

# OPERATION IRAQI FREEDOM: LEGAL AND POLICY CONSIDERATIONS

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On the eve of Operation Iraqi Freedom, I was asked by Dr. Laurie Mylroie to write a 5,000-word legal defense of the campaign to remove Saddam Hussein from power by force to appear in a new book she was writing. It took me 15,000 words to even summarize what I saw as the most compelling legal arguments—without in the process even mentioning the intelligence reports (of which I was aware) that Iraq had sought to purchase uranium from Niger that have become so central to the campaign to characterize President Bush as a “liar.”<sup>2</sup>

While the chapter was being prepared I was invited to give lectures to legal conferences in Hawaii and Germany on the same issue sponsored by U.S. Pacific Command (PACOM) and European Command (EUCOM) and attended by international lawyers from many nations, invitations that provided further opportunities to examine these issues.

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1. Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, BUSH VS. THE BELTWAY: HOW THE CIA AND THE STATE DEPARTMENT TRIED TO STOP THE WAR ON TERROR 164 (2003).

2. The fact that this clearly false allegation has round resonance within the American public may be evidence of an appalling ignorance of public affairs. As will be discussed, years before President George W. Bush called for the removal of Saddam, both chambers of the U.S. Congress enacted legislation declaring that it should be U.S. policy to remove Saddam from power, and numerous high-ranking Clinton administration officials, including former President Clinton himself, all manifested their belief that Saddam Hussein possessed Weapons of Mass Destruction. See *infra* notes 72-74 and accompanying text.

I don't start off with any fondness for war. As the son of an Air Force medical officer posted to a NATO assignment in Oslo more than half a century ago, I traveled around Europe as a child and saw some of the remaining rubble from World War II. Later, as a young adult, I spent considerable time in Indochina in a variety of capacities, including twice as a junior Army officer. I saw soldiers die, and I saw civilians and even small children die. I returned with a hatred for war, and when I was selected in 1985 to be the first president of the congressionally established U.S. Institute of Peace, it was all the more exciting because of my passion for peace. Since 1995, I have been co-teaching a seminar on "War and Peace" at the University of Virginia School of Law.

In a 1793 letter to James Monroe, Secretary of State Thomas Jefferson observed that "through all America there has been but a single sentiment on the subject of peace and war, which was in favor of the former. . . . We have differed perhaps as to the tone of conduct exactly adapted to the securing it."<sup>3</sup> And there, indeed, lies the rub. Two of my primary areas of interest are international and constitutional law, and my interest in both resulted in no small part from inquiries I began as I tried to understand the Vietnam conflict in the mid-1960s. Most of my international law colleagues opposed U.S. intervention in Iraq because of their preference for peace and their respect for the rule of law; and yet, I supported Operation Iraqi Freedom for precisely the same reasons. Because I believe 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.

While flying into Munich International Airport for the EUCOM conference, I did not miss the irony that, sixty-five years earlier, world leaders had gathered there and ignored the prohibition in international law<sup>4</sup> against the aggressive use of armed force in an

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3. Letter from Jefferson to Monroe (June 28, 1793), in 26 PAPERS OF THOMAS JEFFERSON 392 (John Catanzariti ed., 1995).

4. The 1928 Kellogg-Briand Treaty (or "Pact of Paris") had, in Article I, condemned "recourse to war for the solution of international controversies" and required that states "renounce it, as an instrument of national policy in their relations with one another." General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force July 24, 1929). Although originally proposed by French foreign minister Aristide Briand as a bilateral U.S.-French accord, American Secretary of State Frank Kellogg suggested that the entire world be invited to

effort to appease Adolf Hitler and maintain “peace for our time.”<sup>5</sup> Despite their good intentions, history reveals that their failure to enforce the law made legal constraints on aggression irrelevant and emboldened Hitler, who dismissed the cautions of his generals the following year by asserting he had “seen” the British and French leaders at Munich and they were “little worms.”<sup>6</sup> At least forty million people around the globe lost their lives during World War II, and one of the fundamental lessons drawn from that tragedy was that *unenforced* international law will not maintain the peace. Indeed, early efforts like the toothless Kellogg-Briand Treaty may actually have contributed to Hitler’s aggression by giving peace-loving states a false sense of security that encouraged them to neglect their military defenses. War, after all, was unlawful.

Hoping to avoid the same mistake in the future, in 1945 representatives of fifty nations gathered in San Francisco to draft the U.N. Charter. This time, peace would be maintained by more than mere paper barriers. Article 1 of the Charter provided:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and *removal* of *threats to the peace*, and for the suppression of acts of aggression or other breaches of the peace . . . .

Reflecting the sagacity of Sun Tzu,<sup>8</sup> rather than simply agreeing to unite against aggression once war had broken out, the authors of the Charter vowed to *remove* “threats to the peace” even before aggression could occur. Drawing on the lessons of the pre-war era, when neither the League of Nations nor any other state or group of states was willing to do more than utter a few words of criticism in response to Japanese aggression in Manchuria in 1931 and Italian

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join in the process of outlawing aggression, and ultimately more than sixty nations—including all of the major powers—became parties.

5. On September 30, 1938, British Prime Minister Neville Chamberlain returned from Munich and spoke to a cheering crowd in front of 10 Downing Street, concluding his remarks by saying: “My good friends, for the second time in our history, a British Prime Minister has returned from Germany bringing peace with honor. I believe it is peace for our time. Go home and get a nice quiet sleep.” THE DICTIONARY OF WAR QUOTATIONS 121 (Justin Wintle ed., 1989)

6. DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 412 (1995).

7. U.N. CHARTER art. 1 (emphasis added).

8. “For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.” SUN TZU, THE ART OF WAR 77 (Samuel B. Griffith trans., Oxford Univ. Press 1963).

aggression in Ethiopia four years later, the new United Nations was to have its own enforcement body.

Chapter V of the Charter established a Security Council with “primary” (but not *exclusive*) “responsibility for the maintenance of international peace and security,”<sup>9</sup> and every U.N. member accepted a legal obligation to “carry out the decisions of the Security Council” in accordance with the Charter.<sup>10</sup>

Not every use of force by sovereign states in the absence of Security Council authorization is unlawful. The basic prohibition against the use of force is set forth in Article 2, paragraph 4, of the Charter, which provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Professor Phillip C. Jessup, one of America’s preeminent authorities on international law in the mid-twentieth century and a distinguished judge on the International Court of Justice, wrote shortly after the Charter was written:

Article 2, paragraph 4, is not an absolute prohibition on the use of force. If force can be used in a manner which does not threaten the territorial integrity or political independence of a State, it escapes the restriction of the first clause. But it must then be established that it is not “in any other manner inconsistent with the Purposes of the United Nations.”<sup>12</sup>

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.” The clear intention was to remove a repeat offender—a tyrant who had slaughtered countless human beings and ruled his own people by terror—from power so that he would no longer remain a threat to the peace of the world. In the end, Iraq will

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9. U.N. CHARTER art. 24, para. 1.

10. U.N. CHARTER art. 25.

11. U.N. CHARTER art. 2, para. 4.

12. PHILLIP C. JESSUP, A MODERN LAW OF NATIONS 162-63 (1952).

have every square meter of territory it had under Saddam's rule, and if the intervention is fully successful it will have a new government composed of Iraqis and reflecting the will of the majority clearly expressed through free and fair elections, supervised by the United Nations and anyone else who wishes to observe.

It seems clear that the people of Iraq do not feel their "political independence" has been undermined by Operation Iraqi Freedom. Responding to a July 2003 YouGov public opinion poll of 798 adult residents of Baghdad, commissioned by a London television station, only 9 percent said they would rather live under Saddam Hussein than under the Americans, and more than three out of four expressed hope that the coalition forces would remain in Iraq for the time being—with 56 percent hoping they would remain "at least" one year. When given six options for the kind of government they would like to see replace Saddam's dictatorship, the most popular response was "western-style democracy," receiving 36 percent of the votes.<sup>13</sup> Sovereignty belongs ultimately to the people of a country, and the best evidence suggests that the Iraqi people did not view Operation Iraqi Freedom as an infringement upon their rights.

