Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq

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Recommended Citation
George Bisharat, Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq, 7 Journal of Gender 1 (2003).
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Author: George Bisharat
Source: Journal of Gender, Race & Justice
Citation: 7 J. Gender Race & Just. 1 (2003).
Title: Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq

Originally published in JOURNAL OF GENDER, RACE & JUSTICE. This article is reprinted with permission from JOURNAL OF GENDER, RACE & JUSTICE and Iowa College of Law, Iowa City.
Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq

George E. Bisharat*

I. INTRODUCTION

Unbeknownst to most residents of the U.S., our government has waged a quiet, illegal, and relentless war against Iraq for the past twelve years.¹ If we have invaded Iraq by the time this article is published, it will not be because we have lacked policy alternatives. Although Iraqi President Saddam Hussein is a brutal and dangerous man and the regional challenge constituted by his regime is not wholly illusory, none of the disasters caused by our actions have been

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1. A preponderantly U.S. readership is assumed, and so the liberty of an "our" or "we"-referring to citizens/residents of the U.S.-is occasionally taken. No slight to others is intended; it is in the U.S. that knowledge and understanding of the U.S.-Iraqi relationship is most urgently needed. It is here, as well, that the fog of disinformation has been thickest. At no point was this more egregious than during the 1991 Gulf War, when the U.S. government actively manipulated public perceptions of the fighting, with the complicity of a thoroughly compliant press. See generally, John R. MacArthur, Second Front (1992) (providing a highly informative account). This is not to suggest, however, that these features of U.S. policy are unique to its relationship with Iraq. For a discussion of U.S. interventions in many other countries across the globe, see William Blum, Killing Hope: U.S. Military and CIA Interventions Since World War II (1995). Neither is the complicity of the press in misleading the public as to the objectives of U.S. foreign policy. See David MacGowan, Derailing Democracy (2000). The disinformation campaign is once again approaching a crescendo. See generally Norman Solomon and Reese Ehrlich, Target Iraq: What the News Media Didn't Tell You (2003).
inevitable or necessary. On the contrary, we have always had policy alternatives with respect to Iraq that would have been just, humane, and consistent with international law. Moreover, these policy alternatives would have better advanced any legitimate U.S. foreign policy goals. In contrast, an invasion of Iraq may bring devastating consequences for the people of that country, for the people of the U.S., and for the status of international law and international institutions. Thus, the three aims of this article are to explore the record of U.S. illegal actions toward Iraq, critique the current legal and political stance the U.S. government has taken with respect to an invasion of Iraq, and identify positive alternatives to war that might guide our present and future dealings with that country.

The second section of this article will review the main components of U.S. policy toward Iraq over the last three decades, pointing out, where appropriate, respects in which our behavior has violated international law. The third section examines the American position regarding war against Iraq and considers the dangers and possible outcomes from such a conflict. The article then lays out a sequence of policy alternatives that address the real challenges posed by the Iraqi regime. These alternatives uphold, rather than undermine, international law. Finally, the article concludes with thoughts about possible future directions of U.S. Middle East policy, based on justice, democracy, and respect for international law.

II. U.S. POLICY TOWARD IRAQ: OIL AND INTERVENTION

The tale of U.S. involvement with Iraq is either mostly forgotten or never learned in this country. We must excavate the history of U.S.-Iraqi relations in some detail for four reasons. First, excavation serves to highlight the extent to which the dangerous impasse we now face in our relationship with Iraq is one of our own making. Second, it reveals the many fallacies and distortions that

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2. "Insulting the [Iraqi] President is a capital offense. Reports of widespread extrajudicial killings, torture whose cruelty defies the imagination, prolonged detentions without trial or charge, mass 'disappearances,' persecution of the Shi'a of the south and genocidal acts against the Kurdish minority have been abundantly documented." Karima Bennoune, Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq, 13 EUR. J. OF INT'L L. 243, 249 (2002).

3. Fully elaborated legal arguments as to each of the many arguable violations of international law committed by the United States in its relations with Iraq are beyond the scope of this article. Partial elaboration, illustrative examples, and citations to sources with greater detail should suffice to establish a platform for discussing current policies and their alternatives. There is broad consensus, but not unanimity, among commentators regarding many of the legal positions taken here (for example, regarding the legality of U.S.-British "no fly zones" in Iraq, discussed in Section II. G) and lesser agreement as to others; for example, whether UN-sponsored sanctions against Iraq have come to constitute genocide, discussed in Section II. F. The author will attempt to indicate where the weight of opinion lies and provide cites to contrary views. Also, the article does not deal with possible U.S. constitutional violations in either past or contemporary dealings with Iraq. See Richard Falk, The Rush to War, THE NATION, Aug. 19, 2002, at 5.
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underlie the justifications that are currently being offered for a U.S. invasion of Iraq. Third, it aids in a more factual and level-headed reading of the real challenges constituted by the regime of Saddam Hussein, and thus positions us to better define effective policy alternatives for the future. So that no reader is mistaken; restoring a more realistic assessment of the character of the Hussein regime is in no sense an apology for its horrific crimes. Finally, a historical review of U.S. dealings with Iraq may instill a salutary measure of humility as we contemplate our future relations with that country, and the wider Middle East.

A. The Imperative of Oil

U.S. policy toward Iraq, and toward the Gulf region more generally, has been shaped by the goal of defending Western access to the region's oil, which constitutes well over 60% of the world's known reserves, against either internal or external threat. Iraq itself possesses proven oil reserves of over 112 billion barrels, second only to Saudi Arabia. Moreover, this figure may represent less than half of Iraq's production potential, since many fields have yet to be explored. Iraq also has natural gas reserves estimated at 110 trillion cubic feet. In 1945, State Department officials referred to the Middle East as "a stupendous source of strategic power, and one of the greatest material prizes in world history." To recognize the centrality of oil in U.S. Middle East policy is not, however, to claim that oil explains every nuance or shift in that policy. It does not-a fact to which we will return below when we examine the current push for war with Iraq.

4. It seems entirely appropriate that much of the present Iraqi leadership, including Saddam Hussein himself, should ultimately face an international criminal tribunal for war crimes and other crimes against humanity. See discussion infra Part IV.E.


6. According to Mark Phythian, "The West has traditionally feared losing its influence over and access to oil, either as a result of foreign (in classic cold war terms, Soviet) intervention, or internal revolution. Therefore, the three most important issues in oil politics have been access, reliability of flow, and stability of price." MARK PHYTHIAN, ARMING IRAQ: HOW THE U.S. AND BRITAIN SECRETLY BUILT SADDAM'S WAR MACHINE 5 (1997).


8. Id. at P23.


By the close of the Vietnam war era, a strong American aversion to direct military intervention in distant parts of the globe had developed. Hence, U.S. interests in the Gulf were advanced via support of the local "twin pillars," Iran and Saudi Arabia, both staunchly anti-communist monarchies. While Saudi Arabia wielded diplomatic and economic clout, Iran was the military juggernaut under the Shah, armed with the most advanced U.S. weaponry. Together, they were charged with maintaining a stability favorable to their own, and American, interests in the Gulf.

Meanwhile, since 1976 U.S. policy with respect to the broader Middle East has also rested on maintaining Israeli military superiority over the Arab world. Israel's primary role in U.S. strategy for the region has been to quell the upsurge of radical Arab nationalism, which has persistently been a more concrete challenge in the region for the U.S. than the prospect of direct Soviet intervention. While the U.S. has cultivated alliances with a variety of Arab and non-Arab countries, Israel "stands at the apex of U.S. alliance structure in the Middle East." Among other things, an American-supervised stability in the Middle East—or more bluntly, hegemony—has also ensured that the region remained a welcoming market for American commodities and services.

11. The strategy of relying first on local forces to repel aggression and only secondarily on U.S. military power was a key feature of the Nixon Doctrine, announced in 1969. Elizabeth Gamlen, United States Strategic Policy toward the Middle East: Central Command and the Reflagging of Kuwait's Tankers, in THE UNITED STATES AND THE MIDDLE EAST 215-16 (Hooshang Amirahmadi ed., 1993).


13. In the words of political scientist Stephen Zunes:

If it were concerned simply with Israel's security, the United States would be dedicated to maintaining Israeli defenses to the point where they would be approximately equal to any realistic combination of Arab armed forces. Instead, leaders of both American political parties have called for the United States to help maintain not a military balance between Israel and its neighbors, but qualitative Israeli military superiority. When Israel was less dominant militarily, there was no such consensus for U.S. backing of Israel. The continued high levels of U.S. aid to Israel [post-1967] does not likely come out of concern for Israel's survival. One explanation may come from a desire for Israel to continue its strategic political dominance over the Palestinians and the region as a whole.


15. Davis, supra note 5, at 274.

16. One of the key ways in which the petrodollars of Middle Eastern nations have been recycled to the United States and other Western nations has been through arms sales. U.S. arms
U.S. relations with Iraq during the 1970’s were cool, but not openly hostile. Iraq had severed diplomatic relations with the U.S. following the 1967 Arab-Israeli war. In 1972, the ruling Ba’ath Party both nationalized the Iraq Petroleum Company (IPC) and signed a friendship treaty with the Soviet Union. Iraq was also locked in periodic border disputes with U.S. client Iran over the Shatt al-Arab waterway in the south, and with a Kurdish uprising in the north, which was sustained in part by aid funneled into Iran by both the U.S. and Israel. The two disputes were temporarily abated by the 1975 Algiers Agreement, shepherded by U.S. Secretary of State Henry Kissinger and according to which outside aid to the Iraqi Kurds was stopped, and Iraq accepted the median line of the Shatt al-Arab as the border between the two countries. The Kurdish rebels, abandoned by their erstwhile "benefactors", were quickly decimated by the Iraqi military.

B. Our "SOB"

The ascendance of Saddam Hussein to the presidency of Iraq in 1979


17. IPC is a consortium of British, French, and American interests established to exploit Iraqi oil.


19. The Kurds are a Turkic-language speaking ethnic group whose natal lands straddle Syria, Turkey, Iran, and Iraq. In Iraq, they constitute approximately 20% of the population, and are concentrated in the northern reaches of the country, including the mountains and plains adjacent to the three other countries mentioned above. ANDREW & PATRICK COCKBURN, OUT OF THE ASHES: THE RESURRECTION OF SADDAM HUSSEIN 59 (2000).

20. Id. at 33. In a practice repeated in U.S. support for Iraq during its war with Iran, the quantity of aid doled out to the Kurds was carefully maintained at a level that made attainment of their goal of autonomy impossible. A 1974 CIA memo reviewed by the House’s Pike Commission stated:

We would think that Iran would not look with favor on the establishment of a formalized autonomous government. Iran, like ourselves, has seen benefit in a stalemate situation . . . in which Iraq is intrinsically weakened by the Kurds refusal to relinquish semi-autonomy. Neither Iran nor ourselves wish to see the matter resolved one way or the other.

BLUM, supra note 1, at 243. U.S. intervention in internal Iraqi affairs is taken up infra in Section II.

21. BLUM, supra note 1, at 243.

coincided with a momentous shift in the regional constellation of power: the victory of the Islamic revolution in Iran that year. The U.S. was immediately deprived of its most militarily capable "pillar" in the Gulf region. Moreover, Iran made no secret of its aspirations to spread the Islamic revolution to other countries of the region. Through much of the eighties, a major preoccupation of U.S. policy-makers was containment of the Islamic Republic of Iran, which was increasingly seen as the main threat to U.S. interests in the Middle East.23

Notwithstanding Iraq's relationship with the Soviet Union and the Ba'ath Party's affinity for a pallid version of socialism,24 U.S. policy makers might have had inklings that they would find Iraq to be a congenial replacement for their fallen Iran "pillar." With the Algiers Agreement safely behind it, the largely nationalist, secular, but Sunni Muslim-based Iraqi regime had turned its attentions in the late seventies to consolidating its grip on power, brutally suppressing both its communist rivals and Islamist groups based within the majority Shi'a Muslim population of the South.25 Even before Iraq launched its attack against Iran in September 1980, Zbigniew Brzezinski, President Carter's National Security Advisor, had stated publicly: "We see no fundamental incompatibility of interests between the United States and Iraq . . . We do not feel that American-Iraqi relations need to be frozen in antagonisms."26

Equally important was the fact that Saddam Hussein himself was well known to U.S. intelligence and policy makers from previous dealings in the 1960's.27 Hussein, who had joined the Ba'ath Party at the age of twenty-two,

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23. Blum, supra note 1, at 64-72. Of course, the decidedly anti-American tone struck by revolutionary Iran was a legacy of long U.S. support for the repressive government of the Shah, dating back at least to 1953, when a CIA-instigated coup overthrew the legally elected government of Prime Minister Mossadeq. Id.

24. The Arab "Ba'ath" ("Renaissance") Party was founded in the 1940's by Syrians Michel Aflaq (a Christian) and Salah al-Bitar (a Sunni Muslim) under the slogan "Unity [of the entire Arab nation], Freedom [from colonial, primarily Western, domination], and Socialism." Mackey, supra note 12, at 186-87. The socialist element of Ba'ath ideology has translated primarily into an enduring commitment to a social welfare state and the Ba'ath Party has been distinctly hostile toward Iraqi communists. Davis, supra note 5, at 266.

25. Moushabek, supra note 18, at 32. Sunni Muslims are the orthodox and majority sect within Islam; Shi'a Muslims are the heterodox sect that emerged from a seventh century schism. Charles Lindholm, The Islamic Middle East 167 (1996). While Shi'as are the minority within the Muslim world as a whole, Shi'a Arabs constitute upwards of 50% of the population of Iraq, chiefly occupying the southern districts of the state. Id. The Sunni minority, perhaps only 20% of the population and concentrated in the triangle formed by the confluence of the Tigris and Euphrates rivers, nonetheless has monopolized power over government and the military since the birth of the modern state of Iraq. Cockburn, supra note 19, at 58. Iraq is host to a Christian population of about 800,000, some of whom are also ethnic minorities (Assyrians, Armenians) and to several Muslim ethnic minorities (Kurds, Turkomans, and others). See Peter Baker, Christians in Iraq Fear Backlash, INT'L HERALD TRIB., Dec. 26, 2002, at http://www.iht.com/articles/81387.htm (last visited Mar. 13, 2003) (discussing the Christian community in Iraq).


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had participated in a botched assassination and coup attempt against Iraqi President Abd al-Karim Qassim in 1959.28 Wounded, he fled to Egypt, where, through Egyptian intelligence agents, he provided the Cairo CIA station with names of Iraqi leftists.29 In 1963, Qassim was overthrown in a CIA-backed coup carried out by a smattering of Ba'athi activists.30 Hussein hurried back to Iraq to assume responsibility over the internal Ba'ath intelligence apparatus. Armed with lists compiled by the CIA stations throughout the Middle East, Hussein, by some accounts, supervised the hunt for Iraqi communists and other dissidents, and personally participated in their torture and executions.31 The Ba'ath Party staged a second coup in 1968, this time bloodless, that brought Hassan al-Bakr to power after the Ba'ath had been briefly ousted from the ruling clique. Saddam Hussein, vice president and deputy chair of the Revolutionary Command Council (RCC)32 under al-Bakr, and the real power behind the government, eventually packed al-Bakr off into retirement and declared himself president of Iraq in 1979.33 On August 8, under the pretense of foiling a Syrian-backed coup attempt, Hussein ordered the execution of twenty-one members of the RCC, leaving the Ba'ath Party and state positions filled with loyalists, many from his own clan originating in the village of Takrit.34

Despite the severe and unrelenting political repression practiced by the Hussein regime, it should not be overlooked that during the 1970's and early 1980's, Iraq achieved spectacular gains in economic development, which were largely funded by oil revenues:

With income from petroleum expanding between 1973 and 1978 from $1.8 billion to $23.6 billion, the Ba'ath transformed agricultural Iraq


28. Id. at 7.
29. Id. at 7.
30. This followed a 1960 assassination attempt on Qassim that was backed by the CIA. William Blum, Rogue State 133-34 (2000). The U.S. sought replacement of Qassim for several reasons: first, Qassim had withdrawn Iraq from the anti-Soviet Baghdad Pact in 1961; second, he had "threatened to occupy Kuwait and nationalized part of the Iraq Petroleum Company;" and third, he had lifted a ban on the Iraqi Communist Party. Cockburn, supra note 19, at 74.

31. Said Aburish, Saddam Hussein: The Politics of Revenge 61 (2000); Simons, The Making of Iraq, supra note 27, at 7-8. Both maintain that Saddam Hussein personally committed torture and ordered killings during the Ba'ath's anti-leftist campaign. Some 5,000 persons were killed, among them many members of Iraq's educated elite. Id.; See generally, Said Aburish, A Brutal Friendship: The West and the Arab Elite (1997). Andrew and Patrick Cockburn assert, however, that Saddam Hussein had no role in the 1963 coup, nor in the massacres that followed. Cockburn, supra note 19, at 75.

32. Moushabek, supra note 18, at 30. The RCC, under the constitution, is a body that "maintained an absolute monopoly of all judicial, legislative and executive authority." Id.

