underway is no longer easy to obtain in time for self-defense.[99]

In making decisions to go to war preemptively or otherwise, Professor Novak emphasizes the need for *phronesis,* or practical wisdom, which entails the best possible choice one can make on what one knows at the time, and "must meet the highest standards of such reason."[100] Professor Novak then finishes his discussion on just war by observing that "[g]iven the great destructive power available to terrorists today, preemption may be the only practical manner of self-defense."[101]

Professor Novak's discussion of legitimacy underscores the economic, moral, and political nature of the division between Europe and the United States. He concludes that "Europeans consider themselves more secular and enlightened than Americans, and also more moral and politically advanced," despite the fact that the "collapse of socialism as an economic idea has failed to awaken the European left to a fresh appreciation of the resiliency and creative capacities of capitalism."[102] Accordingly, these differences translate into the international legal sphere, with Europe trying to force the United States to submit to the U.N. in the name of legitimacy because Europe, particularly France, believes "it is better able than the United States to guide and control the U.N.," while in the U.S., the U.N. is a "source of division."[103] Stating that "there is no utility in idealizing the United Nations," as it is "deeply flawed . . . mired in the muck of self-interest, disguised alliances, [and] double dealings" Professor Novak observes that "member states singled out for the special privileges of the Security Council in 1948 no longer represent the political realities of the twenty-first century."[104] Dismissing the positivist argument, identified above by Professor Rogers, that strictly

98. *Id.* at 830.
99. *Id.* at 831.
100. *Id.* at 832.
101. *Id.* at 834.
102. *Id.* at 835.
103. *Id.*
104. *Id.* at 836.

limits the use of force to individual or collective self-defense or as a result of a U.N. mandate, Professor Novak opines that the "canons of self-defense put forth in the U.N. Charter . . . sufficiently establish[] the moral legitimacy of the removal of Saddam Hussein from power by the Coalition of the Willing," and drives home this point by describing the unpalatable alternative.[105] The question of how to achieve a legitimate and working government in Iraq after the war poses the second issue involving legitimacy. "The faster that the Iraqis take responsibility for their own self-governance, the better—with one major caveat," that it would be "a grave error to turn self-governance over to Iraqis until sufficient checks-and-balances are in place so that no one faction can seize total control over everybody and everything."[106]

Both Professor Cook and Professor Novak view ethics as a vital element of international law, albeit one that is not yet directly acknowledged as such by many States or international officials. By discerning the pull of the ethical moral impulse on nations, justifying a use of force not strictly within the Westphalian positivist paradigm, and by emphasizing how ethics and the just war tradition can provide precedent and reasoning for states engaged with an asymmetrical enemy, Dr. Cook and Professor Novak respectively recapture the moral content of international law. In so doing, they illustrate how a less positivist, more naturalist, legal approach may better meet the critical challenges to, and gaps in, the positivist legal paradigm created by the end of the Cold War, the GWOT, and increasing humanitarian crises.

D. Between Peace and War: What Law Applies?

In contrast to the authors described above, Professor Wolf Heintschel von Heinegg takes a largely positivist approach to international law as he clarifies the law applicable to transitions from war to peace in his article, *Factors in War to Peace Transitions*.[107]

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105. *Id.* at 836.

> The alternative was to leave in place a major supporter of world terrorism against the United States and other nations, a particularly cruel tyrant over his own people, a bellicose, destabilizing threat to his immediate neighbors, and a leader ordered by the United Nations (in vain) both to destroy his known weapons of mass destruction and to provide proof that he had done so.

Id.

106. *Id.* at 837.

107. Wolf Heintshel von Heinegg, *Factors in War to Peace Transactions*, 27 HARV. J.L. & PUB. POL'Y 843 (2004).

Attributing some of the misunderstandings that arise in this topic to reliance on political statements rather then on "a proper analysis of the relevant treaties," the theoretical theme that flows throughout Professor Heintschel von Heinegg's article is his insistence on a positivist approach, which he views as key to international order.[108] "If international lawyers cease to remember one of their main tasks, i.e., the identification of rules and principles of international law as expressions of the consensus of States," he accordingly reminds his readers in his conclusion, "public international law will lose its credibility, and, most of all, its legally binding force."[109] In the face of today's dynamic legal order, Professor Heintschel von Heinegg counsels patience. This current attribute of the legal order does not "justify calls for a modification of international law as soon as its application to a given situation creates problems."[110] Rather, he states that existing law will produce operable solutions, especially if it includes "concepts of international law that may have been established a long time ago but that still continue to govern international relations."[111] Any remaining disconnect between this existing law and new situation creates "inconveniences," but "that is a typical side effect of every legal order."[112]