As a general principle, of course, states may not invade each other's territory, even for short periods of time, without violating the Charter. However, as Professor Derek Bowett has correctly observed, "the inviolability of territory is subject to the use of that territory in a manner which does not involve a threat to the rights of other states."<sup>14</sup> And the Security Council *repeatedly* determined that Iraq's use of its territory *was* a "threat to the peace."<sup>15</sup>

The Charter also expressly recognized that, "until the Security Council has taken measures necessary to maintain international peace and security," member states may act in "individual or collective self-defence . . . ." <sup>16</sup> To clarify that the Security Council was not the only remedy available if peace was threatened, the committee that drafted Article 2, paragraph 4, of the Charter in San Francisco announced that "the use of arms in legitimate self-defense remains admitted and

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13. *YouGov Survey Results: Baghdad's View of the War*, CHANNEL4.COM, at [http://www.channel4.com/news/2003/07/week\\_3/images/iraq\\_survey.html](http://www.channel4.com/news/2003/07/week_3/images/iraq_survey.html).

14. D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 54 (1958).

15. *See, e.g.*, S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 1, U.N. Doc. S/RES/1441 (2002); S.C. Res. 949, U.N. SCOR, 49th Sess., 3438th mtg. at 1, U.N. Doc. S/RES/949 (1994); S.C. Res. 688, U.N. SCOR, 46th, 2982d mtg. at 31, 32, U.N. Doc. S/INF/47 (1991).

16. U.N. CHARTER art. 51.

unimpaired” by the Charter.<sup>17</sup>

Senator Arthur Vandenberg of Michigan, a senior member of the U.S. delegation to San Francisco, told the Senate:

If the omission [of the right of collective self-defense] had not been rectified there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon Article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance.<sup>18</sup>

Addressing the Inter-American Bar Association in 1949, Senator Vandenberg further explained that the realization that Security Council action could be blocked by any of five permanent members made it imperative that the Charter permit states to defend each other (and, of course, themselves) when the Council is blocked from effective action. “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.”<sup>19</sup>

Because of the Cold War, the Security Council was virtually stillborn. In the days following the North Korean invasion of South Korea in June 1950, the Council was able to act and to authorize a military response because the Soviets were boycotting Council meetings in protest to the decision to seat the Republic of China (Taiwan) as a permanent member despite Mao’s victory and control of mainland China.<sup>20</sup> But when the Soviets returned, their veto prevented further Security Council action. More than four decades passed before the Security Council would again act effectively in response to major international aggression.

On August 2, 1990, Iraq invaded Kuwait. The Security Council responded first by demanding that Iraq withdraw its forces<sup>21</sup> and then by authorizing collective military action if Iraq did not withdraw by January 15, 2001.<sup>22</sup> After more than twenty-five years in which the

17. BOWETT, *supra* note 14, at 188.

18. Robert F. Turner, *Military Action Against Iraq Is Justified*, NAVAL WAR C. REV., Autumn 2002, at 72, 73 (2002).

19. Turner, *supra* note 1, at 185.

20. For a discussion of this issue, see Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J.L. & PUB. POL’Y 533, 564 n.140 (1996).

21. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/INF/46 (1990).

22. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/INF/46 (1990).

American Congress had “pulled the plug” on U.S. military operations either by cutting off funds or enacting legislative restrictions,<sup>23</sup> Saddam Hussein was not deterred by U.N. threats that ultimately would have to be carried out primarily by American forces.

Armed with 900,000 troops (many of them combat veterans from the Iraq-Iran war), nearly 6000 Soviet-built tanks, and nearly 4000 artillery pieces, Iraq had the fourth largest army in the world.<sup>24</sup> Well aware that a shift in only six votes could produce the necessary majority in Congress to again undermine a military operation (and 80 percent of Senate Democrats had voted to deny President Bush *any* authority to enforce Resolution 678), there was little reason for Saddam to take U.N. or American threats seriously. He had already been assured that his own personal safety would not be at risk in any military operations,<sup>25</sup> and Congress had clearly *denied* the President authority to use American forces to go beyond ejecting Iraqi troops from Kuwait.<sup>26</sup>

To make matters even worse, on the eve of military intervention prominent legal scholars and legislators alike were publicly discussing *impeaching* the President if he used force against Iraq.<sup>27</sup>

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23. See, e.g., P.X. Kelley & Robert F. Turner, *Out of Harm's Way: From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994, at C2.

24. See Federation of American Scientists, *WMD Around the World: Iraq Special Weapons Guide*, at <http://www.fas.org/nuke/guide/iraq/agency/army.htm> (last modified Nov. 3, 1998).

25. See, e.g., Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1991, at D1.

26. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991). Security Council Resolution 678 had authorized the coalition to use force to implement previous resolutions “and to restore international peace and security in the area . . . .” But restoring peace and security in the area might arguably involve more than just ejecting Iraqi soldiers from Kuwait—it might even involve going to Baghdad and capturing Saddam to be tried as the war criminal he clearly was. To avoid giving the President a “blank check” while acting “pursuant” to Security Council Resolution 678, Congress only authorized the President to “implement” resolutions 660-677, clearly excluding the broader authorization of 678. The only one of these earlier resolutions to establish a military objective was Resolution 660, which demanded “that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.” S.C. Res. 660, *supra* note 21, at 19.

27. See, e.g., *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 201-02, 212 (1991) (statement of Prof. William W. van Alstyne, a witness before the committee). It is worth noting that in 1945 the overwhelming majority of the Senate recognized that the President needed no authorization from Congress to use force when authorized by the Security Council. In December 1945, during consideration of the U.N. Participation Act, an amendment was offered requiring congressional approval before the President could send U.S. forces into combat pursuant to Security Council authorization under Article 42 of the Charter. The overwhelming view expressed by leaders of both parties in the debate over the “Wheeler Amendment” was that the U.N. Charter had already given the President

From Saddam's perspective, there seemed little risk in playing out his hand. In essence, he was being allowed to gamble with other people's chips yet to keep any winnings.

Unfortunately for Saddam, it turned out that American military technology and tactics were a bit more sophisticated than he had anticipated. General Norman Schwarzkopf's U.N. coalition made quick work of the Iraqi military, ejecting them from Kuwait in only six weeks.

In order to obtain a cease fire and avoid the destruction of his remaining forces, Saddam was forced to accept the terms of Security Council Resolution 687, which required Iraq to "unconditionally accept the destruction, removal, or rendering harmless, under international supervision" of "all chemical and biological weapons" and "all ballistic missiles with a range greater than 150 kilometers . . . ." <sup>28</sup> When, shortly after accepting the cease-fire terms, Saddam refused to cooperate with U.N. inspectors, a confrontation of wills began that lasted more than a dozen years. During this time, the Security Council repeatedly made demands and declared Iraq to be "a threat to the peace." <sup>29</sup>

A neutral observer watching from places like Pyongyang, Tehran, or Tripoli might reasonably have concluded that the Security Council longed for the era of the League of Nations, when aggression was permitted to go unchecked and world leaders fantasized that, since war was now illegal, peace would necessarily prevail. Each time Saddam thumbed his nose at a new U.N. resolution, the Security Council would take another step backwards, draw a new line in the sand, and announce solemnly that "this time" it was serious and Saddam just better clean up his act or really bad things might happen to him.

In October 1998, for example, the Council passed Resolution 1154, expressing its determination "to ensure full compliance by Iraq without conditions or restrictions with all its obligations" under previous resolutions, and threatening that "any further violations" would be followed by the "severest consequences" for Iraq. <sup>30</sup> There was, of course, no compliance—nor were there any "consequences,"

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that authority, and the amendment was defeated by a margin of seven-to-one, receiving only nine votes. *See* Turner, *supra* note 20, at 553-55.

28. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 11, 13, U.N. Doc. S/INF/47 (1991).

29. *See supra* note 15 and accompanying text.

30. S.C. Res. 1154, U.N. SCOR, 53rd Sess., 3858th mtg. at 1, U.N. Doc. S/RES/1154 (1998).

severe or otherwise. And the message being sent to Saddam was almost certainly being received as clearly by North Korea, Iran, Libya, and other potential threats to the peace. The sheriff who had stood firm against aggression in 1950 and 1991 was clearly long in the tooth and no longer to be taken seriously.