34. Mackey, supra note 12, at 232-34.
into a rapidly developing industrialized country. No longer dependent on taxes or foreign subsidies, government allocations for industry increased twelve times in those five years, transportation eleven times, housing nine times. Networks of highways connected town to town, and electrical lines stretched through the landscape to reach almost every village. Promising to spin a 'silk thread' between the government and the common man, the Ba'ath declared jihad against poor health and illiteracy. Free health care grew quickly available to a population accustomed to neglect. And schools and literacy programs proclaiming the slogan "Knowledge is Light, Ignorance is Darkness" opened everywhere from Baghdad to the most humble village on the edge of the southern marshes.35

Oil wealth contributed to a steadily rising standard of living for ordinary Iraqis, and the country became a regional employment magnet for workers from nearby non-oil-producing Arab countries.36 Gender equality under the Ba'ath was, perhaps, the most advanced in the Arab world.37 Saddam Hussein's political legitimacy grew based on his image as a beneficent strongman, whose repressive tactics were, to a fractious nation weary of political instability, a necessary condition for the country's material advancement.38

C. Bleeding Iraq and Iran

In the 1980's, the U.S. contributed materially to the consolidation of Saddam Hussein's regime and aided in the building of the Iraqi military capacity. The main reason that the U.S. cultivated Iraq during this period was that policy makers saw it as a counterweight to Iran, which, as stated above, had

35. Id. at 229.


38. Davis, supra note 5, at 265. In the words of another commentator:
The system of political rule was primitive, brutal, and cynical-and in its tight circle, corrupt. But Iraq in general was not a corrupt or corrupted society. The people had accepted a deal for themselves that the British had invented for the state they created in 1922: obey and be rewarded, disobey and be punished. Saddam Hussein took this philosophy to extreme lengths as he built his power base in the 1970s, but for most Iraqis what his apparatus delivered in terms of education, literacy, health, comfort, and respect among Middle Eastern neighbors was worth the cost.

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undergone revolution in 1979.\textsuperscript{39} Iran's Ayatollah Khomeini had denounced all of the regimes in the Middle East as corrupt and un-Islamic, and made clear that the secular nationalist Ba'ath regime in Iraq would be among the first targets of Islamic revolutionary fervor. Within months, the calm that had prevailed along the Iraq-Iran border since the Algiers Agreement was giving way to skirmishes. Tehran was urging revolt by the Kurdish and Shi'a Muslims against Saddam Hussein, and attempting to assassinate senior Iraqi officials.\textsuperscript{40}

In September, 1980, with the Iranian officer corps in the throes of a political purge-and at the discreet urging of the Carter administration-Saddam Hussein launched a limited war against Iran designed to thwart the hegemonic ambitions of his stronger neighbor.\textsuperscript{41} Although seemingly an act of aggression, and therefore a violation of international law,\textsuperscript{42} the war was not an act of irrational megalomania. Indeed, it "... was not a reckless adventure; it was an opportunistic response to a significant threat."\textsuperscript{43} Saddam Hussein depicted his blow against Iran as one for the entire Arab world, and Iraq as an "Arab shield" against Iranian expansionism.\textsuperscript{44}

Iraq's aggression against Iran, today cited as one justification for a U.S.-led war against Iraq, was supported diplomatically and, ultimately, militarily by the United States.\textsuperscript{45} Initially, the official U.S. stance with respect to the war was one of neutrality.\textsuperscript{46} Yet this stance persisted only so long as neither party to the
bloodletting could obtain decisive strategic advantage. By 1982, Iraq's military fortunes were flagging, and any pretenses of neutrality were abandoned, as the U.S. swung its power more openly behind Iraq.47

U.S. aid to Saddam Hussein's government assumed a variety of forms. In February 1982, Iraq was removed from the list of state-sponsors of terrorism, enabling U.S. corporations to ship "dual use" goods (those which had both civilian and military application) to Iraq.48 Some $500 million in "dual use" imports from the United States, ranging from Hughes and Bell helicopters to computer hardware and software, were directly sent to the Iraqi military with the certain knowledge of the U.S. government.49 Dozens of biological agents, including strains of anthrax, were sent to Iraq under license from the U.S. Department of Commerce and formed the basis of that country's biological weapons program.50

Iraq was made eligible for assistance through the Department of Agriculture's Commodity Credit Corporation (CCC) and to the delight of farm-state politicians in the United States, became the ninth largest purchaser of U.S. grains by 1989.51 Full diplomatic relations between Iraq and the U.S. were restored in 1984.52 At the height of the "tanker war," when Iraq and Iran exchanged attacks on Gulf shipping, the United States "reflagged" tankers under U.S. colors and provided them naval protection against Iranian attack, sinking

conflict. Sarah Graham-Brown notes: "Ironically, the only exception to this ban on commercial sales of defense items was if the items were for the protection of the head of state. As a result of the exception, license applications valued at $48 million were approved." SARAH GRAHAM-BROWN, SANCTIONING SADDAM 3 (1999).

47. Michael Dobbs, The U.S. Had Key Role in Iraq Buildup, WASH. POST, Dec. 30, 2002, at Al. While the main aim of U.S. support to Iraq was to fortify a bulwark against Iranian power, as Mackey points out:

Other reasons were involved in the policy shift: the hope that Hussein might serve a constructive role in the ever present Arab-Israeli dispute, the realization that oil-rich Iraq represented an untapped market for U.S. industry and agriculture, and desire to wean Baghdad away from Moscow once and for all.

MACKEN, supra note 12, at 340.

48. Davis, supra note 5, at 257.

49. MACKEN, supra note 12, at 341. Investigations into Commerce Department records show that export licenses were approved for goods sent to the Iraqi Air Force, the Iraqi Ministry of Defense, and a variety of Iraqi state enterprises that were engaged in military research and development. DIGITAL NATIONAL SECURITY ARCHIVE, IRAQGATE: SADDAM HUSSEIN, U.S. POLICY AND THE PRELUDE TO THE PERSIAN GULF WAR, 1980-1994, at http://nsarchive.chadwyck.com/igessayx.htm (last visited Jan. 7, 2003).

50. Dobbs, supra note 47, at Al.

51. JAMES BAKER, THE POLITICS OF DIPLOMACY 263 (1995); see also MACKEN, supra note 12, at 340.

52. Davis, supra note 5, at 257.
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six Iranian war vessels and attacking Iranian oil platforms.53 Also, the U.S. quickly accepted Iraq's apology for an apparently accidental Iraqi missile attack on the *USS Stark* that claimed thirty-seven sailors' lives.54 American satellite images depicting Iranian troop deployments were also shared with Iraq, decisively influencing some of the war's major battles.55 The U.S. also monitored arm sales by other countries to Iraq to insure that its military needs were being met, and apparently orchestrated sales of cluster bombs to Iraq from a company based in Chile.56

There is abundant evidence that U.S. policy makers were fully aware of the murderous characteristics of the Hussein regime, and of its repeated uses of chemical weapons in the war against Iran.57 In November 1983, Secretary of State George Schultz was informed by a senior department official of intelligence reports indicating that Iranian troops were being subjected to "almost daily use of CW [chemical weapons]" by the Iraqis.58 On March 24, 1984, Donald Rumsfeld was in Baghdad negotiating, as President Reagan's emissary, the re-establishment of diplomatic ties with Iraq when the UN issued a report confirming Iraq's use of poison gas against Iranian soldiers.59 Declassified State Department notes of Rumsfeld's meetings with Iraqi officials, including Saddam Hussein, reflect no discussion of the topic of Iraqi use of chemical weapons against Iran, except in passing, as something that "inhibited" closer U.S.-Iraqi ties.60

In March 1988, in the waning days of the Iran-Iraq war, Iraqi soldiers were attempting to re-establish control over the Iraqi Kurdish village of Halabja, which had been occupied by Iranian troops.61 Chemical bombs were dropped, killing an estimated 5,000 Iraqi Kurds.62 This is the famed incident that is now the basis of the claim that Saddam Hussein has used weapons of mass destruction against Iran.

54. Id; see also Mackey, supra note 12, at 341.
55. Phythian, supra note 6, at 40; see also Mackey, supra note 13, at 341-42.
61. Scahill, supra note 59.
62. Id.
destruction against his own people, which is another of the current justifications for a possible U.S. invasion of Iraq. Tellingly, however, the Reagan administration at the time defended Iraq and State Department officials were instructed to publicly blame Iran for the attack.\textsuperscript{63} Congressional efforts to impose economic sanctions on Iraq were snuffed out by the White House, pleading the importance of ongoing U.S.-Iraqi cooperation, the loss of commercial opportunities for U.S. businesses, and probable counter-productivity of sanctions.\textsuperscript{64} It was, in all senses, too profitable a relationship to abandon.

At no time during the eight-year Iran-Iraq bloodbath, however, was U.S. military and economic support for Iraq sufficient to permit an outright military victory for Iraq. Indeed, at times, the U.S. supported or encouraged arms aid to Iran, mostly through Israel.\textsuperscript{65} This cynical policy was designed to secure, in the words of Henry Kissinger, the "ultimate American interest" in the Iran-Iraq war: that "both sides lose."\textsuperscript{66} Lose they did, and in tragic proportions. By the time both countries had accepted a UN-sponsored ceasefire in 1988, the war had taken as many as 1,000,000 Iraqi and Iranian lives, and may have cost the two countries as much as $1 trillion.\textsuperscript{67} One cannot be certain of this, but it seems highly improbable that U.S. decision makers would have deliberately fueled such an orgy of destruction, and facilitated Iraq's use of horrific weapons, were

\begin{itemize}
  \item \textsuperscript{63} Joost R. Hilterman, The U.S. Didn't Seem to Mind Gas Attack, \textit{Intern'l Herald Trib.}, Jan. 17, 2003, at 2003 WL 4534113. There has been some controversy over responsibility for the Halabja attack. A 1990 Pentagon report concluded "... it seemed likely that it was the Iranian bombardment that had actually killed the Kurds." \textsc{Stephen C. Pelletiere et al.}, \textit{Iraqi Power and U.S. Security in the Middle East} 52 (1990). Some have disputed the conclusions of this report, noting that its overall thrust was to advocate continuation of a close U.S.-Iraqi alliance See Mike Langridge, Who is Responsible for the Deaths of Iraqi civilians, at http://members.fortunecity.com/britonsvbUsh/articles/gas.html#update (last visited Jan. 17, 2003). Perhaps the most judicious assessment of the tragedy at Halabja is that responsibility for the deaths of the villagers is indeterminable. Id. Other Iraqi villages may have been gassed, although some only after warnings of several weeks to evacuate. Jude Wanniski, Where did Saddam come from? Part I, at http://www.polyconomics.com/searchbase/02-18-98.html (last visited Jan. 13, 2003); see \textsc{Rick Francona}, From Ally to Adversary 24-25 (1999) (discussing Iraq's use of chemical weapons against Iranian soldiers; see generally, \textsc{Stephen C. Pelletiere et al.}, \textit{Iraq and the International Oil System} 205-206 (2001).
  \item \textsuperscript{64} Dickey & Thomas, \textit{supra} note 57, at 34; see also Dobbs, \textit{supra} note 47, at A1; \textsc{Graham-Brown, supra} note 46, at 6.
  \item \textsuperscript{65} \textsc{Phythian, supra} note 6, at 33. However, the U.S. was not alone in supporting both sides of the Iran-Iraq conflict; a total of 28 nations sold arms to both Iraq and Iran during the course of the war. Id. at 24.
  \item \textsuperscript{66} Davis, \textit{supra} note 5, at 256; see also \textsc{Mackey, supra} note 12, at 340; Blum, \textit{supra} note 1, at 332. This is reminiscent of U.S. support for the Kurds in the mid-1970s, mitigated to such a degree as to guarantee permanent conflict.
  \item \textsuperscript{67} Wanniski, \textit{supra} note 63. Bahbah maintains that the costs to Iraq alone were \$500 billion. \textsc{Bishara Bahbah, The Crisis in the Gulf – Why Iraq invaded Kuwait, in Beyond the Storm} 52 (Phyllis Bennis & Michel Moushabez eds., 1999). An additional 1.8 million Iraqi and Iranians were wounded in the fighting. \textsc{Phythian, supra} note 6, at 3.
these not two brown-skinned, Muslim peoples, battling it out on the far side of the globe.

The U.S. fomented aggression by Iraq against Iran, and its subsequent sponsorship, of Iraq aided and prolonged that aggression. Accomplice liability is a well-recognized concept in international law. Although U.S. acts did not target Iraq in this instance, it is arguable, nonetheless, that the U.S. was culpable for violations of international law. This was so both in relation to Iraq's crime against peace in attacking Iran and in relation to Iraq's use of proscribed chemical and biological weapons, some of which were of American provenance.

The U.S. continued in its cultivation of Saddam Hussein in the aftermath of the Iran-Iraq war, even after allegations surfaced that Iraq had participated in bank fraud and corruption in the U.S. Department of Agriculture's CCC program. This policy was consecrated in National Security Directive 26 of October, 1989, concluding that "normal relations between the United States and Iraq would serve our longer-term interests and promote stability in both the Gulf and the Middle East." High officials in both the Reagan and first Bush administrations repeatedly defended close cooperation with Iraq. In 1989, Saddam Hussein hosted a visit from senior American business executives from such major U.S. corporations as Amoco, Mobile, Westinghouse, General Motors, Xerox, and others. By 1990, annual trade between the U.S. and Iraq

68. As Professor William Schabas points out, many of the Nazi leaders in the Nuremberg Trials were held liable as accomplices to crimes against peace and against humanity. Complicity, according to Schabas, requires: First, "proof that the underlying or predicate crime has been committed by another person . . . Second, there must be a material act by which the accomplice actually contributes to the perpetration of the crime . . . Thirdly, the accomplice's act must be carried out with intent and with knowledge of the perpetrator's act." WILLIAM SCHABAS, INT'L COMMISSION OF THE RED CROSS, ENFORCING INTERNATIONAL HUMANITARIAN LAW: CATCHING THE ACCOMPLICES, INTERNATIONAL REVIEW OF THE RED CROSS NO.42, INT'L COMMISSION OF THE RED CROSS at 447-48, at http://www.icrc.org/WEBGRAPH.NSF/Graphics/439-460_Schabas.pdf/$FILE/439-460_Schabas.pdf.


71. MACKEY, supra note 12, at 342-43.

72. DIGITAL NATIONAL SECURITY ARCHIVE, supra note 49.

73. Simons, supra note 27, at 9.
had reached $3.5 billion.\footnote{GRAHAM-BROWN, supra note 46, at 4.} On April 12, 1990, a delegation of five U.S. Senators, led by Robert Dole and Alan Simpson, met with Saddam Hussein during which the senators commiserated with Saddam Hussein over criticisms of him in the American press, derided by Simpson as "haughty and pampered."\footnote{Gilbert Cranberg, \textit{Glaspie's Cable Sets Record Straight}, \textit{ST. PETERSBURG TIMES}, Nov. 10, 1991, at 8D.}

Just weeks before Iraq's invasion of Kuwait in August, 1990, U.S. Assistant Secretary of State, John Kelly, testified in Congress that, while Iraq's human rights record was "abysmal," economic sanctions were still inappropriate.\footnote{\textit{Hearing on US-Iraq Relations Before the Senate Foreign Relations Comm.}, 101st Cong. (1990) (statement of Assistant Secretary of State John Kelly).} Economic and military support continued until the eve of Iraq's invasion of Kuwait. On August 1, 1990, the day before the invasion, President Bush authorized sales of advanced data transmission technology to Iraq.\footnote{\textit{GEOFF SIMONS, THE SCOURGING OF IRAQ} 74-75 (1998). The support included sales of pesticides to Iraq in December 1988 by Dow Chemical, that were amenable to use as chemical weapons. Dobbs, \textit{supra} note 47, at A1.} As Geoff Simons observes:

In 1990, Saddam Hussein-having been provided with substantial military support by the United States, protected from sanctions by successive U.S. administrations, and negotiating business deals with top American executives-had every reason to believe that his happy relationship with Washington would continue. He had protected the pro-U.S. gulf states from a resurgent Islamic fundamentalism, for which he had paid an enormous cost in men and treasure. What Saddam now wanted was to rebuild Iraq with the help of his former allies.\footnote{Simons, \textit{supra} note 27, at 9-10.}

This is how matters stood in the months leading to Hussein's fateful decision to invade neighboring Kuwait on August 2, 1990.

\section*{D. The Fall From Grace}

Iraq's invasion of Kuwait looks to have been the decisive turning point in U.S. policy toward Saddam Hussein. At one level, at least, it certainly was. Virtually overnight, the Hussein regime came to be publicly depicted as a dangerous liability rather than a strategic asset.\footnote{Marjorie Williams, \textit{Monster in the Making: From Unknown to Arch-Villain in a Matter of Days}, \textit{WASH. POST}, Aug. 9, 1990, at D01.} Yet Washington's perceptions of Saddam Hussein had begun to shift even earlier. This process may have
begun as early as 1989 when the U.S. military conducted simulation exercises in repelling a hypothetical Iraqi invasion of Kuwait and/or Saudi Arabia. In April 1990, Saddam Hussein, may have sealed his fate when, in a speech to his army, he threatened to retaliate against any Israeli use of nuclear weaponry with his own chemical weapons. In effect, this underscored the fact that Iraq was emerging as a potential challenger to Israeli military dominance that rested ultimately on its regional monopoly over nuclear arms.