Professor Heintschel von Heinegg's evidently tolerant attitude towards gaps in the positivist approach to international law created by current challenges is understandable, since, at least in his field of study, there are not many glaring gaps created by the lack of positive treaty law or state practice. As his article clarifies, the 1907 Hague Regulations, the Geneva Conventions of 1949, and the Additional Protocols of 8 June 1977 to the Geneva Conventions provide answers for determining the law applicable in various scenarios of state use of force and occupation. He notes that common Article 2 of the 1949 Geneva Conventions makes those humanitarian conventions applicable to every situation of armed conflict, whether recognized or not by a state, as well as to all "cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance."[113] Discussing the relationship between occupation and the cessation of active hostilities, Professor Heintschel

108. *Id.* at 843.
109. *Id.* at 873.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 844 (quoting common language in the Geneva Conventions).

von Heinegg notes that the beginning and end of international armed conflict do not necessarily have to coincide with the beginning and ending of occupation. He defines "positive peace" as "the reestablishment of the full sovereignty of all belligerents," which is "based upon the principle of sovereign equality of States,"[114] thereby contrasting sharply with Dr. Cook's and Professor Novak's approaches to state's sovereignty as encompassing a justly constituted political order.

Professor Heintschel von Heinegg uses state practice, in addition to treaty law, to illustrate how armistices no longer suspend military operations but rather terminate wars, and how a ceasefire has the same effects as an armistice under the 1907 Hague Regulations.[115] He also tackles the issue of how the ancient international legal concept of *debellatio*, the extermination in war of one belligerent by another through annexation of the former's territory after conquest and the annihilation of enemy forces, no longer provides valid title to territory but remains a valid term to describe a "factual phenomenon" of "the total defeat of one party to the conflict that has led to the extinction of most of that State's sovereignty."[116] If followed by occupation or some form of exercise of authority by the victorious State, *debellatio* will not imply termination of war.[117]

Professor Heintschel von Heinegg's approach of his topic from a positivist perspective does not preclude his conclusion that Operation Iraqi Freedom was legal. When discussing cease-fires ordered by the U.N., he observes that Article 25 of the U.N. Charter makes cease-fires ordered by the Security Council binding upon the parties to the conflict, and if the ceasefire is made dependent upon unfulfilled conditions by one belligerent, the other belligerent is entitled to resume hostilities.[118] Accordingly, Professor Heintschel von Heinegg notes, since "Iraq had been in material breach of the obligations imposed on it by Resolution 687, the allied forces regularly resumed armed hostilities in order to induce Iraq to comply with its obligations under the Security Council resolutions."[119] Moreover, he adds "the

114. *Id.* at 847 (observing that positive peace, in this formulation, did not occur between Germany and victorious Allied Forces until its reunification, when Germany could at long last decide the core questions of its sovereignty).

115. *See id.* at 850. *See also id.* at 858 n.64 and accompanying text (noting the absence of state practice in cases of *debellatio*).

116. *Id.* at 851.

117. *Id.*

118. *See id.* at 856.

119. *Id.*

extent and scale of armed force used in response to the breach of a ceasefire is immaterial."[120] As one would expect in a positivist approach that strives to separate the moral from the legal, the immorality of Saddam Hussein's tyrannical regime does not factor into Professor Heintschel von Heinegg's analysis. Instead, the legally significant "fact" in his article is the fact of Iraq's material breach of the UN's resolution.