By October of 1998, Saddam was no longer amused by the impotent rantings of the Security Council and simply expelled the remaining U.N. inspectors and declared he would no longer cooperate. Five days later, the Security Council passed Resolution 1205 noting “with alarm” the Iraqi decision and expressing, yet again, its “determination” to ensure “immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687” and other relevant resolutions.<sup>31</sup>

This embarrassing relationship continued for another four years, when in November 2002 a frustrated Security Council approved Resolution 1441,<sup>32</sup> once again acting under Chapter VII (and thus again implicitly recognizing that Saddam’s regime remained a “threat to the peace”<sup>33</sup>). After two pages of preamble recalling and deploring various acts of Iraqi noncompliance with prior Council resolutions—including specifically “recalling” that “resolution 678 (1990) authorized Member States to use all necessary means . . . to restore international peace and security in the area,” once again declaring Iraq to be in “material breach” of its legal obligations, and deploring that the Government of Iraq had failed to comply with its commitments regarding terrorism and the repression of its own population—the Council declared that it was giving Iraq “a final opportunity to comply with its disarmament obligations . . . .”<sup>34</sup>

At the end of January 2003, chief U.N. weapons inspector Hans Blix reported to the Council that Iraq still had not come to “a genuine acceptance of its disarmament obligations.”<sup>35</sup> At that point, the United States and Great Britain demanded that the Council take serious action, and both Russia and France announced that they would veto any resolution that authorized any use of force against Iraq.

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31. S.C. Res. 1205, U.N. SCOR, 53d Sess., 3939th mtg. at 1, U.N. Doc. S/RES/1205 (1998).

32. S.C. Res. 1441, *supra* note 15.

33. Chapter VII of the Charter is entitled “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.”

34. S.C. Res. 1441, *supra* note 15, at 3.

35. Dr. Hans Blix, An Update on Inspection (Report to the Security Council, Jan. 27, 2003), available at <http://www.un.org/Depts/unmovic/Bx27.htm>.

Saddam clearly had friends on the Security Council, and the evidence may ultimately show that his disregard of legally-binding directives from the U.N. Security Council for more than a decade was in part a result of assurances he may have received that either France or Russia—both of whom possessed a veto power to block any substantive action by the Council—would in the end protect him. Saddam had had close relations with both countries throughout his reign, and both had assisted him in his earlier WMD endeavors.<sup>36</sup> In February 2004, documents were found in Iraq indicating that Saddam's regime had given "vouchers" for discounted oil purchases to individuals in some fifty countries entitling them to purchase oil through the U.N.'s "oil for food" program at discounted rates. According to press accounts, the four pages detailing Russian recipients (totaling more than one billion barrels of oil) included the "director of the Russian President's office," and the eleven entries under France included at least one "close friend of [French President] Jacques Chirac . . . ."<sup>37</sup>

Whatever the reason, the threatened vetoes made it impossible for the Security Council to play an effective role in maintaining peace and dealing with threats to the peace. The Council at that point became essentially irrelevant to the problem. Individual states, acting alone or collectively, would have to act if anything was to be done to fulfill the primary purpose of the Charter by "removing" a regime that for more than a dozen years the Security Council had recognized remained a "threat to the peace."

#### ACTING WITHOUT SECURITY COUNCIL AUTHORITY

One of the many myths that have confused the debate over Operation Iraqi Freedom is that only the U.N. Security Council may lawfully authorize the use of force in international relations. Had that

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36. Experts concluded that Saddam's initial chemical weapons were provided by the Soviet Union, see, e.g., Marcus Walker et al., *Why Greed Isn't Driving U.S. or Europe Over Iraq*, WALL ST. J., Feb. 14, 2003, at A6, and—in addition to any covert support—France had provided considerable support to Saddam's nuclear program. Stephen Bryen, *Iraq's Threat: What We Know About Their Biological and Chemical Weapons*, NAT'L REV. ONLINE (Jan. 3, 2002), at <http://www.nationalreview.com/comment/comment-byren010302.shtml>.

37. Thérèse Raphael, *Saddam's Global Payroll*, WALL ST. J., Feb. 9, 2004, at A26; see also Philip Delves Broughton & Jack Fairweather, *Saddam's Web of Bribery "Went Round the World"*, DAILY TELEGRAPH (London), Jan. 28, 2004, at 13, available at 2004 WL 59387685 (quoting Iraqi newspaper *al-Mada* as saying "millions of barrels of oil were offered to individuals who had nothing to do with the oil business" as part of the former regime's "largest corruption operation").

been the case, it is unimaginable that ninety-three U.S. Senators<sup>38</sup> would have favored the ratification of a treaty that empowered any of four other countries—one of them at the time a Leninist dictatorship<sup>39</sup>—to veto any attempt to protect the world community from a future threat to the peace. The delegates who gathered in San Francisco to write the U.N. Charter, and the Senators who later that year voted to consent to its ratification by the United States, had each lived through two world wars and they were determined to find a solution that would maintain the peace. In order to permit member states to act collectively when a threatened veto blocked enforcement action by the Security Council, the drafters of the Charter provided in Article 24 that the Security Council would have only *primary* responsibility for the maintenance of international peace and security.

Nor, for that matter, is there anything unique about using force in the twenty-first century without Security Council authority. On September 23, 1998, the Security Council passed Resolution 1199, expressing “grave concern” that more than 230,000 people had been displaced from their homes and declaring that the “deterioration of the situation in Kosovo . . . constitutes a threat to peace and security in the region . . . .”<sup>40</sup> In Kosovo, the threat was humanitarian in character and did not involve any external threat or act of aggression by the Milosevic regime. But when further Security Council action was blocked by the threat of a Russian veto, the United States joined with its NATO allies—with the support of the French, it might be noted—and launched armed attacks against the Federal Republic of Yugoslavia.

The NATO operation in Kosovo helped to clarify that in extraordinary circumstances it is permissible for the world community to intervene inside the territory of another sovereign state if necessary to prevent genocide or other widespread abuses of fundamental human rights norms threatening large numbers of human lives. The doctrine of “humanitarian intervention” predated the U.N. Charter, and conceptually ought to be recognized as a defensive act—a use of force to preserve human lives from wrongful slaughter.

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38. The actual Senate vote was 89-2, but four absent Senators announced that had they been present they would have voted for ratification. See Turner, *supra* note 20, at 541.

39. Such an arrangement would likely have immunized Hitler, because in 1939 the Soviet Union and Germany signed the Molotov-Ribbentrop Pact, pledging not to support military action against the other and secretly agreeing to divide up Eastern and Southern Europe between them.

40. S.C. Res 1199, U.N. SCOR, 53rd Sess., 3930 mtg. at 2, U.N. Doc. S/RES/1199 (1998).

The Charter framers were anxious to prevent the horrors of aggressive wars, but they clearly permitted the use of force when it was necessary to take the lives of aggressors to protect the lives of the innocent. States may no longer (without Security Council authorization) resort to war to resolve economic or political grievances or to extend territorial boundaries, but lethal force may sometimes be used when necessary to save other human lives. And this balance applies both when the innocent lives being threatened are nationals of a third country and when a state elects to slaughter its own people.<sup>41</sup>

Historically, of course, it was not only improper but a flagrantly wrongful act for one state to inquire into or comment upon the way another sovereign state treated its own subjects. But international law has changed dramatically (for the better) during the past half-century or so, and today it is firmly established that individuals have internationally recognizable human rights and the violation of these rights is an offense against the world community. Article 2, paragraph 7, of the Charter denies the United Nations authority "to intervene in matters which are essentially within the domestic jurisdiction of any state" save for peace enforcement actions under Chapter VII. But fundamental human rights protections are now codified in numerous treaties that remove genocide and other flagrant abuses from the character of purely internal matters of a state.<sup>42</sup>

Professor R.J. Rummel has made the remarkable observation that, during the twentieth century, roughly four-times as many people were slaughtered by oppressive governments than died in all of the wars of the century combined.<sup>43</sup> Thomas Jefferson reminded us that "law" was not the "end" but rather the "means" to the end of good governance.<sup>44</sup> And if international law were so corrupt or wrong-

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41. See, e.g., Julie Mertus, *The Imprint of Kosovo on the Law of Humanitarian Intervention*, 6 ILSA J. INT'L & COMP. L. 527 (2000) (arguing for the legality of humanitarian interventions but criticizing the means by which the war in Kosovo was waged); Dr. Clinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403 (2000).

42. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 832 n.109 (1997) (listing many treaties that remove egregious human rights abuses from the sole control of territorial states).

43. R. J. RUMMEL, DEATH BY GOVERNMENT 3 (1994).

44. See Robert F. Turner, *The Supreme Court, Separation of Powers, and the Protection of Individual Rights During Periods of War or National Security Emergency*, 28 J. SUPREME CT. HIST. 323, 333-34 (2003).

headed that 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.

