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Agora: Future Implications of the Iraq Conflict Editors' Introduction

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AGORA: FUTURE IMPLICATIONS OF THE IRAQ CONFLICT

EDITORS' INTRODUCTION

The military action against Iraq in spring 2003 is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century. As with the great debates surrounding U.S. involvement in the two world wars, the establishment of the United Nations, and the challenges to UN Charter norms during the Cold War, this *Journal* seeks to provide a forum for reasoned and respectful treatment of legal issues that have aroused fierce passions.

The decision of the Legal Adviser of the Department of State to participate with colleagues in this forum reinvigorates an important tradition of explaining and exchanging views on the legal position of the United States in international controversies. U.S. lawyers took pains to articulate a legal theory in support of the quarantine of Cuba, in a memorandum made public October 23, 1962, which the Department of State's chief legal officer of the day later characterized as a "best-seller."¹ Government legal opinions about the Vietnam War were published and subjected to critical scrutiny, in this *Journal* and in studies sponsored by the American Society of International Law.² An official U.S. view of legality of military intervention in Central America was set out at length in connection with resisting Nicaragua's suit at the International Court of Justice.³ Concerning the 1999 Kosovo intervention (which shares with the recent Iraq action the circumstance that the Security Council had not explicitly authorized use of military force), parliamentary debates in several of the intervening countries and litigation brought by the Federal Republic of Yugoslavia at the ICJ elicited a fairly full exposition of legal justifications on the public record; from such materials it was possible to discern an overall legal position of the NATO coalition (with nuances among the various coalition partners) and to infer the main lines of a U.S. legal position. In respect of the 2003 Iraq conflict, the views of the British government on international legal aspects were conveyed to parliament through a formal opinion of the Attorney-General;⁴ in the absence of a comparable and equally accessible legal opinion from the U.S. government, the actual U.S. position on justification for military action in 2003 could easily have been misunderstood.

Short of a full-scale legal analysis, the U.S. government did intimate the general contours of its position on legitimate use of force against Iraq, over the period spanning President George W. Bush's address to the UN General Assembly on September 12, 2002, and the outbreak of war in late March 2003. But in the same time frame the Bush administration also announced

¹ ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 48 (1974).

² See, e.g., *THE VIETNAM WAR AND INTERNATIONAL LAW* (Richard A. Falk ed., 4 vols., 1968, 1969, 1972, 1976); *Symposium: The United States Military Action in Cambodia, 1970, in the Light of International and Constitutional Law*, 65 *AJIL* 1 (1971).

³ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 *ICJ REP.* 392 (Nov. 26); 1986 *ICJ REP.* 14 (June 27). Cf. *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?*, 84 *AJIL* 494 (1990); Abraham D. Sofaer, *The Legality of the United States Actions in Panama*, 29 *COLUM. J. TRANSNAT'L L.* 281 (1991) (article by Legal Adviser).

⁴ Lord Goldsmith, Attorney General Clarifies Legal Basis for Use of Force Against Iraq (Mar. 18, 2003), available at <<http://www.fco.gov.uk>>.

a new strategic doctrine of preemptive use of force in respect of weapons of mass destruction and terrorism.⁵ The confluence of these developments led many observers to conclude that the initiation of armed force against Iraq in March 2003 was the first application of the new preemption doctrine. Analytically, however, there are alternative and narrower bases on which a legal argument supporting the Iraq war could rest, deriving from the unfinished business of the invasion of Kuwait in 1990 and Iraq's flouting of numerous compulsory resolutions of the UN Security Council concerning demilitarization and disarmament between 1991 and 2003. The implications of the war for the future of the international system may depend in some measure on whether the issue of its legality is limited to interpretation of Security Council resolutions applicable only to Iraq, or broadened to embrace the very meaning, utility, and vitality of the Charter's basic provisions on the use of force and self-defense.