Iraq's attack against another sovereign Arab country was quickly, and deservedly, condemned within the UN. The attack is now frequently cited as further evidence that Saddam is a megalomaniacal "serial aggressor," undeterrable and, therefore, an appropriate target for "regime change" or worse. It is important, therefore, to understand the sequence of events leading up to Iraq's Kuwait misadventure in somewhat greater detail. The reality is that the attack, wholly illegal and unjustified, was not an act of an irrational leader bent, against all reason, on expansion. In fact, Iraq had longstanding and seemingly legitimate grievances with Kuwait and initially attempted to resolve them through negotiations.

As this article has already hinted, the Iraqi invasion of Kuwait was a direct outgrowth of the Iran-Iraq war. Iraq had entered into the Iran war flush with reserves of $35 billion, but limped out of it with $80-100 billion in debt, approximately half of it held by Kuwait, Saudi Arabia, and the United Arab Emirates. In Saddam Hussein's view, his nation had sacrificed mightily on behalf of all Arabs—indeed, fears of Iran were the very reason the militarily vulnerable Arab Gulf states had underwritten the Iraqi war effort to the extent they had. With Iraq's economy in tatters, Hussein sought relief from his Arab

80. Blum, supra note 1, at 324.
81. Davis, supra note 5 at 275.
82. Simons, supra note 27 at 10.
85. Mearshimer & Walt, supra note 40.
87. Phytyian, supra note 6, at 292.
88. Id. at 292.
neighbors in the form of cash and loan forgiveness. He also sought sympathetic resolution of a dispute with Kuwait over two islands in the Shatt al-Arab that would secure Iraqi shipping access to the Gulf.

Aggravating matters, Kuwait was consistently over-producing its OPEC-set oil-production quotas, driving the price of oil down, and with it, Iraq's oil revenues. In an Arab summit meeting in Baghdad in May 1990, Saddam Hussein likened Kuwaiti tactics to economic warfare, stating that every U.S. dollar drop in the price of oil caused an annual loss to Iraq of $1 billion. The Kuwaiti response was not just unsympathetic, it was insulting, the emir offered Iraq a paltry $500,000.

The Iraqi leader next tested the waters regarding possible U.S. reaction to a military action against Kuwait. A series of public statements by U.S. officials stressed the fact that the U.S. had no treaty obligations to defend Kuwait. On July 24, 1990, in the last direct meeting between Saddam Hussein and a U.S. official, U.S. Ambassador April Glaspie stated:

I admire your extraordinary efforts to rebuild your country. I know you need funds. We understand that and our opinion is that you should have the opportunity to rebuild your country. But we have no opinion on Arab-Arab conflicts like your border disagreement with Kuwait.

Although the ambassador went on to express concern over the possible use of force by Iraq, in hindsight, it is evident that Hussein interpreted these statements

89. Id. at 292.

90. The dispute dated from World War I, when Kuwait, then part of the Basra district of the Ottoman Empire, was severed from Iraq by the stroke of a British colonial pen, but the disposition of the two islands were left ambiguous. Over time, Iraq grudgingly came to accept the forced separation. Surely this legacy contributed to Iraq's sense that Kuwait's sovereignty was something of a contrivance. See Hala Fattah, From Regionalism to Nation-State: A Short History of Kuwait, in BEYOND THE STORM 37-49 (Phyllis Bennis & Michel Moushabeck eds., 1991); Bahbah, supra note 67, at 50-51.

91. Simons, supra note 27, at 10.

92. Id.

93. Bahbah, supra note 67, at 52. Iraq had also accused Kuwait of permitting slant-drilling into the Rumaila oil fields, which extend from Iraq into Kuwait, and siphoning off excessive shares of oil. Id.

94. On July 24, 1990, U.S. Department of State spokesperson Margaret Tutwiler clarified the absence of "any defense treaties with Kuwait, and there are no special defense or security commitments to Kuwait." Simons, supra note 27, at 10-13. Shortly thereafter, Under Secretary of State John Kelly suggested that an Iraqi invasion of Kuwait would be cause for great concern, but would not oblige an armed U.S. response. Id. at 2-3; BLUM, supra note 1, at 321-22 (providing additional examples).

95. Simons, supra note 27, at 10; see also Mearshimer & Walt, supra note 40.
as a "green light" for an invasion of Kuwait.\textsuperscript{96} Just over one week later, after another failed attempt to negotiate a resolution with Kuwait, Iraqi tanks rumbled across the border into Kuwait City against token resistance.

To be clear, the point is not that the invasion of Kuwait was legally or morally permissible: it was neither. It was a ruthless act of aggression against another sovereign nation and a clear violation of international law.\textsuperscript{97} However, the invasion was not the act of a reckless madman, as it has sometimes been portrayed. Rather it was, from the Iraqi perspective, consistent with past actions that the U.S. had tolerated.\textsuperscript{98} However, it should be obvious that speaking purely pragmatically, Saddam Hussein's real error was not in committing unprovoked aggression, rather his mistake was attacking a nation regarded as critical to American strategic interests.

\textit{E. "Desert Holocaust"} \textsuperscript{99}

As we know, Iraq failed to withdraw from Kuwait in the face of UN resolutions demanding that it do so. Ultimately, Iraqi troops were forcibly ejected from Kuwait by coalition forces composed of twenty-eight nations, the military operation led by the U.S. was dubbed "Desert Storm."\textsuperscript{100} The fact that the UN Security Council ultimately blessed enforcement of its resolutions demanding Iraqi withdrawal using "all necessary means,"\textsuperscript{101} implicitly including the use of force, appears to foreclose the question as to the legality of the attack against Iraq by the coalition cobbled together by the United States. Yet, this is only partially true.

There is considerable reason to believe that Iraq's withdrawal from Kuwait could have been secured peacefully. The very day of Iraq's invasion, the UN Security Council passed UN Security Council Resolution 660, demanding Iraqi withdrawal and the restoration of Kuwait's legitimate government.\textsuperscript{102} Four days

\textsuperscript{96.} Mearshimer & Walt, \textit{supra} note 40. In addition to this, compelling evidence assembled by author William Blum indicate that the United States may have lured Iraq into invading Kuwait to provide a pretext for an American attack on Iraq. The evidence and analysis are too complex to reproduce here and should be read in the original text. Blum, \textit{supra} note 1, at 321-25.

\textsuperscript{97.} U.N. \textit{Charter} art. 2, para. 4.

\textsuperscript{98.} Mearshimer & Walt, \textit{supra} note 40. Other factors contributed to Hussein's decision to invade Kuwait. His regime was internally weakened and faced substantial unrest among high-ranking officers in the military; the attack on Kuwait served to unify the military against an outside force. Phythian, \textit{supra} note 6, at 292; see also Bahbah, \textit{supra} note 67, at 68; Davis, \textit{supra} note 5, at 271.

\textsuperscript{99.} Blum, \textit{supra} note 1, at 321-25.

\textsuperscript{100.} Hiro, \textit{supra} note 33, at 37.


\textsuperscript{102.} S.C. Res. 660, \textit{supra} note 83.
later it was followed by UN Security Council Resolution 661, noting Iraq's failure to comply with UNSCR 660, and imposed comprehensive, multilateral economic sanctions on Iraq.\textsuperscript{103} Many members of the international community, including France and the Soviet Union, counseled patience, preferring to allow the sanctions to take their course.\textsuperscript{104}

Iraq offered several times before the ground war commenced against it to withdraw from Kuwait, although these were diplomatic openings that were never seriously explored.\textsuperscript{105} On the contrary, from early in the crisis, the United States committed itself to war and actively sought to persuade other nations to support its initiative. Speaking of UNSCR Resolution 678, which authorized "all necessary means" to effect Iraqi withdrawal from Kuwait, former Secretary of State James Baker wrote in his memoirs: "I met personally with all my Security Council counterparts in an intricate process of cajoling, extracting, threatening, and occasionally buying votes."\textsuperscript{106}

The Bush administration also engaged in a sustained campaign to "sell" the war to a then skeptical American public with the aid of a credulous press.\textsuperscript{107} Pentagon representations that 250,000 Iraqi troops had taken up positions in Kuwait were accepted without challenge, even after some news organizations possessed satellite imagery casting doubt on Pentagon claims.\textsuperscript{108} Many will also remember the widely publicized allegation that Iraqi soldiers in Kuwait had thrown babies from their incubators in a Kuwait City hospital. It was later revealed that this incident was a hoax concocted by Kuwaiti interests in the United States working with renowned public relations firm Hill and Knowlton.\textsuperscript{109} Saddam Hussein, still just weeks removed from a decades-long partnership with the U.S., was relentlessly vilified as a "new Hitler."\textsuperscript{110}

\textsuperscript{104} GRAHAM-BROWN, \textit{supra} note 46, at 9.
\textsuperscript{105} Davis, \textit{supra} note 5, at 269-70.
\textsuperscript{106} JAMES BAKER, \textit{The Politics of Diplomacy} 303 (1995). A list of emoluments offered to gain "yes" votes was compiled by U.S. Representative Henry Gonzalez. Ratner, \textit{supra} note 42. It includes $7 billion in loan forgiveness to Egypt; $7 billion in aid from various countries and U.S. food shipments for the Soviet Union; unblocking a $140 million World Bank loan to China; and others. \textit{Id.} Among the states that was threatened, unsuccessfully, was Yemen, whose entire aid from the United States of $70 million was cut for its "no" vote. \textit{See generally,} Phyllis Bennis, \textit{False Consensus: George Bush's United Nations, in Beyond The Storm} 112 (Phyllis Bennis & Michel Moushabek eds., 1991).
\textsuperscript{107} MACARTHUR, \textit{supra} note 1, at 172-77.
\textsuperscript{108} \textit{Id.}
\textsuperscript{110} There was a marked tendency in the American press toward personification of the conflict, as if "Saddam" (who rated neither a title nor full name) were indistinguishable from Iraq and its people. Ali Abunimah and Rania Masri, \textit{The Media's Deadly Spin on Iraq, in Iraq Under
Facing Tyranny with Justice

The preference of U.S. policy-makers for a military response to the Kuwait crisis was doubtlessly grounded in a number of factors. Chief among these factors was the fear of the breakdown of the fragile consensus in support of sanctions and the inability of the United States to achieve its strategic objectives within the framework of a peaceful resolution. Specifically, Iraq had become too strong a regional power for American comfort, and threatened to diminish longstanding Israeli military dominance in the Middle East. Iraqi power could only have been thoroughly removed through the medium of war.

Therefore, the goal of the United States was not simply to force Iraqi withdrawal from Kuwait, nor even to cripple the Iraqi military as such. Instead, the U.S. aim was to actualize the threat, issued by then-Secretary of State James Baker to Iraqi foreign minister Tariq Aziz, to render Iraq a "weak and backward" state, and thereby eliminate Iraq as a contestant for regional leadership for the foreseeable future. At a broader level, cutting Iraq down to size would demonstrate to the world, and especially ambitious Third World potentates, the readiness of the U.S. to deploy military force in the soon to be post-Soviet "New World Order."

Nonetheless, the UN Security Council's endorsement of the use of force to eject Iraqi troops from Kuwait in UN Security Council Resolution 678 renders any argument that the U.S.-led coalition attack was in itself a violation of international law exceedingly problematic. However, the scale of the U.S.-led attack vastly exceeded that necessary to implement the internationally agreed upon aims of ejecting Iraq from Kuwait and restoring Kuwait's legitimate government that were first articulated in Security Council Resolution

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SIEGE 83 (Anthony Arnove ed., 2000); Davis, supra note 5, at 264-68; see also Williams, supra note 79, at DOI.

111. BAKER, supra note 106, at 301; see also, GRAHAM-BROWN, supra note 46, at 10.
112. Davis, supra note 5, at 274-75; see also MACKEY, supra note 12, at 338.
113. Davis, supra note 5, at 274-75.
116. In principle, of course, the Security Council is bound under Article 24(2) to uphold the purposes of the UN Charter, and therefore could not legally authorize an aggressive war. See U.N. CHARTER art. 24, para. 2, available at http://www.un.org/Overview/Charter/chapter5.html. Therefore, it is not impossible to make a claim that the U.S.-led coalition's use of force constituted, as an aggressive war, a crime against peace under the Nuremberg principles, and a violation of the UN Charter. See Francis Boyle, U.S. War Crimes During the Gulf War, COUNTERPUNCH, Sept. 2, 2002, at http://www.counterpunch.org/boyle0902.html. However, the Security Council may only authorize the use of force under Article 42 following a finding of a threat to international peace and security, and after concluding that other measures have been insufficient to abate the threat. A finding had been made in UNSCR 660 that the Iraqi invasion of Kuwait constituted such a breach, and by the time UNSCR 678 was passed, both sanctions and diplomacy had been employed unsuccessfully. S.C. Res. 678, supra note 101. An argument that the coalition violated international law against aggressive war must essentially show that, in fact, pacific measures had not been exhausted and that force was not necessary.
Given American objectives, this inevitably led to numerous general and specific violations of the law of nations and humanitarian law.\footnote{117} Desert Storm commenced on January 16, 1990, with a furious aerial bombardment of Iraqi troop positions within Kuwait and of the civilian infrastructure in Baghdad, Basra, and other major cities in Iraq.\footnote{119} The U.S., as the driving force behind the coalition and the provider of most of its military muscle, asserted de facto command of military operations, ensuring the primacy of U.S. strategic goals for the operation.\footnote{120}

Within a week, coalition forces had flown 12,000 sorties over Iraq and Kuwait.\footnote{121} By the end of the war on February 27, some 88,000 tons of munitions had been dropped.\footnote{122} This was the equivalent of one Hiroshima-size atomic bomb per week for the roughly seven weeks of the war, making it the most concentrated aerial bombardment in human history.\footnote{123} Destroyed in the onslaught were eighteen of Iraq's twenty power-generating facilities,\footnote{124} water treatment plants, dams, telecommunications equipment, food-processing and distribution plants, bridges, roads, bus and train stations, factories, schools and universities, and as many as 20,000 homes and dwellings.\footnote{125} Mosques, churches, and historical sites were struck as well.\footnote{126} In the words of a UN
inspector, the war wrought "near apocalyptic results" on Iraq. Iraq had been reduced to a "pre-industrial age," yet with all of a modern society's dependencies on electricity, sewers, and the like, for survival.

Ground operations were commenced by coalition forces on February 23, producing a total rout of Iraqi troops within 100 hours. One hundred and thirty-seven American soldiers were killed in the fighting. Estimates of Iraqi casualties range between 100,000 to 200,000, at least half of whom were non-combatants. Thousands, if not tens of thousands, of Iraqi troops, Kuwaiti and other civilians were obliterated as they fled Kuwait in full retreat toward Basra. These troops and civilians retreated along the "Highway of Death," as it became known, after Baghdad radio had broadcast Iraq's unconditional surrender and ordered Iraqi troops to withdraw from Kuwait:

The skies cleared on February 26 to reveal the snarling traffic jam of Iraqi vehicles and troops desperately scrambling to get out of Kuwait, and the most horrific slaughter of the war thus far commenced. U.S. and coalition attack helicopters, missile launchers, fighter-bombers, and B-52's rained explosives and bursting shrapnel on the stricken Iraqi withdrawal, resulting in total carnage.

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128. Id.

129. Seymour Hersh, Overwhelming Force: What Happened in the Final Days of the Gulf War?, THE NEW YORKER, May 22, 2000, at 1-2. available at http://www.polyconomics.com/sy.html. Diplomatic efforts to resolve the conflict during the weeks of the aerial bombardment, and before the commencement of the ground war, were undertaken by the Soviet Union and Iran, but "U.S. and Great Britain remained locked in a no-ceasefire, no-withdrawal, nothing-less-than-surrender scenario." Bennis, supra note 106, at 122.

130. Thousands of others, however, have in subsequent years developed symptoms of "Gulf War syndrome," possibly due to battlefield exposure to toxic substances. See, e.g., Richard Lieby, The Fallout of War, WASH. POST, Dec. 30, 2002, at C1.

131. Simons, supra note 77, at 15-16. As Simons reports, an American demographer with the U.S. Census Bureau estimated the number of Iraqi casualties at 158,000.

132. Niva, supra note 119, at 70.

133. Id. at 69-70. On March 2, 1990, two days after the ceasefire, an American mechanized division led by Major General Barry McCaffrey-later federal "drug czar" under President Clinton-attacked a retreating Iraqi tank division, claiming that Iraqi troops had initiated fire. Hersh, supra note 129, at 1-2.