It is worth noting that some of the strongest critics of Operation Iraqi Freedom not only supported Operation Allied Force, but affirmatively placed pressure on President Clinton to act unilaterally in other contexts. Thus, in a letter to President Clinton, dated July 19, 1995—more than three years before the start of Operation Allied Force—Vermont Governor Howard Dean wrote that “the gross atrocities committed by the Bosnian Serbs” weakened “our moral fiber as a people” and made military action essential. “Since it is clearly no longer possible to take action in conjunction with NATO and the United Nations, I have reluctantly concluded that we must take unilateral action.” Governor Dean concluded his letter by saying “I understand the risks of this policy and their implications for the NATO Alliance and the future success of the United Nations.”<sup>45</sup>

Professor Richard Falk has for at least four decades been a sharp critic of American uses of military force in places like Indochina and Central America. But during the Kosovo intervention, he expressed concern about the “self-marginalization of international law and international lawyers,” and concluded that “Articles 2(4) and 51, although important guidelines, are no longer dispositive in relation to inquiries as to legality.”<sup>46</sup>

As will be discussed, while Slobodan Milosevic was certainly a brutal tyrant whose policies costs tens of thousands of innocent lives, his brutality was hardly comparable to that of Saddam Hussein. A detailed discussion of the humanitarian abuses of Saddam Hussein and his regime is beyond the scope of this short essay—and has already been published elsewhere by the present writer<sup>47</sup>—but a few points may be worth highlighting:

- The Special Rapporteur of the U.N. Commission on Human Rights reported in 1992 that “the gravity of the human rights situation in Iraq had few comparisons in the world since the end of the Second World War” (a reference to Adolf Hitler). In 1999, he reported that “the situation of human rights in Iraq is worsening and the repression of civil and political rights continues unabated”

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45. See Steve Komarow, *Dean Urged Clinton to Take Unilateral Action in Bosnia*, USA TODAY, Jan. 14, 2004, at 4A. Governor Dean’s letter was reprinted in several American papers.

46. Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847, 855 (1999).

47. See Turner, *supra* note 1, at 192-207.

and “entails systematic and systemic violations throughout the country, affecting virtually the whole population.”<sup>48</sup>

- Amnesty International estimated in 2001 that more than half-a-million Iraqi children under the age of five had died during the previous decade because of acute poverty and malnutrition<sup>49</sup>—a direct consequence of Saddam’s refusal to take advantage of the Security Council’s offer of “Food for Oil” and his decisions to divert Iraq’s financial resources (and at least \$1.8 billion from the U.N. Food for Oil Program<sup>50</sup>) to building additional presidential palaces and military programs. The Amnesty International figures are reinforced by U.N. data, which report that during the five year period ending in 1999 the under-five mortality rate in the areas of Iraq controlled by Saddam shot up 93 percent, while comparable figures<sup>51</sup> in the autonomous northern region declined by 20 percent.

- According to U.N. figures, Iraq under Saddam had the greatest number of “disappearances” in the entire world, and was second only to Afghanistan in the number of displaced persons. An estimated three<sup>52</sup> to four million Iraqis fled their country under Saddam’s reign.

- Human rights organizations report countless stories of Iraqis even suspected of being disloyal to Saddam being imprisoned, tortured, and sometimes forced to watch as their wives, mothers, or daughters were gang-raped by Saddam’s thugs until they would sign a confession.<sup>53</sup>

If the situation in Kosovo in 1998 justified intervention on humanitarian grounds, it is difficult to understand why the people of Iraq did not have an equal right to be free from such egregious abuse of the most basic human freedoms.

#### PREEMPTION—ACTING BEFORE WE ARE ATTACKED

Another major objection to Operation Iraqi Freedom has focused on the American claim that, in certain limited circumstances, it might act against a rogue nation that was supporting international terrorism or attempting illegally to acquire Weapons of Mass Destruction

48. *Id.* at 204-05.

49. *Id.* at 200.

50. Susan Schmidt, *More Than \$1 Billion in Iraqi Assets Found in Foreign Banks*, WASH. POST, Dec. 21, 2003, at A26.

51. Turner, *supra* note 1, at 203.

52. *Id.* at 202.

53. *Id.* at 200-01.

(WMD) without waiting for those weapons to be used first. Indeed, excluding presidential wannabes and their supporters who have their own reasons for wishing to discredit the incumbent U.S. President, it appears that much of the world was far more concerned about the ramifications of such a “lawless” doctrine than it was about protecting Saddam Hussein himself.

Much of law involves balancing competing values and interests. There is almost universal recognition that nations should be permitted to defend themselves, but also a fear that aggressors might try to mask their behavior behind allegations they feared they were “about to be attacked”—as Hitler did with Poland in 1939 and Kim Il Song did when he attacked South Korea in June 1950. The concern is a real one.

Nevertheless, the doctrine of “anticipatory self-defense” was alive and well when the Charter was ratified,<sup>54</sup> and the rationale for it is many times stronger today than it was then. It is quite reasonable to conclude that a nation that fears an enemy that has marshaled military forces along its border must wait until the first enemy tank crosses the bridge before opening fire. In such a case, the disadvantage produced by permitting the adversary to select the precise moment to begin the conflict must be balanced against the risk that last minute diplomacy might have prevented the war or that the adversary actually had no subjective intention of attacking and was merely reinforcing its border out of fear that it might be attacked.

But the destructive potential of WMD requires that the scales be rebalanced. The forces of darkness have in recent years demonstrated how easy it is to launch coordinated attacks using conventional weapons in different countries<sup>55</sup> or different cities<sup>56</sup> hundreds of miles

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54. See, e.g., George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era*, 31 CORNELL INT'L L. J. 321 (1998). The anticipatory use of force against a repeat offender who continues to threaten the peace has been recognized by prominent publicists for more than two centuries. See, e.g., EMERICH DE VATTEL, *THE LAW OF NATIONS* 301-314 (Joseph Chitty trans., Gaunt 2001) (1758).

[T]here cannot exist a doubt, that, if that formidable potentate certainly entertains designs of oppression and conquest . . . the other states have a right to anticipate him . . . .

This right of nations is still more evident against a sovereign, who, from a habitual propensity to take up arms without reasons, or even so much as plausible pretexts, is continually disturbing the public tranquility.

*Id.* at 312.

55. For example, the al Qaeda attacks on U.S. embassies in Kenya and Tanzania on August 7, 1998.

56. The September 11, 2001, coordinated al Qaeda attacks on the World Trade Center and the Pentagon are one chilling example.

from each other. If the Security Council finds a “threat to the peace” but then is blocked from effective action by the threat or use of a veto, a legal principle that requires potential victims to sit idly by while their adversaries develop and use unlawful WMD makes very little sense.

Saddam Hussein or another tyrant bent on obtaining WMD could then stockpile large quantities of anthrax, polio, smallpox, plague, and more exotic chemical or biological agents as well as an assortment of nuclear devices—which could then be turned over to radical terrorists groups and delivered against every major city in America and perhaps most of its allies for detonation or release at a pre-arranged time. Millions of lives might well be lost, and even then there might be no clear “fingerprints” to warrant a military response against Iraq under more traditional theories self-defense.

Indeed, the special character of WMD was recognized by President John F. Kennedy more than four decades ago, when (in almost certain violation of the U.N. Charter) he threatened to use military force against Cuba if Soviet-made ballistic missiles believed to be armed with nuclear warheads and aimed at the United States were not removed. In explaining his decision to the American people and the world, President Kennedy noted: “We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril,” adding that “any substantial increased possibility” of the use of nuclear weapons constituted “a threat to the peace.”<sup>57</sup> The same logic applies as well to other WMDs that are capable of inflicting catastrophic casualties on a victim nation. And when the regime seeking to acquire such illegal weapons has a long history of international aggression and of ignoring binding orders of the Security Council, the case for defensive action is all the stronger.

The United States and 190 other countries have by ratifying the U.N. Charter made a solemn commitment to act collectively to *remove* “threats to the peace.” The very limited doctrine that is widely referred to as “preemption” ought be seen as merely a continuation of President Kennedy’s wise recognition that the advent of WMD requires that the scales be rebalanced as we measure threats to the peace against defensive rights in the modern world.

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57. Robert F. Turner, *What’s So New About Pre-emption?*, WASH. TIMES, Nov. 28, 2003 at A23.