This *Journal* has devoted substantial attention to legal aspects of the Iraq conflict, beginning with the issues just after the 1990 attack⁶ and continuing through the lead article in the present issue.⁷ We have published a variety of articles, comments, and other pieces presenting diverse viewpoints on legitimacy of uses of force against Iraq with or without authorization of the UN Security Council, as well as on anticipatory self-defense and preemptive uses of force.⁸ Additionally, our section on *Contemporary Practice of the United States Relating to International Law* treats the latest developments in U.S. practice toward Iraq in every quarterly issue.⁹

Against this background, the Editors in Chief announced at the annual meeting of the American Society of International Law in April 2003 that we would convene an Agora on Future Implications of the Iraq Conflict for the present issue. We received an outpouring of submissions, only a handful of which can be published within the applicable space constraints. Indeed, to allow for consideration of developments that were in progress as this issue was in production, and in that connection to broaden participation beyond U.S. contributors, we plan to continue the Agora in the October 2003 issue of the *Journal*. Our terms of reference were (and remain) forward-looking, in that we have encouraged contributors to envision what the future international law of the use of force will be and should become in the aftermath of the Iraq crisis. While respecting those terms of reference, several of our contributors have chosen as a starting point a brief analysis of the lawfulness of the initiation of military force by the United States and its coalition partners in spring 2003. These highly compressed treatments can only hint at the complexities of legal issues that will continue to be debated in these pages and elsewhere.¹⁰

The U.S. decision to invade Iraq has evoked strong political reactions evident in many of the manuscripts submitted. While we are grateful to the contributors for their response to our request to avoid acrimony, we also eschewed the role of censor in this debate and felt that readers would benefit from knowing, and being able to assess independently, those perceptions and perspectives that an author maintains are pertinent to the legal analysis. Readers will find below a range of viewpoints illustrative of the spectrum of opinion within the U.S. legal community.

⁵ THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 17, 2002), available at <<http://www.whitehouse.gov/nsc/nss.pdf>>.

⁶ *Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AJIL 63–109, 506–35 (1991).

⁷ Michael Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AJIL 481 (2003).

⁸ Among them, in the present context we might invite particular attention to Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AJIL 724 (1998); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AJIL 124 (1999); and W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AJIL 82 (2003).

⁹ On developments especially relevant to the legal analysis of the recent conflict, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AJIL 956–62 (2002), 97 AJIL 203–05 (2003), 97 AJIL 419–32 (2003), and 97 AJIL 681–83 (2003) (*infra*, this issue).

¹⁰ See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. (forthcoming 2004).

The Agora begins with a paper by *William Howard Taft IV* and *Todd Buchwald*, respectively the Legal Adviser and the Assistant Legal Adviser for Political-Military Affairs of the U.S. Department of State. In the fullest statement yet to be published of the U.S. government's legal position, Taft and Buchwald justify the 2003 military action in Iraq as a continuation of lawful collective self-defense stemming from Iraq's 1990 attack on Kuwait and Iraq's persistent material breaches of the cease-fire terms established in April 1991. They maintain that renewed military action by coalition forces was justified pursuant to compulsory Security Council resolutions adopted between 1990 and 2003. Finally, emphasizing that contextual factors are relevant to the appraisal of any use of force, they consider the resumption of the Iraq war in 2003 in relation to the Bush administration's preemption doctrine; they conclude that preemptive action against Iraq is lawful as one episode in a conflict initiated by Iraq and in the context of Iraq's ongoing defiance of Security Council resolutions.

John Yoo, a former deputy assistant attorney general in the U.S. Department of Justice, further develops the position that use of force against Iraq in 2003 was authorized under a long series of Security Council resolutions, including Resolutions 678 (1990), 687 (1991), and 1441 (2002), and that Iraq's material breach of the 1991 cease-fire resolution allowed the United States to resume hostilities. He also analyzes the military action in terms of the law of anticipatory self-defense as understood beginning with Secretary of State Daniel Webster's formulation in the *Caroline* dispute with Great Britain (1837) and continuing into the UN Charter era. Yoo concludes with an assessment of the need for self-defense doctrine to respond to twenty-first century threats of weapons of mass destruction, rogue states, and terrorism.