Apache attack helicopters, Bradley fighting vehicles, and artillery units from the 24th [U.S.] division pummeled the five-mile long Iraqi column for hours, destroying some seven hundred Iraqi tanks, armored cars, and trucks, killing not only Iraqi soldiers but civilians and children as well. Many of the dead were buried soon after the engagement, and no accurate count of the victims could be made.
Other Iraqi troops of unknown number were killed when they were buried alive in their trenches by coalition force bulldozers. Wanton slaughter of troops who are wounded, captured, or otherwise "out of combat," as troops retreating in the aftermath of a ceasefire, constitutes a war crime under customary laws of warfare. The catalogue of weapons used against the hapless Iraqis on the "Highway of Death" may have included a number of banned explosives, including fuel-air bombs, napalm, and other incinerants.

Virtually all the Gulf War killing was concealed from the media, and consequently the public, through strict control of media access to the battlefield. Instead, information and images were selectively doled out to reporters that magnified the military accomplishments of the coalition, while fostering the appearance of a "war without death." President Bush assigned the task of managing perceptions of the war to then Secretary of Defense Dick Cheney, who later admitted: "I did not look on the press as an asset."

While Iraq's "eco-terrorism" was widely publicized and lamented, coalition forces also bombed refineries, tankers, and other oil industry fixtures, causing severe ecological damage. Coalition forces also fired an estimated 300 tons of high-density, armor-piercing depleted uranium projectiles, the remnants of which still remain to contaminate Iraqi soil. Two operating nuclear power

\[\text{Id. Subsequent investigations cast strong doubt as to the veracity of McCaffrey's claim that his unit was attacked first. Id.}\]


136. Id.; see also CHRIS HEDGES, WAR IS A FORCE THAT GIVES US MEANING 85 (2002) (describing the results in a chilling manner).

137. Sloyan, supra note 134. "More than 70 reporters were arrested, detained, and threatened at gunpoint and literally chased from the front lines when they attempted to defy Pentagon rules." Id. For additional discussions on both restrictions over news reportage of the war and complicity of U.S. media in obscuring the truth, see Laura Flanders, Restricting Reality: Media Mind Games and the War, in BEYOND THE STORM 160-70 (Phyllis Bennis & Michel Moushabeck eds., 1991); see also Abunimah & Masri, supra note 110, at 83; See generally, MACARTHUR, supra note 1.

138. Sloyan, supra note 134.


plants were also destroyed. Specific rules of international humanitarian law contained in Protocol I of the Geneva Conventions prohibit widespread, long-term and severe damage to the natural environment. These provisions of the Geneva Convention were violated repeatedly by coalition forces. Estimates for the restoration of Iraq's destroyed assets were placed at $200 billion.

Keeping in mind the limited purposes for which force was authorized by UNSCR 678, it is apparent that the deliberate targeting of Iraq's civilian infrastructure by coalition forces violated two principles that are at the foundation of international humanitarian law: the principle of distinction, and the principle of proportionality. The principle of distinction prohibits direct attacks on civilians or those that fail to discriminate between civilian and military objectives. Where attacks with military objectives also have civilian impacts, as with many of the sites bombed in Iraq by the coalition forces, the principle of proportionality requires that such impact not be excessive "in relation to the concrete and direct military advantage anticipated." It is not inconceivable that some military advantage was derived from the bombings throughout Iraq, often many miles from the Kuwait battlefield. But the extensive destruction visited by coalition bombings on Iraq caused terrible direct and indirect losses among Iraqi civilians, far disproportionate to any

141. See generally, BLUM, supra note 1.

142. Article 55 of Protocol I Additional to the Geneva Conventions requires that "Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, art. 55, 1125 U.N.T.S. 3 (hereinafter Protocol I). Article 56 protects "works and installations containing dangerous forces", such as dikes, dams, and nuclear generating plants. Id.; Protocol I, art. 56, 1125 U.N.T.S. 3. It goes without saying that Iraqi abuses of the environment during the battle were also egregious violations of international law.

143. SIMONS, supra note 77, at 12.

144. Both are customary norms of international law that have been codified in Protocol I Additional to the Geneva Conventions of 1949. Protocol I, supra note 142. Article 48 of Protocol I stipulates: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Id. Article 51(2) defines military objectives "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage," and further states that "the civilian population as such, as well as individual citizens, shall not be the object of attack." Id. Article 51(5) bars indiscriminate attacks, or "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is also possible to view coalition military operations that exceeded the scope of the mandate of UNSCR 678 as a violation of Article 2(4) of the Charter of the United Nations. Cf. Kenneth Rizer, Bombing Dual-Use Targets: Legal, Ethical, and Doctrinal Perspectives, AIR AND SPACE POWER CHRONICLES, May 1, 2001, at http://www.airpower.maxwell.af.mil/airchronicles/cc/Rizer.html (last visited Jan. 21, 2003).
reasonable military advantage gained in the Kuwait theater. We have already
seen that as many as half of Iraqi direct casualties, in other words, 50-100,000,
were civilians. Over time, indirect losses of lives caused by degradation of
the civilian infrastructure would be far greater.

These losses were not only foreseen by U.S. military planners, but, in at
least some cases, they were deliberately inflicted with non-military purposes in
mind. Nowhere is this more evident than in the case of the destruction of Iraqi's
water supply. During the aerial bombardment of Iraq:

[T]he country's eight multi-purpose dams had been repeatedly hit,
simultaneously wrecking flood control, municipal and industrial water
storage, irrigation and hydroelectric power. Four of seven major
pumping stations were destroyed, as were 31 municipal water and
sewage facilities-20 in Baghdad, resulting in sewage pouring into the
Tigris. Water purification plants were incapacitated throughout
Iraq.\footnote{146}

Defense Intelligence Agency documents drawn up in advance of the allied
attack, recently made public, show that the U.S. military studied the potential
effects of attacks on Iraq's water supply in great detail and was fully aware of
the likely impact of its impairment on civilians, including children.\footnote{147} One
report, entitled "Disease Information," under a heading "Subject: Effects of
Bombing on Disease Occurrence in Baghdad," states:

Increased incidence of diseases will be attributable to degradation of
normal preventive medicine, waste disposal, water purification/
distribution, electricity, and decreased ability to control disease
outbreaks. Any urban area in Iraq that has received infrastructure
damage will have similar problems.\footnote{148}

The document proceeds to list likely epidemics, including E.coli, shigella,
salmonella, giardia, rotavirus, typhoid, and cholera, while noting, with respect
to several of these, the particular vulnerability of children.\footnote{149}

The coalition destruction of the Iraqi water system represents a violation of
the requirements of discrimination and proportionality that were discussed
above. After interviewing U.S. military planners, a 1991 article in the
Washington Post concluded:

\footnote{145} See infra Section II. E.
\footnote{146} Felicity Arbuthnot, Allies Deliberately Poisoned Iraq Public Water Supply in Gulf
War, SUNDAY HERALD, Sept. 17, 2000, at 2.
\footnote{147} Thomas J. Nagy, The Secret Behind the Sanctions; How the U.S. Intentionally
\footnote{148} Id.
\footnote{149} Id.
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Many of the targets in Iraq's Mesopotamian heartland, the list of which grew from about 400 to more than 700 in the course of the war, were chosen only secondarily to contribute to the military defeat of Baghdad's occupation army in Kuwait. Military planners hoped the bombing would amplify the economic and psychological impact of international sanctions on Iraqi society, and thereby compel President Saddam Hussein to withdraw Iraqi forces from Kuwait without a ground war. They also hoped to incite Iraqi citizens to rise against the Iraqi leader. $^{150}$

This conclusion is buttressed by the fact that coalition bombing, including some of the heaviest against the city center of Baghdad, continued for two weeks after a February 12, 1990 Pentagon statement declared: "Virtually everything militarily . . . is either destroyed or combat ineffective." $^{151}$

The crippling of Iraq's water supply also violated Article 54 of the Geneva Conventions, which prohibits attacks on objects indispensable to a civilian population for any motive, explicitly including "drinking water installations and supplies." $^{152}$ Grave breaches of the Geneva Conventions, under Article 85, are to be treated as war crimes, $^{153}$ thus U.S. culpability seems glaringly apparent. The callous indifference, bordering on racism, of U.S. policy-makers toward Iraqi lives was epitomized when then-General Colin Powell responded to a question regarding the number of Iraqi war casualties by saying: "It's really not a number I'm terribly interested in." $^{154}$ Wartime damages to Iraq were severe enough in themselves. Yet, their impact on the Iraqi people was multiplied by both the pre- and post-war imposition of comprehensive multilateral sanctions, amounting to a siege reminiscent of medieval times, which is the topic of the next sub-section.


$^{151}$ BLUM, supra note 1, at 334.

$^{152}$ Protocol I, supra note 142. Article 54 stipulates:

It is prohibited to attack, destroy, remove, or render Useless objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

*Id.*

$^{153}$ *Id.*

$^{154}$ BLUM, supra note 30, at 69.
F. Siege

The topic of sanctions against Iraq is lengthy and complex, and has generated voluminous literature. It is sufficient for our purposes here to make several limited points. First, the post-war sanctions policy, while implemented through the United Nations, is very much an American initiative and, like Desert Storm, has been crafted to accomplish U.S. policy objectives. Second, while sanctions led to the effective disarmament of Iraq, they have also caused immense suffering among Iraqi civilians, leading to the deaths of as many as 1 to 2 million individuals. Third, the targeting of innocent Iraqis is the modern-day equivalent of a medieval siege, which violates a number of international laws and treaties, arguably including the UN Convention on the Prevention and Punishment of the Crime of Genocide.

We have already seen that comprehensive multilateral sanctions, barring any exchange between Iraq and the outside world, except for the import to Iraq of "humanitarian goods," were originally imposed to compel Iraq's withdrawal from Kuwait. The sanctions had already critically weakened Iraq by the commencement of the Gulf War, multiplying the devastation caused by coalition bombardment.

After Desert Storm, sanctions were re-imposed to force Iraqi compliance with a lengthy, complex, and shifting set of demands, perhaps the most central of which was submission to inspections for, and destruction of, weapons of mass destruction, or WMD. Post-war sanctions were largely a fruit of U.S. and secondarily British diplomacy; a number of nations had favored abandonment of sanctions at Iraq's acceptance of a cease-fire in April, 1991. In the ensuing years, the U.S. has ceaselessly campaigned to maintain the strictest sanctions enforcement possible against mounting international skepticism and has accorded to minor amelioration in the sanctions regime only as a means to rescue it from termination.

155. See generally, George E. Bisharat, International Sanctions Against Iraq: Where Are We After Ten Years, 11 TRANSNAT'L. L. & CONTEMP. PROBS. 379 (2001) (presenting a good starting point); see generally, GRAHAM-BROWN, supra note 46 (providing superb detail and analysis); and SIMONS, supra note 77, at 74 (providing superb detail and analysis).

156. SIMONS, supra note 77, at 223.

157. See infra this section.

158. See supra Section II.E.

159. For example, as the Defense Intelligence Agency studies of the vulnerability of the Iraqi water system noted, chlorine (used in water purification) was already in short supply in January, 1991, due to the sanctions. Nagy, supra note 147; see also SIMONS, supra note 77, at 34-73.

160. This was accomplished in UN Security Council Resolution 678. S.C. Res. 678, supra note 101.

161. GRAHAM-BROWN, supra note 46, at 81. So, for example, the U.S. has steadfastly
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It has been evident virtually from the outset that U.S. goals for the sanctions against Iraq exceeded even the compendium of those enunciated in the cease fire agreement. Chief among U.S. demands was "regime change," for which international consensus, let alone UN authorization, has never existed, but was announced by high U.S. officials early on as the real objective of the sanctions. A more effective tool could hardly be imagined to dissuade the Iraqi government from compliance with UN requirements than repeated reminders that relief from sanctions would not be achieved anyway. Thus, the international effort to disarm Iraq was consistently frustrated by the American insistence on "regime change."

The weapons inspection program has also been undermined by Iraqi suspicions, later confirmed, that the program was being used to gather intelligence outside of the UN mandate. This intelligence was variously shared with Iraq's enemy, Israel, used to direct aerial bombardments during subsequent U.S.-British attacks on Iraq, and could have been employed in assassination attempts on President Saddam Hussein. Given stated U.S. intentions and its support for several coup attempts during the 1990's, there was no reason for Hussein to not take such threats on his life seriously, which also illuminates the Iraqis' extreme sensitivity to inspections of presidential palaces.

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162. GRAHAM-BROWN, supra note 46, at 83. In April, 1991, barely two weeks following the ceasefire, President Bush responded in a press conference: "Do I think the answer is now for Saddam Hussein to be kicked out? Absolutely . . . There will not be normalized relations with the U.S. until Hussein is out of there. And we will continue economic sanctions." Id. at 64.

163. Eric Hoskins, The Humanitarian Impacts of Economic Sanctions and War in Iraq, in POLITICAL GAIN AND CIVILIAN PAIN 141 (Thomas Weiss et al. eds., 1997). The very complexity of the demands in UN Resolution 678 also contributed to a "moving the goalposts" problem. Any incremental Iraqi cooperation could be, and was, met with a shift in emphasis to some other term of the cease fire agreement, thereby justifying retention of sanctions. Id.


165. See infra Section II.F.

166. U.S. support for the Iraqi opposition to Saddam Hussein, including several coup attempts, is discussed infra in Section II.F. Scott Ritter, a former U.S. Marine and member of the UN weapons inspection team during the 1990's, describes an encounter with Iraqi security agents that seemed, at first blush, to provide evidence of ongoing production of biological weapons. Upon further investigation, it was revealed that the agents were part of a presidential security detail that had biological antidotes for use in possible attempts on the life of Saddam Hussein.

William
The U.S. call for "regime change" nonetheless masked an underlying ambivalence in attitude toward Saddam Hussein, one that was manifest even during the Gulf War. Coalition troops halted their advance well before reaching Saddam's refuge in Baghdad. Even following President Bush's call for Iraqis themselves to overthrow Hussein in the aftermath of Desert Storm, coalition troops stood idle while the Iraqi military brutally crushed internal rebellions in the Shi'a south and Kurdish north of the country.  

The factor inhibiting unrestrained U.S. pursuit of Hussein's demise was then, and still is, uncertainty regarding "the day after." Fragmentation of Iraq as a state, and with it, the prospect of a Shi'a majority-dominated Iraqi government that might be friendly to Iran is a distinct, and unwelcome possibility. As some have noted, Washington wanted a coup, not "regime change"—in short, replacement of Saddam Hussein within an otherwise surviving governing structure.  

Through the same period, sanctions have been exploited by the U.S. to maintain pressure on the Iraqi regime and contain it from aggressive exploits without actually toppling it. This has amounted, as a matter of practice, to keeping Iraq in the "weak and backward" state in which it was rendered by the Gulf War.  

Sanctions, particularly in a war-ravaged Iraq, were simply devastating to the Iraqi people. Reports of immense civilian suffering due to sanctions began to surface within months of the war, and have continued to the present. Estimates of the numbers of Iraqi civilian deaths due to sanctions over the last twelve years.  

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RIVERS PITT & SCOTT RITTER, WAR ON IRAQ, WHAT THE BUSH TEAM DOESN'T WANT YOU TO KNOW 44-46 (2002). It was Ritter, too, who admitted that intelligence gathered by weapons inspectors outside the UN mandate, including information on Saddam Hussein, was passed on to the CIA and Israeli Mossad. Id.; see also Spying on Saddam: Interview of Scott Ritter, PBS FRONTLINE, April 27, 1999, at http://www.pbs.org/wgbh/pages/frontline/shows/unscom/interviews/ritter.html (last visited Mar. 13, 2003).

167. GRAHAM-BROWN, supra note 46, at 153-57. To dispel any illusions, the rebellions themselves were also extremely brutal. In the south, Ba'ath party officials were dragged from their offices and killed by rampaging mobs. Id. Loyalist Iraqi troops were alleged to have used chemical weapons to suppress the uprisings, again, without comment from the United States. Davis, supra note 5, at 275.

168. GRAHAM-BROWN, supra note 46, at 62-64. This much was admitted by Richard Haas, director for Middle East affairs of the National Security Council, when he said, to a staff director of the Senate Foreign Relations Committee in 1991: "You don't understand. Our policy is to get rid of Saddam, not his regime." COCKBURN, supra note 19 at 37-38.

169. Infra Section II.G.

170. Supra, Section II.E. During the years of the Clinton presidencies, sanctions were part of a broader strategy phrased as "dual containment" addressing both Iraq and Iran. GRAHAM-BROWN, supra note 46 at 62-63.
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twelve years range as high as one to two million. The UN officials have recently suggested that as many as five to six thousand Iraqi children die each month, primarily due to sanctions. The main cause of these grim figures appears to be the synergy between malnutrition and disease, both of which are attributable to the degradation of the Iraqi infrastructure.

None of the various amendments to the sanctions regime have allowed Iraq to rebuild its decrepit infrastructure, which is the real key to alleviating civilian suffering. Iraqi civilians, innocent of the misdeeds of their dictatorial leadership, have suffered the brunt of the punishment. Their reliance on the central government for food rations, and the emergence of a class of smugglers and profiteers trading on ties to the state, have only increased the hold of the Hussein regime over the Iraqi people.