## IRAQI INVOLVEMENT IN TERRORISM

Along with Iran, Syria, Libya, Cuba, North Korea, and Sudan, Iraq has been on the State Department's list of designated state sponsors of international terrorism for more than a dozen years.<sup>58</sup> In April 1993, seventeen individuals were arrested in Kuwait for plotting to assassinate former U.S. President George H. W. Bush using a Toyota Land Rover filled with nearly 200 pounds of plastic explosive. Several of those arrested admitted that they were working for the Iraqi intelligence service, and FBI explosive experts confirmed that the technology involved was identical to devices known with certainty to have been designed by the Iraqi intelligence service.<sup>59</sup>

There is at least circumstantial evidence of Iraqi involvement in the first World Trade Center bombing in February 1993. Ramsay Yousif, the mastermind of the operation, entered the United States on an Iraqi passport, and the bombing occurred on the anniversary of the end of the First Gulf War.<sup>60</sup> There are also recent reports that one of the terrorists involved in the 1993 attack fled to Iran, where he was given a house and a "monthly stipend."<sup>61</sup> Dr. Laurie Mylroie's book drawing a connection between Saddam Hussein and the first World Trade Center bombing received high praise both from the Director of Central Intelligence and the Director of the New York office of the FBI at the time, both of whom followed the issue closely and had access to sensitive intelligence information not yet made public.<sup>62</sup>

There have been repeated reports of Iraqi support for the September 11, 2001, al Qaeda attacks on the World Trade Center and the Pentagon, but hardly conclusive proof. Among many items of

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58. Iraq was on the first list of state sponsors of international terrorism released by the Department of State on December 29, 1979, was removed in March 1983 and returned to the list on September 1, 1990, where it remained until after the overthrow of Saddam Hussein. Telephone Interview with Loretta Phillips, Office of Public Affairs, State Department (Nov. 18, 2003).

59. For useful background on this issue, see History News Network, *How Do We Know that Iraq Tried to Assassinate President George H. W. Bush?*, at <http://hnn.us/articles/1000.html> (last modified Sept. 30, 2002).

60. See, e.g., *Lateline: Evidence of Iraqi Involvement* (Australian Broadcasting Corp. television broadcast, Sept. 20, 2001) (interview by Australian Broadcasting Corp. reporter Tony Jones with Laurie Mylroie), available at <http://www.abc.net.au/lateline/content/2001/s371900.htm>. See also LAURIE MYLROIE, *THE WAR AGAINST AMERICA* (2001), which features an interesting foreword by former Director of Central Intelligence R. James Woolsey.

61. M.E. Sprengelmeyer, *Cheney Stands by Bush's Iraq Policies*, ROCKY MOUNTAIN NEWS, Jan. 10, 2004, 2004 WL 58484901.

62. See LAURIE MYLROIE, *STUDY OF REVENGE: SADDAM HUSSEIN'S UNFINISHED WAR AGAINST AMERICA* (2000) (statements on back cover).

potential interest is a report in the London *Sunday Telegraph* alleging that Iraq's coalition government has found a hand-written "top secret memo" written by Tahir Jalil Habbush al-Tikriti, the former head of the Iraqi Intelligence Service, to Saddam Hussein, dated July 1, 2001, and reporting on a training program given Mohammed Atta in preparation for Atta's role in an unspecified attack on "the targets that we have agreed to destroy."<sup>63</sup> Interviews with former employees of Saddam's secret police—the *Mukhabarat*—have reportedly confirmed links between Saddam and al Qaeda and training hundreds of foreign "fighters" in "urban combat, explosives, and car bombs" at a secret facility twenty miles south of Baghdad known as Salman Pak (where a Boeing aircraft was reportedly used to train aircraft hijackers).<sup>64</sup>

Some facts seem to be beyond question, including that Saddam's regime openly provided support to terrorists involved in numerous murders in Israel, including paying money to families of homicide bombers.<sup>65</sup> This, too, was in flagrant violation of Security Council Resolution 1373, of September 28, 2001, which—in binding language under Chapter VII—prohibited states from "providing any form of support, active or passive, to entities or persons involved in terrorist acts," from giving "safe haven to those who finance, plan, support, or commit terrorist acts," and from permitting "the movement of terrorists or terrorist groups" through their territory.<sup>66</sup>

Speaking of giving "safe haven" to terrorists, Baghdad has been a haven over the years for some of the most wanted international terrorists, including of course Abu Nidal, whose organization was believed responsible for the killing of an estimated 900 people over two decades and was responsible for numerous aircraft hijackings and attacks on airports in Europe and elsewhere. Nidal lived in Baghdad

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63. Con Coughlin, *Terrorist Behind September 11 Strike "Was Trained by Saddam,"* SUNDAY TELEGRAPH (London), Dec. 14, 2003, 2003 WL 69069062. The present writer has not seen this alleged document and has no opinion as to its authenticity. The published story asserts "Dr. Ayad Allawi, a member of Iraq's ruling seven-man Presidential Committee, said the document was genuine." *Id.*

64. See, e.g., Jonathan Schanzer, *Saddam's Ambassador to al Qaeda: An Iraqi Prisoner Details Saddam's Links to Osama bin Laden's Terror Network*, WKLY. STANDARD, Mar. 1, 2004, at 22. For a summary by the State Department of Iraqi links to terrorism (prior to the 9/11 attacks), see U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000 (2001), <http://www.state.gov/s/ct/rls/pgrtrpt/2000/2441.htm>.

65. See, e.g., Suzanne Goldenbert, *Threat of Suicide Bombers Changes the Face of War*, GUARDIAN (London), Apr. 1, 2003, at 1; Hassan Fattah, *Families of Palestinian Dead Payed by Saddam*, ORLANDO SENTINEL, Mar. 14, 2003, at A14.

66. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 2, U.N. Doc. S/RES/1373 (2001).

off and on between 1970 and his death there in late 2002. According to one report, Nidal was murdered on Saddam's order because he refused to train al Qaeda terrorists.<sup>67</sup>

Another major terrorist given safe-haven in Baghdad was Abu Abbas, perhaps best known for his leading role in the October 1985 hijacking of the Italian cruise ship *Achille Lauro* during which a disabled American tourist, 69-year-old Leon Klinghoffer, was brutally murdered and his body thrown overboard with his wheelchair. Abbas was captured on the outskirts of Baghdad by U.S. forces in mid-April 2003.

The U.N. Security Council repeatedly criticized Saddam's Iraq for violating international obligations related to terrorism. For example, paragraph 32 of Security Council Resolution 687, which provided the basis for the 1991 cease-fire agreement, required Iraq "to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism."<sup>68</sup> In Resolution 1441 of November 2002, the Security Council deplored, *inter alia*, that the Government of Iraq had failed to comply with "its commitments pursuant to resolution 687 (1991) with regard to terrorism . . . ."<sup>69</sup>

Perhaps the most telling bit of evidence that Iraq constituted a terrorism threat to the United States was revealed in mid-June 2004—after this article had initially been submitted for publication—when Russian President Vladimir Putin was quoted in *Pravda* as admitting that he had informed President Bush after the attacks of September 11 and prior to the start of Operation Iraqi Freedom that Russian intelligence had learned Iraq "was planning terrorist acts in the United States and beyond the country's borders . . . ."<sup>70</sup>

#### "SEXED UP" INTELLIGENCE AND THE ISSUE OF THE MISSING WMDs

Nazi propaganda guru Joseph Goebbels is credited with having said

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67. Con Coughlin, *News—Saddam Killed Abu Nidal Over al-Qa'eda Row*, SUNDAY TELEGRAPH (London), Aug. 25, 2002), at 1, 2002 WL 7779152.