The latter part of Professor Heintschel von Heinegg's article discusses the establishment of post-conflict law in a vanquished state, setting forth a useful chart to aid in his thorough discussion of how current treaties and state practice impact the exercise of sovereignty in a vanquished state by an occupying power.[121] It is in his analysis of *debellatio* and occupation law, however, that one senses the gap in the positivist approach to the law of war to peace transactions, a gap that natural law unobtrusively fills. Specifically, Professor Heintschel von Heinegg observes that "[n]either the Hague Regulations nor Geneva Convention IV seem to have anticipated a situation of *debellatio*," since it does not reflect the reality of total defeat and the extinction of functioning governmental structures as in Iraq after Operation Iraqi Freedom.[122] This lack of controlling international law does not result in international paralysis, rather, he states, "the victorious power that decides to establish and maintain an occupation regime have to be adapted to the special situation of *debellatio*," may, absent U.N. Security Council veto, "take all measures necessary to install functioning administrative, juridical, legislative, and social structures that are a prerequisite for the 'orderly government' of the territory concerned."[123] Indeed, this is a right the U.N. acknowledges as going "beyond the traditional rules of occupation law."[124] It is in this U.N.-recognized *debellatio* gap in existing positivist rules where natural law subtly but powerfully provides the reasoning for preserving the political sovereignty of the vanquished state and the moral dignity of its inhabitants. What Dr. Cook would describe as preserving "the lives and rights of its citizens,"[125] and what Professor Novak would assert is "the Iraqis tak[ing] responsibility for their own self-governance,"[126]

120. *Id.*
121. *Id.* at 857-58 tbl.
122. *Id.* at 862.
123. *Id.* at 863.
124. *Id.*
125. Cook, *supra* note 79, at 813.
126. Novak, *supra* note 90, at 837.

is exactly the ethical reasoning the U.N. urged in U.N. Resolution 1483 when calling upon the United States and United Kingdom "to promote the welfare of the Iraqi people through the effective administration of the territory, including, in particular, working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."[127]

Concluding the article with a discussion of the human rights in international armed conflict, Professor Heintschel von Heinegg also implicitly continues reasoning in a less then positivist manner. He reasons that, in line with the traditional view, the laws of armed conflict, as *lex specialis*, apply exclusively in an international armed conflict, and that "it would not make much sense to complicate the situation" and submit armed forces to Human Rights instruments, despite the lack of positive law that would guarantee this choice of law.[128] He also explains how this conclusion is not undermined by the European Court of Human Right's decision in the *Loizidou* case, which applied the European Convention on Human rights to Turkish armed forces in Northern Cyprus, or in the *Bankovic* case, where the court held that air attacks in the Former Yugoslavia by NATO was not an exercise in jurisdiction subjecting them to the European Convention of Human Rights, dismissing claims of human rights violations as inadmissible.[129] The law of armed conflict, Professor Heintschel von Heinegg reminds us, is a "body of law designed to protect innocent victims of such conflicts by obliging the belligerents to take all measures feasible to spare them from detrimental effects of armed hostilities," and "are a reasonable compromise between considerations of humanity on the one hand and considerations of military necessity on the other hand."[130] "After the termination of the war," he adds, "human rights . . . will, of course, be fully applicable again in the relationship between the citizens and their government."[131]

Professor Yoram Dinstein's article, *Comments on War*, takes a thoroughly positivist approach to international law.[132] His opening section signals a direct conflict between law and justice. Rejecting

127. Heintschel von Heinegg, *supra* note 107, at 863.
128. *Id.* at 869.
129. *See id.* at 869-70.
130. *Id.* at 871.
131. *Id.* at 872.
132. Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877 (2004).

outright a role for "just war doctrine" in present day international law, Professor Dinstein dismisses this doctrine due to its alleged manipulation by states historically who "went to war whenever they deemed fit."[133] Indeed, according to Professor Dinstein, "[t]here is no indication whatever that the 'just war' doctrine affected the practice of States by limiting in a perceptible manner their freedom to go to war."[134] It was only in the twentieth century that international law "underwent a metamorphosis," culminating in Article 2(4) of the U.N. Charter, which prohibits the use and the threat of force in international relations and enshrined in customary international law in the ICJ *Nicaragua* case.[135] Thus, only the self-defense exception in Article 51 of the U.N. Charter and force endorsed by the U.N. Security Council remains legal under international law in Professor Dinstein's view.[136] Unapologically interpreting the U.N. Charter very strictly, Professor's Dinstein's positivist approach to international law invariable results in the complete divorce of law and ethics, including just war tradition: "It is," states Professor Dinstein, "totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter."[137] Explaining why he considers the U.N. Charter—and hence the Security Council—to be the world's singular legitimator of the use of force, Professor Dinstein states the Charter, which he describes as an "international world constitution," stabilizes the "fragile *limes* protecting the international community against forces of chaos and barbarism."[138]

This characterization of the U.N. Charter's alleged palliative role against violence notwithstanding, Professor Dinstein labels the

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133. *Id.* at 877.