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Iraq's record of resistance, evasion, and prevarication with respect to the UN-administered weapons inspections program is undeniable. At the same time, through much perseverance, weapons inspectors succeeded in mostly disabling Iraq's programs to develop weapons of mass destruction. Despite lingering concerns over Iraq's stock of biological agents, in the words of former weapons inspector Scott Ritter:

[B]y the time 1997 came around, Iraq had been qualitatively disarmed. On any meaningful benchmark—in terms of defining Iraq's weapons of mass destruction capability; in terms of assessing whether or not Iraq posed a threat, not only to its immediate neighbors, but the region and the world as a whole—Iraq had been eliminated as such a threat.

Sanctions, no matter how effective, cannot be justified if, as a matter of practice, they involve violations of international law. For example, it has been

171. SIMONS, supra note 77, at 223.
175. Hadani Ditmars, Iraqis fear it can only get worse; U.S. threats come after sanctions ruined economy, S.F. CHRON., Feb. 14, 2002; Hiro, supra note 33, at 5.
176. See, e.g., Chantal de Jonge Oudraat, UNSCOM: Between Iraq and a Hard Place, 13 EUR. J. OF INT'L LAW 139, 141-42 (2002).
177. Scan Gonsalves, Scott Ritter on Iraq, CAPE COD TIMES, Mar. 7, 2000, at http://www.commondreams.org/views/030700-106.htm. As to nuclear weapons, a U.S. official overseeing operations of the International Atomic Energy Agency (IAEA) commented: "The United States pushes the IAEA to find little discrepancies in Iraq's nuclear accounting so the file can be kept open, but short of lobotomizing or killing all the Iraqi nuclear scientists, the Iraqi nuclear program is finished. We have closed down all their nuclear facilities and activities." Andrew Cockburn, Should We Go to War Just Because We Can?, L. A. TIMES, Jan. 20, 2003, at R3.
cogently argued that the sanctions violate the rights to life, health, education, and an adequate standard of living enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.\footnote{178} Sanctions may violate special protections afforded children in such instruments as the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights.\footnote{179} Sanctions may also violate provisions of the Geneva Conventions that bar the use of starvation against civilian populations, and may constitute crimes against humanity under the Nuremberg Principles.\footnote{180}

This author has argued elsewhere that U.S. officials, together with others responsible for prosecuting the sanctions program, may have committed genocide against the people of Iraq under Article 2, subsections (a), (b), and (c) of the UN Convention on the Prevention and Punishment of Genocide of 1948.\footnote{181} There is prima facie evidence that they have, "with intent to destroy, in whole or in part, a national . . . group . . . as such," killed nationals of the state of Iraq under Article 2(a); caused them "serious bodily or mental harm," under 2(b); and have deliberately inflicted on the Iraqi people "conditions of life calculated to bring about its physical destruction in whole or in part," under 2(c).\footnote{182} Neither U.S. moral nor legal culpability is vitiated by the possibility that the impact of sanctions has been exacerbated by actions of the Iraqi regime.\footnote{183}

Confrontations between UN weapons inspectors and Iraq over a variety of


\footnote{181. See generally, George E. Bisharat, Sanctions as Genocide, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379 (2001). The article addresses in some detail the common objection (and subject of a sustained propaganda campaign by U.S. government) that "Saddam Hussein is responsible for his people's suffering." It also takes up the issue of intent, which is an element of the crime of genocide also claimed to be absent in the case of Iraq sanctions. Cf. Joy Gordon, When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide, 5 YALE HUM. RTS. & DEV. L.J. 57.}


\footnote{183. See generally, Bisharat, supra note 1.
technical aspects of the inspections came to a head in late 1998. Iraq announced that it would suspend cooperation with the inspectors, who then withdrew in advance of an intensive bombing campaign mounted by the U.S. and Britain. Iraq steadfastly refused to allow the return of the inspectors for the ensuing four years.

Meanwhile, sanctions were continued, notwithstanding growing reservations by many members of the international community about the humanitarian impact of the sanctions and their dubious efficacy. By May, 2002, support for continued sanctions was mustered by the U.S. only by introducing further modifications to "smarten" them-that is, to target them more specifically to "dual use" and purely military items, and to increase the flow of civilian imports. However, "smart sanctions" have continued to impede reconstruction of Iraq's steadily deteriorating infrastructure. In the view of many, the sanctions were simply a failed policy maintained only through their vigorous promotion by the U.S., and secondarily, Britain. Weapons inspections only resumed in Iraq after the passage of UN Security Council Resolution 1441 on November 8, 2002. That Resolution instituted a new, tougher inspections process, demanding, among other things, that Iraq grant inspectors unfettered access to all parts of the country and virtually everything within it. Inspections to date have turned up a small number of old empty warheads that are apparently still in usable condition, and rocket engines that apparently exceed restrictions on Iraq's possession of ballistic missiles. Iraq, as required by the resolution, submitted a 12,000 plus page declaration


185. Id.


187. See generally Lutz Oette, A Decade of Sanctions Against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council, 13 EUR. J. OF INT'L L. 93 (2002). From 1991 to 2000, the sanctions were structured such that they continued indefinitely, until termination by resolution of the UN Security Council, thus conferring on each of the permanent Council members a "reverse veto." Id. In 2000, however, time limits were introduced, so that the sanctions would lapse after a period (either six or twelve months) unless renewed by the Security Council. This forced the U.S. and Britain, the main-if not, by then, sole - proponents of sanctions to have to periodically rally support for the program-a task that proved increasingly difficult. Id.


189. Id.


presumably offering a full accounting of its WMD program. Bush administration officials have highlighted claimed omissions and falsehoods in the Iraqi declaration, construing them as ongoing Iraqi deception and resistance to the disarmament and as "material breaches" of Iraq's obligations under UNSCR 1441.

G. Covert Actions - "Not Missionary Work"

We have already seen that the U.S. has a legacy of intervention in the internal political affairs of Iraq that dates back at least to the 1960's, including support for two Ba'ath coups, aid to the Kurdish separatist movement in the early to mid-1970's, and incitement of rebellions in the north and south of Iraq in the direct aftermath of the Gulf War. All such interventions violate the fundamental international legal principle of respect for sovereignty embodied at Article 2(7) of the UN Charter, which holds that: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

The composition of the government of a nation state is quintessentially a matter of domestic jurisdiction. Sovereignty of a member nation of the UN may be breached only via a UN authorization of an enforcement action to protect international peace and security. A nation's sovereignty is not compromised by the misdeeds of its leaders, unless such misdeeds lead to UN authorized intervention. Assassination of a head of state is both a violation of that state's sovereignty and of the individual leader's right to life.

The U.S. has added to its record of illegal interventions in Iraq repeatedly in recent years, pursuant to a presidential finding signed by the first President George Bush in May, 1991, authorizing covert actions to overthrow Saddam Hussein, including assassination. Over the ensuing five years, the CIA


193. See, e.g., Condoleezza Rice, Why We Know Iraq is Lying, N.Y. TIMES, Jan. 22, 2003, at A25.

194. BLUM, supra note 1, at 242. Henry Kissinger, defending U.S. betrayal of the Kurds in 1975, commented that "Covert action is not missionary work." Id.

195. R. Jeffrey Smith & David B. Ottaway, Anti-Saddan Operation Cost CIA $100 million, WASH. POST, Sept. 15, 1996, at A1. The incitement was primarily verbal, in the form of President Bush's public invitation that the people of Iraq "take matters into their own hands." Id. But the U.S. also moved troops as if to support the rebellions, before the decision crystallized not to intervene. Id.

196. U.N. CHARTER art. 2, para. 7.

197. U.N. CHARTER art. 42.

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disbursed approximately $20 million annually to a variety of Iraqi opponents of the Hussein regime who bought arms, communications gear, publishing materials, broadcast equipment, and other materiel to be used in killing or otherwise ousting Saddam Hussein. At least two major initiatives, one launched by the Iraqi National Congress (INC) in 1995 and the other led by the Iraqi National Accord (INA) in 1996, were foiled with ease by a combination of the military and Saddam Hussein's ruthlessly efficient security service. Numerous lesser attempts were equally futile. While failing in their goals, the coup attempts led directly to hundreds of deaths of both rebels and loyalists, and a further ratcheting up of Saddam Hussein's repression. The INA has killed over 100 Iraqi civilians in a campaign of terror, employing car bombs among other things as a means of destabilizing the Iraqi regime.

In truth, Washington's commitment to Saddam Hussein's Iraqi opponents has always been equivocal. Doubtlessly this stems mainly from distrust in their capabilities and preference for an Iraq under Saddam Hussein over an incompetent leadership that might fall prey to the influences of Iran. As to the Kurdish-based opposition in the north of Iraq, the U.S. has never endorsed its ultimate objective of national autonomy, largely out of deference to regional ally Turkey. Since Turkey has the largest Kurdish population, it is the country that stands to lose the most when dreams of Kurdish independence are stoked.

Until the administration of the younger George Bush, the most vociferous support for the Iraqi opposition has typically come from Republican members of Congress, rather than from the administration. In 1998, this led to passage of the Iraq Liberation Act, which earmarked $97 million for Iraqi opposition efforts to overthrow the government of another sovereign nation in violation of international law. Still, the Clinton administration dragged its heels in

199. Id.


201. Id.; see also GRAHAM-BROWN, supra note 46 at 116-17. The INC coup attempt originated in parts of the Kurdish areas of the north deemed a "protected zone" that remained outside of Iraqi central government control after the Gulf War. Establishment and enforcement of these zones will be taken up in the next sub-section, II.H

202. BLUM, supra note 30, at 154.

203. Id.

204. Smith & Ottaway, supra note 195, at A1. These concerns led the U.S. to decline to arm the Kurds of Iraq with weaponry that might later be turned against Turkey. Id.

205. GRAHAM-BROWN & TOENSING, supra note 36, at 64. Republican members of the Senate Intelligence Committee were apparently at the forefront in urging "a more 'proactive' strategy against the Iraqi regime." Id.

disbursing the funds, reflecting its dim assessment of the efficacy of the INC and other opposition groups.\(^{207}\)

The second Bush administration has steadily ramped up its promotion of the Iraqi opposition over the last year, as a necessary part of the broader campaign to rationalize war against Iraq. President Bush signed a directive on October 3, 2002, to begin military and sabotage training to Iraqi exiles, as part of a "war before the war" intended to destabilize the Iraqi regime.\(^{208}\) Special presidential envoy Zalmay Khalilzad attended the "Iraqi Opposition Conference" in London in December 2002.\(^{209}\) Three hundred individuals representing fifty-seven parties and organizations were present at the U.S.-sponsored and organized event.\(^{210}\) Although a political statement was agreed upon, the conference was plagued by boycotts, a walkout, and highlighted rifts along political, religious, and ethnic lines. Ongoing disagreements among the groups caused indefinite postponement of a follow-up meeting originally slated to be held on Iraqi soil on January 15, 2003.\(^{211}\) Although support for organizing lawful and peaceful opposition groups does not violate international law, U.S. support for armed insurrection, and terrorism, as we have seen above, clearly violates Iraqi sovereignty. It also violates a variety of other international treaties and principles, including the International Convention for the Suppression of Terrorist Bombings, signed and ratified by the United States.\(^{212}\)

**H. The War Already Underway**

Since the Gulf War, the U.S. and Great Britain have enforced northern and southern "no fly zones" in Iraq, from which Iraqi fixed wing aircraft, and in some circumstances, helicopters, have been banned.\(^{213}\) The no fly zones have been enforced by increasingly aggressive actions by the U.S. and Great Britain, including numerous air attacks that have resulted in both military and civilian

\(^{207}\) Graham-Brown & Toensing, supra note 36, at 11. Only $8 million of the total allocation was actually disbursed before Clinton left office in January, 2001. Id.


\(^{209}\) Id.

\(^{210}\) Id.


A quarter of a million sorties were flown within the first nine years of the no-fly zones. Although figures are difficult to confirm, Iraq claimed that between December 1998 and early 2001, 323 civilians were killed in no-fly zone bombings, and another 960 were injured. Borne of an already questionable legal pedigree, the no-fly zones have evolved away from their original function to such an extent that a credible argument for their legality cannot be sustained. On the contrary, the zones, and military operations to support them, constitute violations of Iraqi sovereignty and acts of aggression respectively, both in violation of the UN Charter.

The first no-fly zone was established in northern Iraq in the aftermath of the Gulf War. Iraqi troops, re-establishing central government control over Kurdish areas then in revolt, drove thousands of Kurds into flight into mountains along the Turkish border. Pressure mounted on coalition forces to respond, and on April 1991, "Operation Provide Comfort" was announced by President Bush. A ban on Iraqi flights north of the 36th parallel was imposed in order to protect both air drops of aid to Kurdish refugees and coalition ground forces entering Iraq from Turkey. France and Britain joined the U.S. in patrolling the no-fly zone.

While coalition ground forces eventually withdrew, the northern no-fly zone was maintained, purportedly to shield the Kurds and the international aid workers who had arrived to help them. The Iraqi government responded by withdrawing government services from its three northern governorates and has not returned them to this day. Instead, the areas have been self-administered by the Kurds in a kind of informal autonomy.

The second no-fly zone was instituted in an area below the 32nd parallel in

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214. Id.
216. GRAHAM-BROWN, supra note 213. In one such incident on May 12, 1999, an American F-15E launched a 3,000-pound bomb into a shepherd's camp after intelligence analysts mistook a metal tank that was used for watering sheep for a surface-to-air missile launcher. Ricks, supra note 215. F-16 pilots then strafed surrounding tents, taking them for camouflaged military facilities. As many as nineteen were killed and forty-six wounded. Id.
217. U.N. CHARTER art. 2.
218. GRAHAM-BROWN, supra note 213.
219. Id.
220. Id.
221. Id.
222. Id.
223. GRAHAM-BROWN, supra note 213.
224. Id.
August, 1992, in response to Iraq's campaign to quell a rebellion originating in the marsh areas of southern Iraq. Ground troops were never committed, however, and the Iraqi military effort in the south continued with the use of tanks and artillery. Hence, protection of the residents of the marsh regions was never effected.

Over time, the functions and rationales for the two zones began to stray into being part of a broader strategy to "keep up the pressure on Saddam Hussein." The northern zone became the staging ground for several unsuccessful coup attempts, supported by an on-site crew from the CIA. Neither function bore much relationship to protection of local populations, which was the claimed legal basis for the original imposition of the zones. Recognizing the changed circumstances, France pulled out of enforcement of the southern zone in 1996 and the northern zone in 1998, leaving the U.S. and Britain to continue alone. The integrity of the humanitarian mission of the zones has been shaken by U.S. and British tolerance of major ground and air incursions into the northern zone against the Kurds by Turkey in 1995 and 2000.

Together, the two zones prohibit Iraqi flights in a majority of that country's sovereign airspace and permit the movement of enemy aircrafts there at will. Legal authority for these actions was claimed under UN Security Council Resolution 688, which had condemned Iraqi "repression of the Iraqi civilian population," and deemed it a "threat to international peace and security." Yet the resolution made no explicit reference to any kind of enforcement action, and was not undertaken pursuant to Chapter VII of the UN Charter, under which such enforcement actions are authorized. No countries other than the original

225. Id.
226. Id.
228. GRAHAM-BROWN, supra note 213.
229. Id.; The coup attempts were described in the previous section, supra II.G.
230. GRAHAM-BROWN, supra note 213.
233. Id. The resolution, drafted by France, was influenced by then-ascendant theories of "humanitarian intervention"- that is, that sovereignty could be legally breached by outside powers acting to protect a civilian population from gross violations of their human rights at the hands of their own government. See generally, Constantine Antonopoulos, The Unilateral Use of Force by States After the End of the Cold War, 4 J. OF ARMED CONFLICT L. 117 (1999). The legality of humanitarian intervention is generally in doubt, however, and the U.S. has argued that the no-fly zones were necessary to enforce UNSCR 688 in the face of material breach by Iraq. Id.
three subscribed to this claim, and the French have since voted on the matter with their feet.234

The U.S. and its partners have further claimed the right to use force in "self-defense" against any Iraqi attacks on their aircrafts that are patrolling the two zones.235 But the no-fly zones in themselves lack any grounding in international law, which is all the more so with the drift away from their original justification.236 They are simply illegal. It follows, as well, that Iraq is legally entitled to use force to defend its sovereign airspace from intrusion by enemy aircraft.