68. S.C. Res. 687, *supra* note 28, at 15.

69. S.C. Res. 1441, *supra* note 15, at 2.

70. *Putin Claims Bush Was Personally Informed*, PRAVDA (June 18, 2004), at [http://english.pravda.ru/main/18/88/350/13132\\_Putin.html](http://english.pravda.ru/main/18/88/350/13132_Putin.html).

that if a lie is repeated often enough, people will start believing it. Goebbels was widely reported to have died in May 1945, but his ghost may be advising some contemporary presidential wannabes. How else can one explain their continued allegation that President Bush “lied” about the reasons for going in to Iraq?<sup>71</sup>

For the record, the push to remove Saddam Hussein from power began *long* before George W. Bush was elected President in November 2000. To mention just one example, because of Saddam’s long history of aggression against neighbors, using WMD against Iran and his own people, years of material breach of legal duties imposed by the U.N. Security Council, and other particulars, Congress enacted (by a vote of 360 to 38 in the House and unanimously in the Senate), and on October 31, 1998, President Clinton signed into law, the “Iraq Liberation Act.”<sup>72</sup>

Other high-ranking government officials recognized the dangers of allowing Saddam Hussein to continue violating his legal duties imposed by the Security Council. President Bill Clinton, Vice President Al Gore, Secretary of State Madelyn Albright, and leaders of both parties in both houses of Congress were declaring that something had to be done to stop Saddam Hussein and his Weapons of Mass Destruction long before George W. Bush became president.<sup>73</sup> Indeed, when former President Clinton visited Portugal in October 2003, he reportedly told Prime Minister Jose Manuel Durao Barroso that he was “absolutely convinced” that Iraq possessed Weapons of Mass Destruction until the end of the Saddam regime.<sup>74</sup> President Clinton presumably formed his impressions on this issue from reports provided by U.N. weapons inspectors and the Central Intelligence Agency, whose very able Director, George Tenet, was appointed to

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71. Particularly egregious in this respect was an article by former Nixon White House Counsel John Dean—who served prison time for his role in the Watergate cover up—which declared that it was “clear” that many of President Bush’s statements about Iraq before the war “appear to be false,” and concluded that if Weapons of Mass Destruction are not ultimately found it will be a “scandal” that “could make Watergate pale by comparison” and could justify impeachment. John W. Dean, *Missing Weapons of Mass Destruction: Is Lying About the Reason for War an Impeachable Offense?*, FindLaw.com (June 6, 2003), at <http://writ.news.findlaw.com/dean/20030606.html>.

72. Pub. L. No. 105-338, 112 Stat. 3178 (codified as amended in scattered sections of 22 U.S.C.).

73. A useful summary of statements by Clinton Administration officials and U.N. weapons experts is contained in a commentary by Robert Kagan, a senior associate at the Carnegie Endowment for International Peace. See Robert Kagan, *A Plot to Deceive?*, WASH. POST, June 8, 2003, at B7.

74. *Clinton Believes Iraq had Weapons of Mass Destruction*, AGENCE FRANCE PRESSE, Jan. 9, 2004, 2004 WL 55608616.

that post by Clinton nine years ago and continued in office under President Bush. Nor was intelligence that Iraq had WMD limited to CIA and British intelligence services. General Tommy Franks, Commander of the U.S. Central Command (CENTCOM), revealed in early August 2004 that several Middle Eastern leaders had provided him personally with similar reports. In January 2003, Jordan King Abdullah told him that Jordanian intelligence sources in Iraq confirmed that "Saddam Hussein has biological and chemical weapons,"<sup>75</sup> and Egyptian President Hosni Mubarak provided a similar account.

While much of the public rhetoric used to justify taking military action against Saddam Hussein focused upon the belief that Iraq had illegal Weapons of Mass Destruction, that was hardly the only reason for Operation Iraqi Freedom. A good summary of the case against Saddam was provided by Congress when it enacted the "Authorization for Use of Military Force Against Iraq Resolution of 2002," which noted, *inter alia*:

- "Iraq . . . poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations . . . .
- Iraq persists in violating resolution of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region . . . ."
- [T]he current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council . . . ."
- "Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend

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75. Gen. Franks: Iraq had WMD in 2003, NEWSMAX.COM (Aug. 4, 2004), at <http://www.newsmax.com/archives/ic/2004/8/4/05219.shtml>.

itself . . . .”<sup>76</sup>

In consequence, the statute authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . . enforce all relevant United Nation’s Security Council resolutions regarding to Iraq.”<sup>77</sup> This was the constitutional equivalent to a declaration of War.<sup>78</sup>

We now hear allegations that Saddam’s Iraq “never had” any WMD. This would come as a shock to the tens of thousands of victims of WMD attacks in Iran and Iraq, as well as to Saddam’s own regime—which *admitted* to U.N. inspectors it had undeclared WMD following the defection of Saddam’s son-in-law (Hussein Kamel Hasan al-Majid, head of Iraq’s Ministry for Military Industrialization, which oversaw the chemical and biological programs) to Jordan in 1995. When he began telling stories out of school, Iraqi officials in Baghdad allowed that that had not been totally forthcoming with U.N. inspectors and, *inter alia*, admitted to having produced 2,850 tons of mustard gas (a blister agent used repeatedly during the Iraq-Iran War), 210 tons of tabun (a nerve agent used in the Iraq-Iran war), 795 tons of sarin (another nerve agent used against Iran), 795 tons of cyclosarin (another nerve agent used against Iran), 2,200 gallons of anthrax (believed by many experts to be similar to the anthrax mailed to various individuals following the 9/11 attacks), 5,000 gallons of botulinum toxin, 581 gallons of aflatoxin, and numerous other chemical and biological agents.<sup>79</sup> All of these agents were supposed to be destroyed under international supervision pursuant to Security Council Resolution 687, which was not done. Iraq later said they had been destroyed, but failed to provide evidence of destruction.

Working with experienced U.N. and International Atomic Energy Agency field inspectors, the prestigious International Institute for

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76. Pub. L. No. 107-243, 116 Stat. 1498.

77. *Id.* § 3(a), 116 Stat. at 1501.

78. As this writer has argued elsewhere, formal declarations of war are an anachronism no more relevant to twenty-first century armed conflicts than is the congressional power to grant “letters of Marque and Reprisal” provided to Congress in the same clause of Article I, Section 2 of the Constitution. See Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT’L L. 904, 906-16 (1994); Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 519, 524-31 (2002).

79. An excellent unclassified source for this information is the International Institute for Strategic Studies. See INT’L INST. FOR STRATEGIC STUDIES, *IRAQ’S WEAPONS OF MASS DESTRUCTION: A NET ASSESSMENT* (2002).

Strategic Studies spent three months in 2002 preparing a net assessment of likely Iraqi WMD programs. In presenting its findings to the media on September 9, 2002, IISS Director, Dr. John Chipman, said in part:

From the start of the inspections by UNSCOM in 1991 through to the demise of UNSCOM in 1998 Iraq practiced a series of measures designed to prevent the UN inspectors from finding the full range and extent of its proscribed WMD and missile programmes. . . . Certainly, the strength of Baghdad's commitment to possess WMD is measurable in part by its efforts to resist unfettered UN inspections. . . . On the eve of the [1991] Gulf War, Iraq was on the verge of producing significant amounts of HEU [highly enriched uranium] that would have allowed it within two to three years to produce its first nuclear weapon. . . . Since 1998, Iraq has had more opportunities to reconstitute elements of its nuclear programme and to keep these activities secret. Iraq could have completed the necessary theoretical modeling and practical testing of critical nuclear weapons components. . . . Our net assessment of the current situation is that:

. . . .

[Iraq] could . . . assemble nuclear weapons within months if fissile material from foreign sources were obtained. . . .

Iraq has probably retained substantial growth media and BW agent (perhaps thousands of litres of anthrax) from pre 1991 stocks.

The regime is capable of resuming BW Agent production on short notice (in weeks) from existing civilian facilities. It could have produced thousands of litres of anthrax, botulinum toxin and other agents since 1998. Actual stocks cannot be known.

. . . .

Iraq has probably retained a few hundred tones of mustard and precursors for a few hundred tones of sarin/cyclosarin and perhaps similar amounts of VX from pre-1991 stocks.

It is capable of resuming CW production on short notice (months) from existing civilian facilities. It could have produced hundreds of tones of agent (mustard and nerve agents) since 1998.

. . . .

The retention of WMD capacities by Iraq is self-evidently the core objective of the regime, for it has sacrificed all other domestic and

foreign policy goals to this singular aim.<sup>80</sup>

Given the broad international consensus on the issue of Iraqi WMD, one must ask what is the basis for the popular allegation in 2004 that President Bush “lied” about the issue and “deceived” the Congress and the American people into going to war? Part of the answer may be that presidential wannabes believe the American voters are so clueless about the history of this issue that they will accept the charge that President Bush invented the idea that Iraq had WMD and become indignant over the president’s “lies.” There is precedent for this, as false allegations that President Lyndon Johnson “lied” about the Gulf of Tonkin incident in August 1964 and alleged North Vietnamese “aggression” against South Vietnam helped fuel opposition to that war.<sup>81</sup>

But the real genesis of the accusation may have come from Great Britain. On September 24, 2002, the British Government released a 50-page intelligence dossier claiming that Iraq could deploy nerve gas and anthrax weapons within 45 minutes on an order from President Saddam Hussein and claiming Iraq had sought to purchase uranium from Africa.<sup>82</sup> On May 29, 2003, the prestigious British Broadcasting Corporation (BBC) reported that an unnamed government intelligence analyst had revealed that Prime Minister Tony Blair had “sexed up” a dossier on Iraq making the case for war.<sup>83</sup> The situation worsened, and when the source of the BBC story was alleged to be intelligence analyst David Kelley, Kelley first denied that the BBC story was accurate and then committed suicide.