Ruth Wedgwood reflects on the need for a system of UN Charter law that can adapt to evolving security challenges, and on the relationship between substantive legitimacy of forcible action and the procedural framework for authorizing military enforcement. In the Iraq conflict, as with several other situations of the 1990s, the UN Security Council failed to back up its substantive demands with adequate institutional capacity and stopped short of formally approving military enforcement of its compulsory measures. In Wedgwood's view, the Charter should be understood to allow states not only to supply the enforcement capability that the Council itself lacks, but also to act proactively in the face of dire threats that state or nonstate actors could use weapons of mass destruction against civilian targets.

With the first three contributions having laid out legal arguments supportive of the 2003 military action in Iraq and considerations relevant to the Bush administration's preemption doctrine, we next turn to viewpoints elsewhere on the spectrum of opinion. Some of the contributors in the next group accept aspects of the U.S. government's position, but most are skeptical about the doctrine of preemptive uses of force, or of the legal case for the 2003 invasion, or both. They present a diversity of perspectives on what the Iraq crisis suggests for the future of the UN Charter system and general international law on the use of force.

Richard N. Gardner brings to the Agora the insights of a member of the Kennedy administration who participated in discussions in October 1962 about the legal aspects of the Cuban missile crisis, when a conscious choice was made not to embrace an expansive concept of preemptive self-defense. In Gardner's view, the reasons to avoid enlarging self-defense to include preemption are just as valid today. The Bush administration did not need the preemption rationale for the Iraq war in any event, since there was an entirely sufficient justification in previous Security Council resolutions and the repeated findings of "material breach" of Resolution 687. Gardner concludes his essay with an indication of the kinds of uses of force that should be considered permissible under the law of the UN Charter today, going beyond classic self-defense against armed attack or Security Council authorization. These would include uses of force to destroy terrorist groups when the state in which they operate is unable to suppress them, to prevent a UN member from transferring weapons of mass destruction to terrorist groups, to rescue endangered nationals, and to act under the auspices of the United Nations or a regional organization to prevent genocide or other massive atrocities.

Richard A. Falk contrasts the 2003 Iraq war to the 1999 Kosovo intervention, which the Independent International Commission on Kosovo (on which Falk served) characterized as “illegal, but legitimate.” The Kosovo Commission found substantive legitimacy in a military intervention that went forward without the formal approval of the UN Security Council, but it also articulated exacting conditions that ought to be satisfied in the absence of such approval, including the imminence of grave harm and the lack of nonforcible means to protect against such harm. In the Iraq case, these material conditions for legitimacy were not met at the time that the intervention was mounted, because there was neither imminence nor necessity; and the intervention could not be justified even if the overthrow of Saddam Hussein’s regime produced good consequences for the Iraqi people or the region. Falk concludes that preventive war is not acceptable and that the United States should return to the Charter system in its own long-range interests.

Miriam Sapiro directs her attention to the Bush administration’s preemption doctrine, which she views as a significant departure from previous conceptions of anticipatory self-defense as understood either in the *Caroline* formulation or in the UN Charter framework. She perceives substantial dangers in the Bush doctrine (which could more accurately be described as “preventive” rather than preemptive self-defense), since the relaxation of the constraints of imminence, necessity, and a high level of certainty of impending harm could be destabilizing and potentially catastrophic. She recommends dealing cooperatively and multilaterally with threats of weapons of mass destruction and terrorism and urges a quiet retrenchment from the expansive readings of the *National Security Strategy*.

The next two pieces in the Agora begin from the premise that the invasion of Iraq in 2003 was a major departure from the norms of the UN Charter. They invite reflection on whether these developments sound the death knell for Article 2(4)’s prohibition on the use of force or whether the Charter system is sufficiently resilient for constructive adaptation.

Thomas M. Franck asked *Who Killed Article 2(4)?* in his 1970 article published in these pages,¹¹ and revisits the same question with even greater poignancy. The major difference between the Charter violations lamented at that time and Franck’s assessment of the conduct of the key actors in 2003 is that today even the fig-leaf of legal justification within the Charter framework seems to have been discarded. He finds little plausibility in the U.S. and British arguments that the invasion of Iraq was authorized by previous Security Council resolutions or by Iraq’s “material breach.” Franck dismisses the possibility that an unvarnished violation of Charter norms might carry the potential for reforming the law of the Charter in salutary directions, in view of the apparent desire of the present U.S. administration to disable the United Nations and shrug off any remaining Charter-based constraints. He ends with an exhortation to international lawyers to remain true to the rule of law.