134. *Id.* at 877-78. Ironically, Professor's Dinstein's criticism of just war doctrine in this regard is equally applicable to the U.N. Charter. "Since 1945," observes author and theologian George Weigel,

> 126 out of 189 U.N. member states have been involved in 291 armed conflicts in which some 22 million people have been killed. Given this record, it is difficult to argue that the "international community" has agreed in practice to be bound by the U.N. Charter and its rules on the use of force. It is even more difficult to argue that the "international community" has ceded an effective monopoly on the use of force to those actions sanctioned by the Security Council.

George Weigel, The Thomas Merton Address: Moral Leadership and World Politics in the 21st Century, Columbia University (Oct. 30, 2003) (transcript on file with Ethics and Public Policy Center, Washington, D.C.) (citing David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, 73 NAT'L INT. 59 (2003)).

135. Dinstein, *supra* note 132, at 878.

136. *See id.* at 882.

137. *Id.* at 880.

138. *Id.* at 879. On the question of the effectiveness of the U.N. in keeping the barbarism of war at bay, see *supra* note 134 and *infra* note 146 and accompanying text.

Kosovo air campaign, even against the backdrop of "ethnic cleansing" and "other violations of human rights," as a "breach of the Charter" and an unlawful "exception to the rule," although "[m]orally speaking" it was "an excusable breach."[139] Similarly, Professor Dinstein dismisses the legality of anticipatory or preemptive self-defense, as Article 51's right to self-defense is only triggered when "an armed attack occurs."[140] Thus, he notes, "all that a State can do in anticipation of a future strike by an unfriendly country is prepare for it militarily, try to defuse the crises, or raise the matter before the Security Council."[141] Professor Dinstein does, however, seem to bring anticipatory considerations back into the self-defense equation by observing that "[o]nce an armed attack is beginning to occur—even when it is at a very preliminary or incipient stage—self-defense may legitimately be invoked in an 'interceptive' manner."[142]

Less contentiously, Professor Dinstein's article provides an overview of that swath of international law on which both positivists and naturalists would agree. He makes the crucial point that in international law there is a "total separation of *jus ad bellum* and *jus in bello*," with the latter laws dealing with the laws of war applying "equally to all Parties to an international armed conflict," regardless of who is responsible for starting the conflict.[143] His article also provides a useful survey of the different attributes and commutations that conflicts take as they begin, are fought, and are concluded. He accordingly provides a brief review of the state of international law in such areas as the demarcation of inter-State and intra-State conflict, incidents short of war, suspension and termination of war, and the legal relevance of formal recognition of an enemy state and length of a war. It is on this latter point that Professor Dinstein joins company with Professor Heintschel von Heinegg in viewing Operation Iraqi Freedom not as a new war, but as a legitimate and legal phase of the previous Gulf War. Since the Security Council in Resolution 1441 stated that it decided "categorically—in a binding manner under

139. Dinstein, *supra* note 120, at 881.

140. *Id.* at 882; see also U.N. CHARTER art. 51.

141. Dinstein, supura note 120, at 883.

142. *Id.* When an armed attack "begins to occur" thus becomes the legally significant issue in this approach. Professor Dinstein provides as an example—the locking in on a warplane by a anti-aircraft battery, as appropriate for self-defense measures. This is a scenario compatible, some might argue, with the terrorist targeting of a US city with WMD, with temporal considerations irrelevant in the era of terrorist attacks with warning. *See supra* text accompanying notes 98-100.