Accounts of this budding scandal in Britain served to reinforce

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80. Press Statement, Dr. John Chipman, International Institute for Strategic Studies Director, Iraq’s Weapons of Mass Destruction: A Net Assessment 2-7 (Sept. 9, 2002), <http://www.iiss.org/showdocument.php?docID=14>. For more information, see generally INT’L INST. FOR STRATEGIC STUDIES, *supra* note 79.

81. See, e.g., Robert F. Turner, *Legal Issues in the U.S. Commitment to Vietnam: A Debate*, in THE REAL LESSONS OF THE VIETNAM WAR 99, 121 (John Norton Moore & Robert F. Turner eds., 2002). In 1983, North Vietnamese leaders admitted in a French TV documentary that the Lao Dong [Communist] Party in Hanoi made a decision in May 1959 to “liberate” South Vietnam, and set up the “National Liberation Front” in South Vietnam to deceive the west. See, e.g., Robert F. Turner, *Myths and Realities in the Vietnam Debate*, in THE VIETNAM DEBATE: A FRESH LOOK AT THE ARGUMENTS 37, 45-47 (John Norton Moore ed., 1990). These were hardly “secrets,” as I documented both points a decade earlier. See ROBERT F. TURNER, VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT 178-82, 224-37 (1975).

82. Glenn Frankel, *Blair: Iraq Can Deploy Quickly; Report Presents New Details on Banned Arms*, WASH. POST, Sept. 25, 2002 at A1.

83. See, e.g., Paul Waugh, *Government Blames Spies Over War*, INDEP. (London), May 30, 2003, at 1.

suspicion by some Americans that their president was also a liar. On the eve of the war, the chief U.N. weapons inspector had revealed that American allegations—mentioned by Secretary of State Powell in addressing the United Nations and by the President in his 2003 State of the Union Address—that Iraq had tried to purchase uranium from Niger were based in part upon a fabricated document.<sup>84</sup> When no WMD were found in Iraq, such stories were used by the President's domestic political opponents and war critics as *proof* that the President had “lied” about the entire issue of Iraq having Weapons of Mass Destruction.

Particularly effective in spreading the “Bush lied” allegation was the testimony of Joseph C. Wilson, IV, who had served as President Clinton's Ambassador to Gabon in the early 1990s, and had made a secret trip to Niger to investigate the allegation that Iraq tried to buy uranium. As the *Washington Post* later noted:

Wilson last year launched a public firestorm with his accusations that the administration had manipulated intelligence to build a case for war. He has said that his trip to Niger should have laid to rest any notion that Iraq sought uranium there and has said his findings were ignored by the White House.<sup>85</sup>

But in July 2004, a unanimous report by the Senate Permanent Select Committee on Intelligence sharply criticized Wilson's story. As summarized by the Post:

Wilson's assertions—both about what he found in Niger and what the Bush administration did with the information—were undermined yesterday in a bipartisan Senate intelligence committee report. The panel found that Wilson's report, rather than debunking intelligence about purported uranium sales to Iraq, as he has said, bolstered the case for most intelligence analysts. And contrary to Wilson's assertions and even the government's previous statements, the CIA did not tell the White House it had qualms about the reliability of the Africa intelligence that made its way into 16 fateful words in President Bush's January 2003 State of the Union address. . . . According to the former Niger mining minister, Wilson told his CIA contacts, Iraq tried to buy 400 tons of uranium in 1998.<sup>86</sup>

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84. See Walter Pincus, *CIA Did Not Share Doubt on Iraq Data; Bush Used Report of Uranium Bid*, WASH. POST, June 12, 2003, at A1.

85. Susan Schmidt, *Plame's Input Is Cited on Niger Mission*, WASH. POST, July 10, 2004, at A9, available at <http://www.washingtonpost.com/wp-dyn/articles/A39834-2004Jul9.html>.

86. *Id.*

But the damage from allegations that the President had "lied" to the American people to justify war had already been done. By February of 2004, polls indicated that the American public's belief that President Bush was "honest and trustworthy" had dropped 19 percent since 2002 and a majority believed he had either "lied" or "deliberately exaggerated" evidence that Iraq possessed WMD in order to justify the war.<sup>87</sup> This despite the fact that Prime Minister Blair had repeatedly publicly confirmed that President Bush's assertion in his State of the Union Address (that the British had told him Iraq had attempted to purchase uranium in Africa) was factually accurate and that the British Government continues to be confident the intelligence information was true on the basis of multiple intelligence sources not including the document the U.N. inspectors had discredited.<sup>88</sup>

Blair was sufficiently confident of his position that he asked one of Britain's most respected judges to conduct an inquiry into the BBC allegation and promised full cooperation. In late January 2004, Lord Hutton cleared the government of the allegation and sharply criticized the BBC report, declaring that the allegation that the dossier was "sexed up" was "unfounded."<sup>89</sup> Andrew Gilligan, the BBC correspondent who had made the allegation, resigned before he could be fired, the BBC issued a public apology declaring that key allegations in Gilligan's report had been "wrong,"<sup>90</sup> and the chairman and director-general of the BBC resigned in disgrace.

Nevertheless, the attacks on the President's credibility and the continued struggle to protect Iraq from remnants of Saddam's regime and reported foreign terrorist elements have reduced public support for Operation Iraqi Freedom. When the United States went to war in March 2003, various public opinion polls reported support by three out of four Americans. A series of polls taken by ABC News and the *Washington Post*, for example, showed that in April 2003 a margin of

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87. Richard Morin & Dana Milbank, *Most Think Truth Was Stretched to Justify Iraq War*, WASH. POST, February 13, 2004, at A1.

88. See, e.g., Glenn Frankel, *Allies Didn't Share All Intelligence on Iraq*, WASH. POST., July 17, 2003 at A14.

89. See, e.g., Glenn Frankel, *Inquiry Clears Blair of Altering Iraq Intelligence*, WASH. POST, Jan. 29, 2004 at A1; Associated Press, *Judge Clears Blair in Official's Suicide, Faults BBC Report: He Found No Evidence That Intelligence Was "Sexed Up" to Support Iraq War; Broadcast Chief Steps Down*, ST. LOUIS POST-DISPATCH, Jan. 29, 2004 at A7, 2004 WL 66530917.

90. See, e.g., Chris Hastings, *BBC Chiefs Vent Anger on "Devious" Gilligan*, TELEGRAPH (Feb. 1, 2004), at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/01/nhutt01.xml>.

75 to 27 percent of Americans thought the war in Iraq was “worth fighting.” By January 2004, that margin had dropped to 55 to 42 percent.<sup>91</sup> A series of Gallup Polls recorded an increase in the number of Americans believing “the United States made a mistake in sending troops to Iraq” from 23 percent in March 2003 to 42 percent in January 2004, with those disagreeing dropping from 75 to 56 percent during the same period.<sup>92</sup> Despite the widespread attacks on the President and his policies in Iraq, however, a clear majority of Americans still support the removal of Saddam Hussein from power by military force.

Indeed, few intelligent critics will say they aren’t happy that Saddam is out of work. Despite the fact that the United States tried for more than a dozen years to rely on sanctions, and President Bush delayed action for months while efforts were made to get Security Council approval, the critics disdainfully explain that the President should have operated through the United Nations or exhausted non-violent alternatives. It is difficult not to sympathize with the President, who recently remarked in a speech to the National Governors Association: “Others would have chosen differently. They now agree that the world is better off with Saddam Hussein out of power; they just didn’t support removing Saddam from power. Maybe they were hoping he’d lose the next Iraqi election.”<sup>93</sup>

#### THE PROPER ANALYTICAL PARADIGM

It is almost certainly true that most international lawyers—even those within the United States—believe Operation Iraqi Freedom to have been an unlawful use of force. And, admittedly, it does not easily fit into the classic justifications for self-defense or even anticipatory self-defense, which in itself is controversial.<sup>94</sup> Normally, to justify anticipatory self-defense there must be an “imminence” of an armed attack that can not easily be established in the case of Iraq.