Tom Farer takes the invasion of Iraq as illustrative of a fundamental jurisprudential problem, namely the effect of law-breaking behavior on the viability of the norms at issue. Much will depend on the reaction to the law-violation: will scholars and politicians continue to insist on the normative quality of the Charter prohibitions, or will they abandon any pretense that the Charter can serve as a meaningful constraint? Farer contrasts the Iraq situation in 2003 with Charter violations in the Cold War period and with the 1999 NATO intervention in Kosovo: he believes the latter had contextual features capable of limiting its potential for overturning the Charter system. The Iraq invasion carries more ominous implications, but the U.S. government could confine them by restraining some of its unilateralist impulses. At the present time, the prognosis for the Charter system is unclear.

The concluding piece in the Agora responds to the alarm raised in the previous two contributions that the core Charter norm of nonuse of force might be dead or at least mortally wounded. *Jane Stromseth* discerns in the Iraq crisis the possibility for genuine renewal of the

¹¹ Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970).

Charter's norms and reform of its systemic features. A first reason that she finds it premature to pronounce the death of Charter law is that the legal case for the use of force against Iraq is much closer than the critics acknowledge: in Resolution 1441, Security Council members left open the possibility of military action without a subsequent authorizing resolution, or at least agreed to disagree on this point. Second, the core of the Charter remains viable, because all states and their informed publics continue to place a heavy burden of justification in terms of the Charter on those who use or propose to use force. Third, the Charter system is flexible enough to evolve to meet changing conditions. Stromseth then turns to concrete proposals for addressing the daunting challenges of the present and future, including terrorism and weapons of mass destruction. In place of the Bush administration's open-ended preemption doctrine, Stromseth recommends intensified efforts to enlist collective support for U.S. initiatives, in the first instance through regional self-defense organizations. She also makes specific proposals for revitalizing the Security Council to improve its capabilities to meet threats to peace and security.

We encourage our readers to carry on this debate in classrooms of international law, in the press, in their communities, and in communications with their elected representatives and other public officials.

LORI FISLER DAMROSCH AND BERNARD H. OXMAN*

PREEMPTION, IRAQ, AND INTERNATIONAL LAW

Preemption comes in many forms and what we think of it depends on the circumstances. One state may not strike another merely because the second might someday develop an ability and desire to attack it. Yet few would criticize a strike in the midst of an ongoing war against a second state's program to develop new types of weapons. Between these two examples lie countless fact patterns.

In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.¹

Operation Iraqi Freedom has been criticized as unlawful because it constitutes preemption. This criticism is unfounded. Operation Iraqi Freedom was and is lawful. An otherwise lawful use of force does not become unlawful because it can be characterized as preemption. Operation Iraqi Freedom was conducted in a specific context that frames the way it should be analyzed. This context included the naked aggression by Iraq against its neighbors, its efforts to obtain

* Editors in Chief.

¹ The legal basis for the doctrine of preemption is set out in President Bush's *National Security Strategy*:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the evidence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 17, 2002), available at <<http://www.whitehouse.gov/nsc/nss.pdf>>. The notion of preemption is inherent in the right of self-defense, recognizing the need to adapt the concept of imminence to the capabilities and objectives of today's adversaries. The use of force preemptively in self-defense is the right of each state and does not require Security Council action. In calculating whether the test of imminence has been met, it would be irresponsible to ignore that these adversaries "rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be *easily concealed, delivered covertly, and used without warning*." *Id.* (emphasis added). In the case of Iraq, President Bush made clear that the United States could always proceed in the exercise of its inherent right of self-defense recognized in Article 51 of the United Nations Charter. See Report in Connection with Presidential Determination Under Public Law 107-243, reprinted in 149 CONG. REC. H1957, H1958 (daily ed. Mar. 19, 2003) (on resolution authorizing use of force against Iraq).