The steady, low intensity warfare waged by the U.S. and others against Iraq through imposition and enforcement of the no-fly zones has been punctuated by a number of attacks of much higher intensity, both within and outside of the zones themselves. Thus, in 1993, President Clinton ordered the Iraqi military intelligence headquarters in Baghdad to be bombed with Cruise missiles in retaliation for an alleged attempt to assassinate former President Bush during his visit to Kuwait. World-renowned Iraqi painter Leila al-Attar was killed in this attack, which was unjustified by the principles of self-defense or any other international law.237 In 1996, the U.S. responded to an Iraqi military incursion into the northern zone, at the invitation of one Kurdish faction, seeking to gain leverage over the other, by stepping up bombing in the south.238

By far the largest of these attacks occurred in December-January, 1998, when the U.S. and British responded to the departure of weapons inspectors, and the refusal by Iraq to readmit them, by launching "Operation Desert Fox." The bombardment commenced while the UN Security Council was still considering the report of the weapons inspectors, and was done without its authorization.239 The two allies claimed an ongoing right to use force to compel Iraqi compliance with the terms of the Gulf War cease-fire agreement, stemming from the original "by any means necessary" resolution, UNSCR 678.240 U.S and British officials also cited UN Security Council Resolution 1205, passed on November 8, 1998, that condemned Iraqi non-cooperation with

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234. GRAHAM-BROWN, supra note 213.
235. Silliman, supra note 117, at 770.
236. Id.
238. Simultaneously, the U.S. announced an expansion of the southern no fly zone up to the 33rd parallel.
240. Antonopoulos, supra note 233, at 154.
weapons inspectors as a violation of the cease fire terms.241

Operation Desert Fox specifically targeted Saddam Hussein and high-level government officials in what was tantamount to an "aerial assassination" attempt.242 Almost half of the 100 targets in the four-day attack—which exceeded the Desert Storm bombing in intensity—were gathering points for the Iraqi leadership, including Saddam Hussein's sleeping quarters in Baghdad. Moreover, these sites were identified in part with information gathered through the UN weapons inspection program.243

The purported legal basis for Desert Fox was roundly criticized, both within the United Nations, whose authority had been bypassed and thereby undermined, and outside of it.244 Of the unilateral use of force to enforce UN resolutions on Iraq, eminent international legal scholar Professor Thomas Franck opined:

In my opinion, by any normal construction drawn from administrative law of any legal system, what the Security Council has done is occupy the field... After all these actions, to now state that the United Nations has not in fact occupied the field, that there remains under Article 51 [affirming a nation's right to self-defense] or under Resolution 678, which authorized the initial use of force, which authorization was terminated in Resolution 687, a collateral total freedom on the part of any UN member to use military force against Iraq at any point that any member considers there to have been a violation of the conditions set forth in Resolution 678, is to make a complete mockery of the entire system.245

Following Operation Desert Fox, rules of engagement for the no-fly zones were expanded such that U.S. and British pilots could strike the Iraqi air defense system either when it fired on them or "locked on" radar detectors.246 During February 2001, in the first month of the new Bush administration, Iraqi antiaircraft fire triggered another intensified U.S. bombing attack encompassing

241. Id.


243. Id.

244. Antonopoulos, supra note 233, at 155.


246. GRAHAM-BROWN, supra note 213.
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Recent months have witnessed a dramatic escalation of confrontations within the no-fly zones. In the five months preceding January 15, 2003, American and British warplanes have bombed eighty targets. Under authorization from Secretary of Defense Donald Rumsfeld, U.S. jets are now attacking air defense communications centers. Military planners acknowledge that the purpose of expanding the range of targets is to degrade the Iraqi air defense system in advance of an impending invasion by U.S. air and ground forces. Meanwhile, Washington has begun to argue that Iraqi firing upon British and American aircraft in the no-fly zones constitutes a "material breach" of UN Security Council resolutions, which is a pretext that is likely to be cited for any upcoming war.

The escalation of military conflict in the no-fly zones has corresponded with a steadily intensifying bellicose rhetoric emanating from Washington. For more than a year, U.S. officials have repeatedly threatened war against Iraq, often expressing willingness of the United States to "go it alone" if necessary, that is, to attack Iraq without UN authorization, and thus in violation of international law. These threats themselves constitute violations of the UN Charter, which in Article 2(4) counsels: "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."

To recapitulate this lengthy review of U.S. policy toward Iraq: first, we fostered Saddam Hussein's rise to power, knowing he was a murderous thug. We helped him consolidate his regime and expand and arm his military, including WMD. We unleashed him against Iran, encouraging an eight-year blood bath that wasted the lives of hundreds of thousands of young Iraqi and Iranian soldiers, as well as Iraqi Kurdish civilians. When our minion gained too much power and independence, we visited massive destruction on the entire country and the people of Iraq during the Gulf War. We followed up with ruinous sanctions, repeated assassination and coup attempts, continuous aerial

247. Id.


249. Id.

250. Id.

251. Id.


bombardment, terrorism, and threats of force. The entire record is replete with numerous, grave violations of international law.

We should meditate, just briefly, on what it would have been like to be on the receiving end of this intense and destructive interest on the part of the U.S. government. In a very real sense, we have waged an illegal war against Iraq for the past twelve years.254 Another hammer blow awaits. It is to that possibility we now turn.

III. THE COMING WAR

A. Why war?

Why are we on the verge of war with Iraq? This is a momentous question, even if in view of our twelve-year campaign against Iraq. An invasion would only constitute a quantitative, rather than qualitative, shift in our relations with that country. The most obvious starting point for answering this question is the Bush administration's stated political and legal reasons for waging a war against Iraq. Because these will prove ultimately unsatisfactory, we must look elsewhere, particularly at the "oil factor" and at the neoconservative ideology with its special solicitude for Israel that is now dominant at senior levels of the American government, especially in the Department of Defense. Following that, we will look at some of the likely costs of war, including human and economic costs, dangers of regional destabilization, increased terrorism, damage to international law and institutions, and harm to U.S. moral, legal, and political standing in the world community.

B. The Stated Motivations for War

Divining the Bush administration's genuine motivations for attacking Iraq has not been easy. In a manner strongly reminiscent of his father twelve years before, the younger President George Bush and his deputies have deployed a revolving set of rationales for war.255 Skepticism regarding the necessity of military action against Iraq has been fueled by the administration's insistence that a diplomatic approach would be feasible in the broadly parallel dispute over North Korea's drive to develop nuclear weapons.256

254. Pilger, supra note 231.


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Nonetheless, the U.S. stated justification for an invasion of Iraq can be distilled into the following: the regime of Saddam Hussein is a threat to the security of the United States and to the international community. Saddam Hussein has repeatedly resisted UN resolutions designed to disarm Iraq of WMD and an invasion is necessary to replace his regime with a non-aggressive, democratic government. In support of this proposition, Saddam Hussein has invaded two neighbors, Iran and Kuwait. He has gassed and brutally repressed his own population. He continues to assiduously amass weapons of mass destruction for threat or use against his neighbors and the U.S., possibly through a terrorist intermediary. His support for, and connections to, "terror" is further proof of the threat that he represents. Let us review the arguments that the Iraqi government is presently so dangerous to us that it must be overthrown.

Saddam Hussein has twice invaded neighboring countries, Iran and Kuwait. Putting aside for the moment that the Iran invasion was at the urging and support of the U.S., do the past invasions show that Saddam Hussein is a compulsive "serial aggressor," likely to strike again against the U.S. or one of Iraq's neighbors? Perhaps, but as we have seen in Section II, neither the Iran nor the Kuwait invasion was without provocation. Both were undertaken in a calculated, if ruthless, fashion and under circumstances in which Hussein had reason to expect gain.

Saddam Hussein is unscrupulous, cruel, and willing to use force to achieve advantage. But there is little evidence to indicate that he is simply an uncontrolled addict of violence. Furthermore, his military has been reduced to a shadow of its former self - by some estimates, it currently enjoys but one third its power at the time of the Gulf War, when it was easily trounced by coalition forces. This is likely the best explanation for the fact that Hussein has not committed an act of aggression for the last twelve years and that he can continue to be contained in the right set of circumstances. This is also why none


257. Supra Section II.E. It is sometimes added that Iraq also aggressed against two other countries - Israel and Saudi Arabia - by firing missiles on them during the Gulf War. Marshall, Making the Case for Iraq, supra note 84. The Scud missile attacks were launched against Saudi Arabia when it served as a base for coalition troops involved in fighting against Iraq, and should be properly considered an extension of that battle. The missile attacks on Israel, meanwhile, were essentially a ploy to put political pressure on Arab and other Gulf War coalition members by symbolically allying them with Israel. Iraq had not attacked Israel before (other than in 1948, under an entirely different government and regional alignment of power), nor has it since.

258. Supra Section II. This is not, to be sure, the same as justification.

259. Mearshimer & Walt, supra note 40.

260. Id.

of the countries immediately surrounding Iraq favor an attack at this time.\textsuperscript{262}

Saddam Hussein, or his generals, ordered the use of gas in the war against Iran and in suppressing internal rebellion. Again, none of this deterred U.S. policy makers from supporting Iraq at the time. Apparently they had no expectation that Iraq would use these fearsome weapons, except against people to whose suffering they were indifferent. Will he now use these or other WMD against the United States? He presumably had such an opportunity during the Gulf War and declined. Wisely, one would think, for one would be hard pressed to find a better guarantee of nuclear incineration. Neither were WMD used in the missile strikes against Israel-another nuclear power.\textsuperscript{263} The fact is that the Iraqis have used WMD only against weaker foes, or ones who did not possess the same weapons. Nothing in Saddam Hussein's bloody history suggests that he is irrationally suicidal. The conclusion: Iraq can be deterred from aggression by threat of equal or superior force.\textsuperscript{264} Only Hussein's imminent demise is likely to trigger his use of WMD, in the estimable judgment of CIA Director George Tenet,\textsuperscript{265} so an American invasion may catalyze the very apocalypse it seeks to prevent.

\textit{Saddam Hussein is rebuilding his stockpile of WMD.} UN inspectors have been scouring Iraq for evidence of WMD since their return to that country in late November, 2002. To date, the inspectors have found no significant evidence of an illegal weapons program, with the arguable exception of ballistic missiles that slightly exceed UN-mandated restrictions.\textsuperscript{266} In the estimation of Daniel Richardson, editor of the respected journal, \textit{Jane's Missiles and Rockets}, the violation was equivalent to "driving 36 mph in a 30 mph limit."\textsuperscript{267} In fact, many of the processes involved in production and testing of weapons and weapons delivery systems are detectable by remote satellite and other sophisticated technology.\textsuperscript{268} No convincing evidence has been shared with an American and world public clearly primed to receive it, including during Secretary of State Colin Powell's February 5, 2003 presentation to the Security

\textsuperscript{262} Id.

\textsuperscript{263} Mershimer \& Walt, supra note 40. On Israel's nuclear capacity, \textit{see generally Seymour Hersh, The Samson Option: Israel's Nuclear Arsenal and American Foreign Policy} (1991).

\textsuperscript{264} Mershimer \& Walt, supra note 40.


\textsuperscript{268} Rivers \& Pitt, \textit{supra} note 166, at 37.
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Moreover, the presence of UN weapons inspectors obviously complicates any plans Saddam Hussein might foster to rebuild WMD. Finally, even if Saddam Hussein now possessed WMD, it would be, as we have seen above, suicidal for him to use them.270

The Hussein regime has supported terror. It is true that Iraq harbored the infamous Abu Nidal until his death in August, 2002, although his active involvement in terror ended years ago.271 It is also the case that Saddam Hussein has ordered payment to families of Palestinians killed by Israeli troops in the al-Aksa Intifada (not simply to families of "suicide bombers", as is often reported).272 But the claimed meeting between Iraqi agents and al-Qa’eda operative and 9/11 perpetrator Mohammed Atta in Prague proved to be false.273 There is little in Saddam Hussein's history-as we have seen, replete with vicious repression of Islamist movements in Iraq, and enmity returned in kind-that would make an alliance with al-Qa’eda likely.274 If a marriage of convenience were nonetheless negotiated, Hussein would be loath to share WMD with Islamist terrorists. Not only would he lose control over targeting and timing of the weapons' use, his address would be written all over them, inviting near certain lethal reprisal from the U.S. in the event of their use.275

The arguments and evidence hardly seem compelling. Putting that aside for the moment, however, what is the legal framework within which the U.S. seeks to advance its aims? What are the justifications in law for war against Iraq?

C. The U.S. Legal Position

As we know, there are two ways that member nations of the UN may


272. HIRO, supra note 33, at 190-91.


275. Mearshimer & Walt, supra note 40. This same conclusion was reached by the Gilmore Commission, appointed by President Clinton following the bombings against the U.S. embassies in East Africa, in its 1999 report. HIRO, supra note 33, at 243.
lawfully employ force: first, the UN Security Council identifies a threat to international peace and security and authorizes military action to eliminate that threat pursuant to Article 42 of the UN Charter.\(^{276}\) Second, a nation may use force under the UN Charter when acting in self-defense against an armed attack under Article 51.\(^{277}\) The U.S. has tried to stake out arguments in support of an invasion of Iraq on both grounds. According to the U.S., Iraq stands in material breach of as many as sixteen UN Security Council resolutions and, other avenues having been exhausted, force is now justified to compel Iraqi compliance.\(^{278}\)

Of course, it is indisputable that the U.S. and its dutiful ally Great Britain, have not yet received explicit authorization from the Security Council to attack Iraq for this or any other purpose. The latest Security Council resolution on the Iraq dispute, UNSCR 1441,\(^{279}\) contains no such wording. Moreover, it was passed amidst numerous public statements by the U.S. and other permanent members of the Security Council that the resolution lacked "automaticity." That is to say, breach of its provisions could not serve automatically to authorize the use of force by a member nation.\(^{280}\) Instead, some further action by the Security Council will be necessary before force may be lawfully employed.

Here, however, ambiguity and disagreement arise. The resolution does not explicitly state what action the Security Council must take in the event that Iraq is found in material breach of UNSCR 1441 or earlier resolutions.\(^{281}\) The U.S. has pledged to abide by UNSCR 1441's requirement that the matter be returned to the Security Council for "discussion," but has also maintained that a new resolution bearing explicit authorization for force is unnecessary.\(^{282}\) In the event that Iraq is in "material breach" of either UNSCR 1441 or other pertinent UN resolutions, a condition the U.S. maintains has already occurred,\(^{283}\) then implicit authorization to use force, stemming from earlier resolutions, is sufficient.

This, it will be recalled, echoes the position taken by the United States in

\(^{276}\) U.N. CHARTER art. 42.

\(^{277}\) U.N. CHARTER art. 51.


\(^{279}\) S.C. Res. 1441, supra note 188.


\(^{282}\) Id.

\(^{283}\) See Rice, supra note 193, at A25.
1998 in with respect to its attack on Iraq during Desert Fox. The U.S. harked back to the original "all necessary means" resolution (UNSCR 678) for justification in launching attacks six years later in response to Iraqi non-cooperation with weapons inspections. The claim was weak then and is even weaker now with the emergence of a stronger international consensus against unilateral exercises of force to implement UN resolutions in recent years, in part, in reaction to the U.S. actions during Desert Fox. Moreover, the American position is impossible to square with repeated statements by France and other Security Council members that no implicit authorization of force was intended in UNSCR 1441.

The U.S. has also stated its view that UNSCR 1441 does not limit its inherent right to self-defense under Article 51 of the UN Charter. That would seem unassailable in the abstract; as the Security Council is bound to uphold the UN Charter, it is in no position to abrogate by resolution a principle enshrined in the Charter. Yet, not constraining legitimate self-defense is not tantamount to authorizing the unilateral use of force. Unless the conditions for legitimate self-defense exist—that is, the U.S. and/or its allies have been attacked by Iraq or perhaps face a threat of attack so imminent that the matter cannot be brought before the Security Council, then this argument seems unavailing as well. Clearly, no attack by Iraq has occurred yet, and no one, at this point, has claimed that such an attack is truly imminent.

To boot, the Security Council has assumed oversight of the situation, "occupied the field," to recall Professor Franck's language, and is managing the dispute through the current weapons inspections. It is hard to conjure a legal justification for unilateral use of force until, at a minimum, the weapons inspection process has been played out unsuccessfully and no other alternatives exist to resolve the dispute pacifically.

Likely recognizing the inapplicability of the right to self-defense in its classic formulation to its face-off with Iraq, the Bush administration has attempted to strike new legal ground for an attack on Iraq in announcing what it calls a doctrine of "preemption." In fact, this term is misleading as it implies

284. See supra Section II.H.
285. Id.
288. Id.
289. See supra text accompanying note 245.
290. Anthony Dworkin, Iraq and the "Bush Doctrine" of Preemptive Self-Defence, CRIMES
an attack in the shadow of an imminent and unavoidable threat from another. In fact, the real logic underlying the doctrine is to strike now because the threat, while distant, may be harder to eliminate in the future. Some have dubbed this "preventive war." There is no such doctrine currently accepted in international law and the suggestion that there should be due to the unique challenges of the "war on terror," has generally been met with consternation. The future of individual states unilaterally acting to prevent perceived incipient threats in other nations across the globe is one that would see the world as a smoking ruin. Iraq's aggression against Iran might have been justified under such a doctrine but surely that is not a desirable result.