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91. Numerous polls on the war in Iraq from various organizations are collected at PolingReport.com, at <http://www.pollingreport.com/iraq.htm>.

92. *Id.*

93. President George W. Bush, Remarks by the President to the Republican Governors Association (Feb. 23, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040223-10.html>.

94. Compare John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283 (2003), and Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT’L L. REV. 69 (2003), with Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1 (2003).

The closed nature of that country under Saddam's dictatorship was such that reliable information was difficult to obtain. Perhaps he already had deliverable nuclear, chemical, and biological weapons. Perhaps he had already delivered such weapons to al Qaeda or other terrorist groups to be smuggled in to the United States and other countries—where they could be simultaneously detonated at a given time. No one knew with certainty whether such attacks might occur tomorrow, next week, next month, or next year. What was known was that Saddam was in flagrant and material breach of his obligations to the U.N. Security Council to permit international destruction of his WMD programs, that he was a repeat offender who had already caused the deaths of perhaps two million human beings, that if unchecked such coordinated attacks might easily add more millions to his total, and that Saddam was not going to obey the Security Council and the French were not going to permit the Council to enforce the law. So the question arose whether the United States, Great Britain, and other peace-loving states who were obviously potential targets of Iraqi aggression (since they had led the 1991 U.N. intervention that ejected Saddam's forces from Kuwait) had a legal duty to wait patiently until Saddam did acquire deliverable WMD and took one more "free kick"—perhaps launching coordinated attacks against a dozen or more cities that would claim hundreds of thousands or even millions of additional lives—before they could act to defend themselves? And in such a setting, the stakes involved were far different from those which led most scholars to say that a nation ought generally to wait and permit the first enemy tank to cross into their territory before using defensive military force. Yet too few international lawyers were willing to acknowledge that the changing nature of the threat might require the progressive development of the *jus ad bellum* to adjust for this enhanced threat.

Of course, it is also true that most international lawyers thought President Kennedy's threat to use force if necessary to stop shipments of Soviet missiles to Cuba was unlawful. Neither in that situation nor in Iraq could it be said that a clearly identified attack on the United States or one of its allies was "imminent." And both operations (Kennedy's threats did not ultimately lead to war because the other side backed down) were premised upon the reality that Weapons of Mass Destruction have really changed the landscape upon which the traditional rules were premised.

Al Qaeda has repeatedly demonstrated the ability to launch coordinated attacks even in different countries, killing thousands of

people at a time even without WMD. Saddam Hussein had a long history of working with international terrorist groups and of ignoring Article 2(4) of the U.N. Charter, and if the world community had continued to respond to his flagrant and material breach of his international obligations with mere words, the likelihood that he would both obtain WMD and provide them to terrorist groups was simply too great to ignore.

At some point, coordinated terrorist attacks might well have slaughtered hundreds of thousands if not millions of innocent people in numerous countries through the use of nuclear, chemical, and biological weapons. And if credibility was not restored to the international system designed to maintain peace, the lessons would hardly be missed and the resulting attacks might just as easily have been engineered by North Korea, Libya, Iran, or other countries with a long history of supporting terrorism. So, even then, the traditional rules of international law would leave the victims virtually helpless.

The increased threats of international terrorism and the proliferation of WMD thus demand a new paradigm for assessing situations like Saddam Hussein's Iraq in the early twenty-first century. And the best approach might well be to take a standard that has grown in popularity in recent decades in our domestic law. We should evaluate<sup>95</sup> the threats in terms of the totality of the circumstances.

In the case of Saddam Hussein, our assessment of whether the decision to use military force was lawful under international law should have taken into consideration such factors as:

- Saddam Hussein's long history of committing major international aggression against his neighbors in flagrant violation of international law. This includes his aggression against Iran and Kuwait—major wars that claimed between them more than one million human lives—and also his unlawful attacks against Saudi Arabia, Israel, and the United States (not only during Operation Desert Storm, but also his attempt to murder former President Bush in Kuwait).
- Saddam's long history of actually using WMD, not only against his military enemies but even against his own people.

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95. *Cf.* *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) (using "totality of the circumstances" to determine probable cause for issuing a search warrant); *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) (determining whether a jury was coerced to bring back a death sentence by considering the supplemental charge given by the trial court in its context and under all the circumstances) (internal quotations omitted).

- Saddam's long history of disregarding legally-binding Chapter VII resolutions of the U.N. Security Council that were clearly designed to negate his status—a status repeatedly confirmed by the Security Council over more than a dozen years—as a “threat to the peace.”
- Saddam's record of ignoring binding Security Council resolutions demanding that he cease supporting and harboring terrorists and formally denounce terrorism.
- Saddam's horrendous record of humanitarian abuse, involving the widespread torture and murder of individuals even suspected of being political opponents, gang rapes, dismemberment, and other behavior that shocks the conscience and flagrantly violates the most fundamental standards of international humanitarian law. This includes his refusal to allow the importation into Iraq of food, medicine, and other humanitarian supplies to care for the needs of his people—which the Security Council authorized and instructed him to permit—that independent human rights organizations have estimated claimed half-a-million lives of children under the age of five.

At minimum, Saddam Hussein was a “three time loser.” He was the only world leader who had been declared guilty of major armed international aggression repeatedly by the Security Council. He was in material breach of more than a dozen Security Council resolutions. And for more than a decade, he has refused to take the steps that the Security Council had declared were essential to remove Iraq from the status of a “threat to the peace.”

#### CONCLUSIONS

The very first “purpose” to which U.N. members committed themselves by ratifying the Charter was to act collectively to “remove . . . threats to the peace.”<sup>96</sup> Primary responsibility for this duty was conferred on the Security Council,<sup>97</sup> but after more than a decade of refusing to carry out that responsibility with respect to Iraq it became apparent that two permanent members were determined to veto any enforcement action. After giving economic sanctions and countless “threats” to take firm action by the Security Council a chance to work, the United States, Great Britain, and numerous other countries united together and put Saddam Hussein out of business. Assessed in

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96. U.N. CHARTER, art. 1.

97. *Id.* art. 24.

light of the totality of the circumstances, I believed a strong legal case for intervening existed before force was used and my views have not changed.

Lawful or not, it is too early to determine with confidence whether it was wise for the United States and its allies to use force to remove the regime of Saddam Hussein. In the short run, the removal of one of the worst tyrants in modern history—a man responsible for as many as two million human deaths—has to be recognized as a noble accomplishment. The people of Iraq have an opportunity to establish a democratic government respectful of human rights and dedicated to the furtherance of the welfare of themselves and their progeny. But there is a very obvious risk that Saddam's tyranny will be replaced by an oppressive theocracy that in the end might produce an even less enlightened future for the people of Iraq.

On the international stage, some harm was done by acting outside the Security Council, but some good was done as well. It is imperative that France and Russia understand that they don't have a veto over international efforts to keep the peace. It would appear that Operation Iraqi Freedom has had a very positive impact upon other states with a long history<sup>98</sup> of supporting international terrorism, including Libya<sup>99</sup> and Syria.

A critical issue in determining the outcome will be the perceptions in the region of American resolve. For the past three decades, most U.S. military policy failures have resulted far more from perceptions of a lack of will than of a lack of ability.<sup>100</sup> After September 11 America stood strong and united, and our credibility around the globe was enhanced because of that unity. We have now entered into the political "silly season," and some of the criticisms leveled at the President—especially the charge that he "lied" about the reasons for going to war in the Gulf—have already had a significant effect on American public support for the war.<sup>101</sup> In the weeks following the apprehension of Saddam Hussein, there were positive signs that the will of the Iraqi resistance was weakened, as attacks on American forces decreased twenty percent.<sup>102</sup> As the domestic political attacks

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98. See, e.g., U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003, at 85, 91 (2004).

99. See, e.g., *id.* at 93.

100. See, e.g., P. X. Kelley & Robert F. Turner, *supra* note 23.

101. See *supra* note 91.

102. See Jim Krane, *Attacks Have Fallen Since Hussein Seized*, KANSAS CITY STAR, Jan. 14, 2004, at A12, 2004 WL 56116568.

on the President within the United States have escalated and public support for the war has dropped, the Iraqi opposition may have found new hope and attacks have once again increased. It is too early to tell whether America as a nation will have the fortitude to stay the course in Iraq.