143. Dinstein, *supra* note 120, at 881.

Chapter VII of the Charter," that Iraq was in material breach of its obligations, and U.N. inspectors reported back that Iraq had not met its obligations after Saddam was given one very last chance, "the decision whether and when to recommence military operations was vested in the other side to the armed conflict under the Hague Regulations and the Vienna Convention, to wit, the (restructured) coalition."[144]

IV. CREATIVE DISCOURSE: HARBINGER OF THE FUTURE?

The symposium articles highlighted above provide a window into the re-energized naturalist-positivist dialogue in international law facing international practitioners and officials in the post-Cold War, post-September 11 world. The U.S., through its strategic doctrines, emphasis on moral differences between States, acceptance of the universality of human rights, and its military actions during the GWOT, has focused the world community on this debate—regardless of whether or not lawyers or government officials are ready to engage in this discourse.[145] In order to build an international legal approach that fosters dialogue rather than diatribe, proponents of both sides of this divide would gain by acknowledging that, at a fundamental level, each approach involves preferring values thought beneficial for guiding decisions by statesmen and other international decision makers. In so doing, naturalists and positivists, recognizing the contribution each value brings to international law when appropriately utilized, can form common ground to foster the rule of law.

Specifically, positivists, in their quest to determine "law as it is," hold the values of stability and predictability in international relations as sacrosanct, and as such their doctrinal defense of territorial sovereignty, their strict interpretation of U.N. Charter provisions, and their unwavering regard for the pronouncements (or silence) of the U.N. Security Council are fully understandable. However, by confronting the fact the prevailing positivist legal regime has not been a war-eliminating panacea,[146] recognizing the normative

144. *Id.* at 890.

145. See, for example, *supra* note 45 and accompanying text for examples of U.S. and other state discourse regarding the GWOT and Operation Iraqi Freedom.

146. For example, between 1816 and 1991, there were no wars between established democracies, while there were 155 major wars between democracies and nondemocracies. John Norton Moore, Editorial Comment, *Solving the War Puzzle*, 97 AM. J. INT'L L. 282, 283 (2003); *see also* Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT'L L. 551, 569 (2003) (stating the seeming stability of positivist international law is mere "illusion").

underpinnings of international law and institutions,[147] and acknowledging natural law's utility in filling gaps in positivist law (in areas highlighted by the symposium articles such as evidentiary requirements for preemptory attacks, requirements for just war, and establishing legitimate post-war governments in *debellatio* situations),[148] positivists will gain better appreciation of factors motivating state and other international official actions creating fault lines in the current international positivist paradigm. Recognizing the role of moral differentiation and normative reasoning will thus prevent analytical stagnation created by conflict outside the strict positivist paradigm[149] and help incorporate these elements into a more inclusive approach to an international "rule of law."[150]

Naturalists, for their part, cherish moral values such as those enshrined in the U.N. Charter of Human Rights, and thus abhor as a betrayal of these animating ideals any approach to international law that dismisses these values as irrelevant in international legal

147. *See, e.g.*, U.N. CHARTER pmbl; Mary Ann Glendon & Elliott Abrams, *Reflections on the UDHR*, FIRST THINGS, April 1998, at 23 (describing how the Universal Declaration on Human Rights belongs to a family of postwar rights documents that accord their highest priority to human dignity, and how the similar Helsinki Accords "Basket Three" of human rights put the Soviets on the defensive regarding human rights).

148. Natural law analytical thought has been utilized by scholars addressing a myriad of modern international legal issues. *See, e.g.*, Magenis, *supra* note 7 (self defense); Travaglini, *supra* note 8 (law of the sea); Searl, *supra* note 11 (nuclear arms); Ariel Zemach, Comment, *Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute*, 41 COLUM. J. TRANSNAT'L L. 895 (2003) (settlement provision of the International Criminal Court); Bruce P. Frohnen, *Multicultural Rights?: Natural Law and the Reconciliation of Universal Norms with Particular Cultures*, 52 CATH. U. L. REV. 39 (2002) (universal human rights).

149. *Compare* Michael Glennon, *The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002) (avoiding any characterization of U.N. member states while arguing the U.N. Charter has failed because the Charter sought to impose rules that are out-of-sync with the way States actually behave, and noting the lack of definition of "aggression" in a positivist approach to law), *with* Moore, *supra* note 146, at 283 (regarding empirical evidence of the types of governments which go to war against each other). *See also* Cohen, *supra* note 146, at 578 (discussing the possible failure of international law to account for the power of ideas and ideology and the problematic nature of an international law based on neutral principles).