The drama is still unfolding. As of this writing, the United States has announced that it will, within days, introduce a further draft resolution to the UN Security Council that will again declare Iraq to be in material breach of prior UN resolutions and will authorize the use of force to disarm Iraq. It remains entirely possible that some conjuncture of circumstances, such as glaring violations of UN resolutions and international consensus on the obduracy of the Iraqi regime, may lead to UN authorization for the use of force (a point to which we return in discussing the costs of war). To date, however, the rationales and evidence in support of war advanced by the U.S. are unconvincing and the legal support for the U.S.' right to use force at this stage is suspect. So we must ask again, why war?

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292. As President Bush's National Security Strategy, introduced in the fall of 2002, puts it:

The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best.


D. The Oil Factor

One popular hypothesis is that the coming war with Iraq is "about oil." At one level, that is indubitably true. Oil has long been the constant, the "Holy Grail" of U.S. foreign policy toward Iraq, the Gulf, and the wider Middle East. As other reserves are depleted in the face of rising world demand for energy, Iraq's considerable oil and gas riches will only increase in economic and strategic value. Meanwhile, according to Vice President Dick Cheney's 2001 national energy policy report, U.S. demand for oil will climb 32% by 2020, while domestic production will remain steady.

The oil industry is dominated globally by five companies, of which two are primarily based in the U.S. (Exxon/Mobil and Chevron/Texaco), two are primarily based in the UK, and one is based in France. As the sanctions regime against Iraq began to weaken, oil companies based in Russia, China, and France inked deals with Iraq worth billions of U.S. dollars for post-sanction exploitation of its oil fields. U.S. and UK firms were shut out of the action by the strict pro-sanctions policies of their own governments. So, perhaps it is not entirely coincidental that the two countries most adamant in pushing for war are home to those four energy giants, thus eager to partake in the rich opportunities Iraq offers.

According to James Paul:

A looming war against Iraq is only comprehensible in this light. For all the talk about terrorism, weapons of mass destruction and human rights violations by Saddam Hussein, these are not the core issues driving U.S. policy. Rather, it is 'free access' to Iraqi oil and the ultimate control over that oil by U.S. and UK companies that raises the stakes high enough to set U.S. forces on the move and risk the stakes of global empire.


296. Supra Section II.A.

297. GRAHAM-BROWN, supra note 46, at 15.


299. Id.

300. Id. Pro-sanction policies, however, did not prevent Vice President Dick Cheney's former company, Halliburton, from vying for the few contracts that were permissible under the sanctions regime. Carola Hoyos, A Discreet Way of Doing Business with Iraq, TRUTHOUT, Nov. 3, 2000, at http://www.truthout.org/docs_01/02.23D.Cheney.Circumvented.htm.

301. Paul, supra note 7.
Thus the claim that the drive for war is "about oil" has a certain grounding in fact and logic.

Yet oil, as we have just noted, is a constant. In a sense, everything in U.S. Middle East policy for the last fifty years or more has been "about oil." For that very reason, however, "oil" cannot fully explain a shift in policy toward war. Some new variable has entered the equation that has impelled the U.S. toward war on Iraq after more than a decade during which the Hussein regime had been, by most accounts, safely contained. That variable is ideology, played out in a political environment radically altered by the events of 9/11. This is not to suggest that the new trend in U.S. Middle East policy is not "about oil," it is, but the role of oil as an end in itself and as a means to broader American objectives has been transformed by the new ideological vision.

**E. American Jihad**

The most crucial change catalyzing the current push for war has been the gathering influence of radical neo-conservative (neo-con) ideologues within the Bush administration, concentrated primarily in the Department of Defense and the office of the Vice President. The general goal of this small but extraordinarily influential clique of advisors and officials is to achieve unilateral global domination through absolute military superiority. Intellectuals close to Vice President Dick Cheney and Defense Policy Board member Richard Perle have proselytized for this goal consistently since the early 1990's-until recently, to the derision even of many conservatives. The purposes of U.S. global

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> At present, the United States faces no global rival. America's grand strategy should aim to preserve and extend this advantageous position as far into the future as possible... Preserving the desirable strategic situation in which the United States now finds itself requires a globally pre-eminent military capability both today and in the future.


304. Scott Ritter, the former UN weapons inspector, U.S. Marine, and avowed Republican, claimed that until recently Paul Wolfowitz had been seen as a "raving lunatic of the far right;" Perle,
hegemony, of course, are couched in such positive terms as promoting democracy and spreading prosperity through free enterprise and free trade.

A number of these neo-conservative thinkers were critical to the U.S. decision to spare the Hussein regime during the Gulf War, then chafed during the years of the Clinton administration's policies of "containment." A more aggressive policy was due, not just to address the problem of Iraq itself, but also to display to other potential upstarts the willingness of the U.S. to deploy overwhelming force to defeat any challenger. Several current administration officials, including Secretary of State Donald Rumsfeld, Deputy Secretary of State Paul Wolfowitz, Defense Policy Board member Richard Perle, and Zalmay Khalilzad, special envoy to the Iraqi opposition, joined other prominent conservatives in signing a 1998 "open letter" to President Clinton urging that he adopt "a comprehensive political and military strategy for bringing down Saddam and his regime." Many of the neo-cons were strong supporters of the Israeli right wing and saw the overthrow of Saddam Hussein as a step toward transforming the regional power dynamic more favorably to Israel's advantage.

By the advent of the younger George Bush to office, Hussein was regaining strength, building a revenue stream through smuggling of oil, forging commercial relationships with both neighboring and distant nations, and further weakening the already crumbling international support for the sanctions. Hussein's dogged defiance of the U.S. and his ability to parlay meager resources into a steadfastness of years was sending precisely the opposite of the required message; he had already outlasted two American presidents. In the words of veteran BBC Middle East Correspondent Tim Llewellyn:

Fortunately for Saddam, the West, with its inconsistent policies, lack of focus, dismissal of any Iraqi and/or Arab interests and heavy-handed pursuit of puritanical punishment of a helpless people, has reconstituted him as the only power in the land. It would be foolish to say he is popular; but the administrators of sanctions, the purveyors of Western moralizing, the supporters of Israel, the bombers of Mosul, have restored him to a kind of credibility.

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307. See generally, Graham-BROWN, supra note 46.

308. Tim Llewellyn, Baghdad Before, COUNTERPUNCH, Jan. 6, 2003, at
For his part, the second George Bush had already staked out a position in favor of "taking out" Saddam Hussein, or at least his WMD capability, while on the campaign trail.309

In the first six months of the new Bush presidency, the "party of war" grew increasingly frustrated as Secretary of State Colin Powell shepherded the policy of "smart sanctions" forward, convinced that sanctions were simply postponing an inevitable showdown with the Iraqi regime.310 However, a series of policy distractions ensured that the simmering debate remained unresolved and in the background.311

The political landscape changed dramatically due to the tragedies of September 11, 2001, greatly empowering the hawks against their more moderate counterparts in the Department of State.312 Within hours of the attacks on the World Trade Towers and the Pentagon, Secretary of Defense Donald Rumsfeld directed his aides to generate plans for striking Iraq. According to notes taken by an aide at the time, which were later revealed to CBS news, Rumsfeld wanted the "best info fast. Judge whether good enough to go after S.H. [Saddam Hussein] at same time. Not only UBL [Usama bin Laden]. [The notes continued] Go massive. Sweep it all up. Things related and not." 313

Since that seminal day, the neo-con agenda for Iraq, issued from the Defense Department, has clearly overshadowed the more moderate approach personified in Secretary of State Colin Powell. On September 17, 2001, President Bush signed a secret memorandum outlining a war plan for Afghanistan, but also ordered the Pentagon to begin military planning for an invasion of Iraq.314 Then, in January 2002, President Bush, in his State of the Union Address, went public with the administration's crystallizing sentiment regarding Iraq, branding it as a member of an "axis of evil."315

The militant evangelism of the neo-con clique and its near "theological" obsession with Iraq is, at first blush, somewhat mystifying. There are indications that some of them wholeheartedly believe that Saddam Hussein poses an imminent threat to the U.S.; for example, Vice President Cheney is described by administration insiders as "consumed" with the possibility that


310. Id.

311. Id.

312. Id.; see also McFaul, supra note 255.


terrorists might gain WMD from Iraq or other countries.\textsuperscript{316} On the other hand, the evidence in support of the "Iraqi threat," even in its "distant version," is so palpably thin as to make widespread belief in it seem improbable, at least by sophisticated policy analysts.

There are indications that the hawks are entirely aware of this evidentiary weakness and have aggressively pressed the CIA to "cook" its reports to provide the backing for a policy that has been selected in advance and on the basis of other objectives.\textsuperscript{317} Douglas Feith, an assistant to Undersecretary of Defense Paul Wolfowitz, has overseen a rump intelligence unit inside the Department of Defense.\textsuperscript{318} The five-person team is designed to arm Wolfowitz and Donald Rumsfeld with an alternate source of information to critique and undermine CIA reports that have been regarded as insufficiently supportive of the drive for war.\textsuperscript{319} The unit has reportedly funneled unconfirmed data to top leaders, including the President, from INC operators regarded by professional intelligence as unreliable.\textsuperscript{320} It has reportedly pressed especially hard, although as yet unsuccessfully, to generate evidence of an Iraq-al-Qa'eda connection.

What, then, explains the neo-con determination to overthrow the Iraqi regime? Cynics might cite the November 2002 mid-term elections and the impending presidential campaign, coupled with consistently bleak economic news, and chalk up the whole matter to electioneering. There may be a kernel of truth in that interpretation; certainly the drive for war plays well with the strongly pro-Israeli Christian fundamentalists who provide the electoral muscle behind much of the neo-con strategy.\textsuperscript{322} Still, war can be an extremely risky strategy for re-election, as the President's father might remind him.\textsuperscript{323} It would seem likely that there is more to the explanation.

The key to the mystery may be the aforementioned special affinity that many of the neo-cons bear for Israel, and not just for Israel but for its extreme nationalist elements.\textsuperscript{324} A number of senior Bush officials, including Wolfowitz, Feith, and others, have spent time in Israel, or have strong

\textsuperscript{316} Kessler, supra note 306, at A1.


\textsuperscript{319} Dreyfuss, supra note 317.

\textsuperscript{320} Id.

\textsuperscript{321} Id.

\textsuperscript{322} Lieven, supra note 293.

\textsuperscript{323} Id.

\textsuperscript{324} Id.
affiliations with elites in the right-wing Likud Party, which is currently led by Ariel Sharon. Douglas Feith and Richard Perle, for example, helped co-author a 1996 study for incoming Israeli Prime Minister Benyamin Netanyahu that advocated abandonment of the land-for-peace provisions of the Oslo Accords and insistence that Palestinians acquiesce to Israel's "rights, especially in their territorial dimension." The paper also described removing Saddam Hussein from power as "an important Israeli strategic objective in its own right-[and] as a means of foiling Syria's regional ambitions." It went on to observe that "Iraq's future could affect the strategic balance in the Middle East profoundly." Intriguingly, it also urged reemphasis on military preemption in place of retaliation for Palestinian violence. A number of the Bush neo-cons, including Perle and Donald Rumsfeld, are past or current board members of the militarist Jewish Institute for National Security Affairs, which is an organization founded to promote Israel's security interests before American policymakers. The neo-con-Likud connection, however, is not a sentimental one and for some, one might speculate, not at all. Rather, it is founded on a particular vision of the central role that Israel plays in securing U.S. strategic interests in the Middle East.

If an Iraqi attack on the U.S. seems altogether farfetched, it is not such a stretch to say that a rejuvenated Iraq could again alter the regional balance of power in ways that would be challenging to Israel. It is not, however, that Iraq might attack Israel or use WMD against if offensively. Iraq, as we have already seen, declined that option for the obvious reason that it would have invoked a nuclear response from Israel, which is the only nuclear power in the Middle


326. INSTITUTE FOR ADVANCED STRATEGIC AND POLITICAL STUDIES, A CLEAN BREAK: A NEW STRATEGY FOR SECURING THE REALM, at http://www.israeleconomy.org/srat1.htm (last visited Mar. 13, 2003). David Wurmser, special assistant to Undersecretary of State for Arms John Bolton - a neo-con said to have been foisted on Colin Powell against his wishes, and one of the few of his ilk in the State Department-also participated in the study. Christison & Christison, supra note 302.

327. INSTITUTE FOR ADVANCED STRATEGIC AND POLITICAL STUDIES, supra note 326.

328. Id.


330. For example, Donald Rumsfeld, one of the strongest proponents of a war against Iraq, was described by American Israel Public Affairs Committee head Morris Amitay as "correct but not warm" vis-a-vis U.S.-Israeli relations. James Besser, Bush Cabinet Complete, No Jews at the Table, THE JEWISH WK., Jan. 5, 2001, at http://abbc.com/islam/english/jewishp/usa/bushadm-tjw.htm (last visited April 9, 2003).

331. ZUNES, supra note 10, at 161-62.
Rather, it is a strong Iraq that deters Israel. Thus, the Bush administration's "intention is partly to retain an absolute certainty of being able to defend the Gulf against an Iraqi attack, but, more important, to retain for the U.S. and Israel a free hand for intervention in the Middle East as a whole."

Another war on Iraq would also eliminate, for the foreseeable future, any obstacle to a disposition of the Israeli-Palestinian conflict on terms that satisfy Israel's territorial ambitions.

Israel, for its part, seems content to remain in the background, quietly exultant at the manifold benefits that U.S. policy now promises. In the words of writer Ben Lynfield:

It echoes the hawks in the Bush administration, but Israel has its own agenda in backing a US attack on Iraq... Viewed through the eyes of Israel's hawkish leaders, however, a US strike is not about Iraq only. Decision makers believe it will strengthen Israel's hand on the Palestinian front and throughout the region. Deputy Interior Minister Gideon Ezra suggested this week that a US attack on Iraq will help Israel impose a new order, sans Arafat, in the Palestinian territories. 'The more aggressive the attack is, the more it will help Israel against the Palestinians. The understanding would be that what is good to do in Iraq, is also good for here,' said Ezra. He said a US strike would 'undoubtedly deal a psychological blow' to the Palestinians. Yuval Steinitz, a Likud party member of the Knesset's Foreign Affairs and Defense Committee, says he sees another advantage for Israel. The installation of a pro-American government in Iraq would help Israel vis-a-vis another enemy: Syria. 'After Iraq is taken by US troops and we see a new regime installed as in Afghanistan, and Iraqi bases become American bases, it will be very easy to pressure Syria to stop supporting terrorist organizations like Hizbullah and Islamic Jihad, to

332. See supra Section III.B.

333. It should be recalled that a pivotal point in the U.S.-Iraqi relationship was the 1990 speech by Saddam Hussein in which he threatened to use chemical weapons against Israel in retaliation for a hypothetical Israeli nuclear attack, upsetting, in some measure, the strategic imbalance in Israel's favor. See supra Section I.D.

334. Lieven, supra note 293.


336. Dana Milbank, Group urges pro-Israel Leaders Silence on Iraq, WASH. POST, Nov. 27, 2002, at A13. Indeed, the Washington Post reported the circulation of a memo by the "Israel Project" to pro-Israeli leaders in the U.S., advising them to remain silent on the possibility of a U.S.-Iraq confrontation, as "[y]ou do not want Americans to believe that the war on Iraq is being waged to protect Israel rather than to protect America." Id.
allow the Lebanese army to dismantle Hizbullah, and maybe to put an end to the Syrian occupation in Lebanon,' he says. 'If this happens we will really see a new Middle East.'

Like the above-quoted Israelis, the ambitions of the neo-cons do not stop at Iraq. Instead, carrying on with themes previewed in the Netanyahu policy paper, Iraq is seen as a first step, or perhaps linchpin, in "redrawing the map" of the entire Middle East. The destabilization that many see as a possible outcome of a war, therefore, is viewed by the hawks as an opportunity to be embraced. Iraq, under a pro-Western leadership with its enormous oil reserves, would diminish the strategic value of Saudi Arabia. With Iraq as an alternative source for oil imports, the U.S. could pressure Saudi Arabia in a way that is currently impossible and negate Saudi leverage with the U.S. vis-à-vis the Israel/Palestine conflict. A new Iraq would be a beachhead from which to rid the Middle East of autocracies, the wellsprings of terrorism, in this view, install democratic governments, and make the region a haven for free enterprise and development.

But the case of the neo-cons is not necessarily one of "dual loyalties." There is, in the outlook of many of these ideologues, virtually no "daylight" between the interests of Israel and the United States. Both are democracies embattled by terrorism and thus share identical concerns. Still, the real motivations for the coming war have not been rolled out before the U.S. public, who might question a campaign with many immediate benefits to Israel's right wing and few to the United States. Simultaneously, the ultimate end, breathtaking in scope and audacity (interventionism on a grand, almost unprecedented scale) is likewise not yet ready for public consumption and may never be.

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339. Id.