150. One starting place for legal positivists is to identify those norms found in international treaties and organizations which can serve as fundamental morality clauses, and as such, utilizing them to determine the "hard cases," much like domestic courts do when interpreting constitutions. *Cf.* Soper, *supra* note 18, at 2411-12; *supra* note 26 and accompanying text. A positivist mindset that can facilitate discerning such a new approach to international law can begin with the "enlightened positivism" described in Simma & Paulus, *supra* note 11, at 307-308. Described as "identical neither with formalism nor with voluntarism," enlightened positivism realizes "moral" considerations are "not alien to law but part of it" while retaining the link to "formal sources recognized as binding by the international community." *Id.*

discourse. Nevertheless, naturalists should recognize that, perhaps most of the time, key components of the positivist paradigm, such as rules associated with territorial sovereignty, the U.N., and bilateral and multilateral treaties and organizations, provide statesmen and other international practitioners with the fora, the procedures, and the structural backbone for solving international issues, including humanitarian crises.[151] By so doing, naturalists can concentrate on identifying the ethical and moral normative context of international challenges, especially in areas where the positivist approach to law is thinner, less robust, or morally incoherent. Naturalists will thus be better suited to provide officials and practitioners not only with reasoned, principled guidance, but also with the practical and moral ramifications for, and the risks attendant to, state or multinational action or inaction in the international arena.[152]

In the conference's keynote speech, Mr. Anthony Dworkin, editor for the website *The Crimes of War Project*, noted that the challenge before international practitioners and governments is "to build on the notion of the fundamental laws of humanity to make sure that they reach down to protect people on the individual level."[153] If dialogue

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151. Indeed, one of the most fundamental decisions in the international system, to use force, even if made pursuant to a naturalist approach, is often executed by the key players in a positivist paradigm, such as by a state entity, by a international personality empowered to find a threat to peace unilaterally, such as the U.N., or by a multilateral organization pursuant to its charter, such as NATO.

152. Naturalists could accordingly benefit from modifying, for an international legal approach, a domestic natural law model proposed by one author, who would focus naturalists on legal concepts such as the finality of legal decisions or the legitimacy of ex-post facto legislation:

> This last observation [focusing natural law on finality of legal decisions or the legitimacy of ex-post facto legislation] suggests an obvious analogy to the Nuremberg principles: the idea that the justifications for fiat (including the right to punish) reach a limit when the content of the law is so unjust as to override the excuse "we did as we, in good faith, thought best."

Soper, *supra* note 18, at 2421-22. For a similar resolution proposed in the midst of the debate of whether "Nazi law" was law, see David Fraser, *"This is Not Like Any Other Legal Question": A Brief History of Nazi Law before U.K. and U.S. Courts,* 19 CONN. J. INT'L L. 59, 60-61 (2003). Accordingly, as noted above in the text, naturalists can provide guidance in international law when State action or inaction is so "unjust" as to override the regularly constituted positivist schematic for the use of force. Compare this with Thomas Franck's comments regarding the Kosovo operation, as noted by Prof Rogers: "the unlawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred." Rogers, *supra* note 32, at 735. The need for developing this guidance is critical, especially in determining how to prevent intra-state murder—in the last 100 years, individuals have been slaughtered by non-democratic regimes at rates several times greater than combatant deaths caused by war. *See* R.J. RUMMEL, DEATH BY GOVERNMENT 3 (1994).

153. Anthony Dworkin, The International Community and the Rule of Law, Marshall Center Legal Conference Keynote Speech (Sept. 14, 2003) (on file in the offices of the

rather than diatribe is encouraged, not only will interpreting, fostering, and implementing a lasting rule of law in conflict and post-conflict situations be facilitated, it will help international law "matter," as Mr. Dworkin hopes, "to as many people as possible."[154] This is vital since ultimately persuasion, not force, prevents conflict, fosters lasting peace, and builds the rule of law—and persuasion requires robust dialogue among the greatest number of people possible.[155]

Staff Judge Advocate, United States European Command, Stuttgart Germany). The Crimes of War Project website is located at www.crimesofwar.org/onnews/news-iraq3.html.

154. Dworkin, *supra* note 141.

155. This thought was captured well by Mr. Dworkin, who noted:

> Questions of international law are now at the very center of world politics—with the global war on terror, the doctrine of pre-emption, and the call for humanitarian intervention—all the things you talked about this week. It can only be healthy if these discussions are discussions that draw on our whole societies, because that's the best way that consistent and responsible policies get made and get followed.

Id.