342. Christison & Christison, supra note 302.
This rosy vision of a revolutionized Middle East has its attractions, as does the more modest and realistically attainable simple riddance of the current Iraqi regime. A humanist and democratic government of Iraq would be a boon for the people of that country, a model by which progressive forces may be galvanized forward in a region now typified by authoritarianism, and a resource-rich friend to the United States. War is, at the same time, highly risky, and fraught with possibilities for disaster. Thus, we must next consider the downside, or the potential costs of the coming war with Iraq.

**F. Paying the Piper**

Calculating a war's cost/benefit ratio is not easy; many variables could lead to a wide variety of outcomes with widely disparate costs and benefits. However, some costs are virtually inevitable and only their magnitude is in question. It seems necessary to start with the cost that, morally speaking, should concern us the most: deaths of innocent Iraqis and also of U.S. and other "coalition of the willing" soldiers. Following that, this article will examine economic costs, the danger of regional destabilization, the possibility of increased terrorism, damage to the integrity of the UN and international law, and losses in the standing of the U.S. in the world community, including those losses within the United States itself.

**Deaths and injuries.** Only recently has public discussion of the war in the United States been trained on the single greatest potential cost of an upcoming war, the likely massive death toll that will be suffered by Iraqi civilians. These are innocents, who themselves have suffered repression at the hands of the Iraqi regime and are no more responsible for its misdeeds than we are (perhaps less so given our record of past support for Saddam Hussein).

Casualty figures from the first Gulf War, between 100,000-200,000 killed directly in war with over half of them being civilians, serve as a kind of benchmark for the possible death toll in the coming invasion. There are reasons to believe, however, that this number may be considerably greater this time. In part this would be due to the defense strategy of the Iraqi army, anticipated to rely on urban warfare to partially neutralize superior U.S. or coalition air power. Reliance on much-touted "smart" technology (bombs, night vision goggles, etc.) may reduce, but will not eliminate, "collateral damage." A U.N. contingency plan has forecast the possibility of 500,000 Iraqis

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343. *Supra* Section II.C.

344. *Supra* Section II.E.

suffering injury that would require medical treatment during the war.  

An even greater concern centers on the possible indirect impacts of war, in light of infrastructural devastation caused by the first war, and the subsequent twelve years of sanctions.  

The same UN report discusses the possibility that 10 million Iraqi citizens, including more than 2 million refugees, will need immediate assistance to stave off hunger and disease in the aftermath of a war.  Yet another group has confirmed, not surprisingly, the particular vulnerability of children to the impacts of a new war, predicting a "grave humanitarian disaster" in which thousands, or even hundreds of thousands, of children will die.  War does not just kill individuals. It also destroys societies by smashing their institutions, deforming social life, and scarring individual psyches into aberrant behavior. The wrecked bodies are only the most visible human costs of war.

American casualties may also be significant. The relatively small number of U.S. soldier lives lost in the first Gulf War may be reassuring since such a "positive" scenario is within the realm of possibility. But urban warfare is necessarily more complex and messy, and it may lead to many more U.S./coalition casualties.  Needless to say, even the stated justifications for the war imply a much longer campaign, followed by a military occupation, with attendant risks of protracted fighting.  It is also critical to keep in mind the likely indirect casualties on our side of the ledger, in the form of a second round of "Gulf War syndrome."

**Direct and indirect economic costs.** The economic costs of a just and necessary war should never be a deterrent from waging the war. However,
these costs weigh all the heavier when the moral and legal justifications for war are in doubt. Estimating potential costs, however, is an exercise in guesswork, as those costs may run from relatively minimal to astronomic, depending on the course and duration of fighting and post-war commitment of military resources.\textsuperscript{354} How the bill is apportioned among possible coalition nations will also influence our share. In the Gulf War, the U.S. paid only 20% twenty percent of the $80 billion in direct costs, while much of the rest was underwritten by two countries, Germany and Saudi Arabia, that may not sign on for another war venture.\textsuperscript{355} If the U.S. has to pay out large sums to coax coalition partners, as it did in the first Gulf War, whatever they contribute will be at least partially offset by these pay-outs.\textsuperscript{356} The United States has already agreed to provide Turkey with some $15 billion in aid in order to secure its agreement to permit U.S. troops to use Turkish bases during an assault on Iraq.\textsuperscript{357} A study conducted by the American Academy of Arts and Sciences and released in December, 2002, estimated the costs of both short and long military campaigns, suggesting a range of direct military costs of $50-140 billion. In a worst case scenario, however, total costs of a war could approach $2 trillion.\textsuperscript{358} In fact, the U.S. economy has already begun to pay the price of war-related uncertainty in the form of a doubling in the price of oil over the ten-months leading up to September, 2002, and periodic price spikes coinciding with each announcement by a U.S. official threatening war.\textsuperscript{359} A stock market swoon in January, 2003, was attributed in large part to war jitters.\textsuperscript{360}

Other likely costs of war are both tangible and intangible, and accordingly difficult to quantify. Here we must consider likely damages to historical and religious sites, cultural artifacts, and the like.\textsuperscript{361} Damage to the environment is also likely to be great, whether or not both Iraqi and coalition forces lay waste to the oil fields as they did in 1991. For example, the U.S. military has stated its intention to continue employing highly effective, but potentially toxic, depleted uranium shells.\textsuperscript{362}

**Regional Destabilization.** An invasion of Iraq can trigger regional
destabilization in a number of ways. The first possibility is that the overthrow of Saddam Hussein will lead to the internal dissolution of the Iraqi state along sectarian, ethnic, and political lines and even to outright civil war.\textsuperscript{363} One stark prediction is that:

Immediately after the boot is lifted from the neck of the Iraqis, a bloodbath is likely to ensue as each group pours out its anger at decades of despotism, enormous suffering under the sanctions, and real and perceived injustices of one group against the other. Even without blood, there will be chaos within the ruins of a police state that never gave the Iraqis any opportunity to participate in governing.\textsuperscript{364}

The power vacuum within the state resulting from overthrow of the strong central government, might easily be exploited by outside forces, preeminent among them is Iran.\textsuperscript{365} This cost can be avoided only by the investment of huge resources for nation building, under the aegis of long-term military occupation, whether by the U.S. alone or in concert with other nations. A major dilemma will be faced, however, if a new Iraqi regime asks the United States to leave the country, which is a likely possibility.\textsuperscript{366}

While the above scenario mostly implicates Iraq and its immediate neighbors, destabilization may unfold along a different track, as Arab and other regimes perceived to have aided or even passively acquiesced in a U.S.-led invasion of an Arab country are challenged by angry and disillusioned constituents.\textsuperscript{367} This form of destabilization could occur virtually anywhere in the region, although likely in some mixture with more purely local grievances.

**Increased terrorism.** Closely linked with the just-mentioned cost of destabilization, an attack on Iraq may ignite anger and resentment against the United States, and with it a rise in terrorism, just as it causes the siphoning away of many resources from the struggle against terror to the multitude of challenges in Iraq.\textsuperscript{368} U.S./coalition troops, whether in Iraq itself or in any other Middle Eastern nation with a U.S. military presence, such as Afghanistan, will be highly likely targets. However, businessmen, students, tourists, aid workers, missionaries, journalists, and others may not be immune. Increased terrorism

\begin{itemize}
  \item \textsuperscript{363} Mackey, supra note 12, at 28-29.
  \item \textsuperscript{364} Id.
  \item \textsuperscript{365} Id.
  \item \textsuperscript{366} Fisk, supra note 337.
  \item \textsuperscript{367} Miller, supra note 291, at 27.
\end{itemize}
within the United States is also a distinct possibility.  

**Marginalizing the UN and international law.** It should be clear from the discussion in Section II that the United States has already done much to debase the UN and international law in its dealings with Iraq over the last twelve years of lawless behavior. The impact of war on the UN, to some extent, turns on the circumstances under which a war begins and the position the UN has taken with respect to it. Irrespective of this, war is certain to exact a toll. As long-time students of international law and organizations Richard Falk and David Kreiger observe:

> There are two main ways to ruin the UN: to ignore its relevance in war/peace situations, or to turn it into a rubber stamp for geopolitical operations of dubious status under international law or the UN Charter. Before September 11, Bush pursued the former approach; since then-by calling on the UN to provide the world's remaining superpower with its blessings for an unwarranted war - the latter.

Repeated violations of Iraqi legal rights by the U.S. have seemingly numbed congressional leaders and the broader U.S. public to the very meaning of international law. Still, the attempt of the Bush administration to introduce a new principle of international law permitting "preemptive strike" by a nation against another, solely at its own discretion, represents a quantum, and highly dangerous, innovation. Were such a principle to prevail, we would have reversed decades of advances, modest but hard won, toward peace-making and returned to an era of dominance through might.

**The new pariah state.** Lastly, this article considers the impact of war on the standing of the United States in the world community. It is abundantly clear that the push for war is exerting tremendous stress on our alliances and friendships abroad, and is contributing to mounting anti-American sentiment in


The impact of the war cannot be isolated from the impacts of many other unilateral moves by the Bush administration since its inception. Withdrawing from the Kyoto Global Warming Treaty, refusing to sign the Rome Statute forming the International Criminal Court, and other acts of disrespect for law and the interests of others, all have taken their toll against our global standing. Speaking of the erosion of British public support for the Iraq war, Anatol Lieven comments: "Basically, it is absurd to treat the views and interests of an ally with ostentatious and systematic contempt and then expect that the citizens of that ally will automatically support you in a crisis." Perhaps only temporarily, our relations with Germany and France may be at their lowest ebb since World War II. One shudders to imagine what sentiments are being stirred in the Arab and Muslim worlds against us for the belligerence of our government toward Iraq.

What is at stake is not simply the coming war, although that is crucial. The paramount issue is the manner in which the United States will conduct itself in the world. Will it be a respectful ally, perhaps a "first among equals" in the community of nations, or a triumphantalist, unconstrained new imperium, impelled by a messianic zeal to remake the world according to our perceived advantage? Moral legitimacy is an important political resource for galvanizing collective action, as was evident in the aftermath of September 11, 2001. We are rapidly squandering that vital capital now.

What is the cost of the push for war on our standing in our own eyes? What is the value of living in a society in which leaders model respect for law and commitment to conflict resolution through peaceful means? On the contrary, what is the social impact of a leadership that conducts its relations with other nations through threats and application of violence, and flouts the laws of the community? We rarely examine relationships between the conduct of foreign policy and social behavior in the United States. Will another hidden cost of bellicosity and flagrant disregard for law be played out in another outburst in the halls of our schools in the years to come?


376. See generally MacGowan, supra note 1. Speculating about the connection between a violent foreign policy and "youth violence" in the United States, arguing that the latter is simply part of a society-wide problem, comprehending adult violence in a variety of spheres, rather than a phenomenon with distinct causes. The connection in the particular case of Iraq may not be as distant as one would imagine. In October, 2002, Gotham Games released a video game at $40 entitled "Conflict: Desert Storm" that permits players to participate in a "special operations" team strike against Iraq. See Petrilla Entertainment, Gotham Games, at http://www.questforhussein.com (official website of the company that carries the game). In the denouncement, the player
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War is not necessary to meet the challenge constituted by the regime of Saddam Hussein. As brutal and wily as he may be, lawful and non-violent means continue to exist that would neutralize any realistic threat emanating from Iraq, while avoiding the costs described above. This article will now review these alternatives.

IV. POLICY ALTERNATIVES

Our search for alternatives to war in the confrontation with Iraq should be animated by several fundamental principles. First, the alternatives must be consistent with international law. Respect for international law is not simply an expedient to be discarded in the service of short-term interest. Rather, it should be a bedrock principle of U.S. foreign policy, consistent with our commitment as a people to democracy and the rule of law. Constraints on the exercise of our power are an acceptable cost for the legitimacy and moral authority that are gained by acting within international law. Nor is there need to act lawlessly because a legal framework exists through the UN for countries to take drastic measures to address truly acute challenges to peace and international security, and, in the aftermath of the Cold War, the UN has done so on numerous occasions.

Second, the alternatives must effectively address the problem presented by the current Iraqi regime. This requires a sense of proportion; neither over-nor underestimating the dimensions of the challenge. Our review of the historical record of U.S.-Iraqi relations has hopefully sharpened that sense. While Saddam Hussein almost certainly does not currently pose an imminent threat to the U.S. or to his neighbors, his history, ideological commitments, and personal ambition are sufficiently indicative of future danger so that actions out of the ordinary are both justified and wise. Iraqi citizens, of course, suffer severe

assassinates the foreign leader, whose features are modeled after Saddam Hussein. Enterprising California high school student Jose Petrilla, 19, is selling his web-based "Quest for Hussein" game for $3.95, offering similar opportunities for "catharsis." It is a sequel to his highly successful "Quest for al-Qaeda," which has been downloaded from the internet over two million times. Farhad Manjoo, Pulling the trigger on Saddam, COMPUTERS AND THE INTERNET, at http://www.buzzle.com/editorials/11-12-2002-30135.asp?viewPage=1 (last visited Mar. 13, 2003).

377. In the words of Kaysen, Steinbruner, and Malin: "Government by consensually formulated law is the defining feature of American democracy, and as a practical matter the threat to freedom has much more to do with the possible defects in the internal rule of law than with the actions of any external aggressor." Carl Kaysen, et al., U.S. National Security Policy: In Search of Balance, in WAR WITH IRAQ: COSTS, CONSEQUENCES, AND ALTERNATIVES 5 (2002).


380. See Bahbah, supra note 67, at 52.
repression on a daily basis and are in immediate and pressing need for relief.

There is one more value, humility that should inform this inquiry. The shameful record of U.S. dealings with Iraq demands nothing less. The fact that we have had so much to do with the havoc wreaked by Saddam Hussein over time means that we bear some quantum of moral responsibility for his crimes. That being so, we must be especially scrupulous not to inflict any more needless harm on innocents. Together, these principles suggest that we should adopt the following package of mutually reinforcing policy alternatives.

A. Immediately Renounce Regime Change in Favor of Regional Democratization

Encouraging the emergence of democratic governments in the Middle East is a legitimate and laudable aim of U.S. policy in the Middle East. It cannot be accomplished, however, by instigating coups, or by threat of military force. "Regime change," at least as envisioned by the U.S. government, would violate Iraqi sovereignty and thus international law. Even a regime change mandated by the UN Security Council would be a startling departure from settled international legal principles of sovereignty and would likely violate the UN Charter. Regime change is simply inconsistent with international law and must be abandoned as a goal of U.S. foreign policy. The sooner we realize that we do not have the right to change the government of another sovereign nation at will, the better the public discussion and our relations with Iraq will be.

Renouncing regime change may have far-reaching political benefits as well. There is a sense in which vilifying Saddam Hussein and making him the focal point of our policy has empowered him, both domestically and regionally. There is, as one observer has wryly noted, a certain glamour to villainy. He is, for many in the Arab world, and quite possibly a large number in Iraq itself, a symbol of determined resistance to U.S.-Israeli hegemony, a pedestal to which we have lifted him through our lavish attention. De-escalation of the rhetoric against Saddam Hussein may cause him to deflate to his proper, rather minor, dimensions. In the long run, this may empower domestic forces against him, forces which, under prevailing circumstances, are forced to swim against a current of Iraqi nationalism. If regime change is accomplished via invasion, we should expect that same current to push at the footing of any successor regime.

Second, it is impossible to predict how differently the Iraqi regime might respond to other aspects of our policy were its demise not so avidly sought. We

381. Supra Section II.G.


383. Llewellyn, supra note 308.
know, at a minimum, that some part of Saddam Hussein's resistance to weapons inspections derived from fears that information gained in the process would be used to kill him, which is not an unreasonable position considering that the U.S. was doing everything it could to do just that.\textsuperscript{384} Overall, the Iraqi response to inspections might very well have been different and more cooperative if the U.S. had not loudly and repeatedly insisted on regime change as a condition for sanctions relief.\textsuperscript{385} Not only was acquiescing to inspections flatly against the interest of the Iraqi leadership, but, coming as it did without international approval, it could have had no legitimacy whatsoever. Rather, it was simply a naked American diktat - galling and offensive.

Illusions should not be held, however, concerning the prospects for democracy in Iraq: the conditions are daunting, to say the least. Even assuming the best of U.S. intentions, the realities of the country have not changed. It is still a fractious society with deep ethnic and sectarian fissures, an incompletely developed sense of Iraqi national identity, and a tradition, in the modern era, of political violence.\textsuperscript{386} The Iraqi opposition groups, to date, have demonstrated only spectacular incompetence and venality, and precious little support from within Iraq.\textsuperscript{387} That is no doubt why the U.S. has been busily planning for a military occupation and administration of the country that will last at least 18 months, and many believe could extend for a decade or more.\textsuperscript{388} Afghanistan stands as a sobering harbinger of the challenges ahead.\textsuperscript{389}

Moreover, there is reason to be skeptical at to just what intentions the U.S. does have for democracy in Iraq. To begin, supporting Iraqi democracy would run completely counter to tradition: U.S. policy toward the Middle East region, and often, elsewhere, has far more frequently subverted democracy than promoted it.\textsuperscript{390} In the most recent example of our anti-democratic practices in the Arab world, we are actively seeking to depose Palestinian Authority President Yasser Arafat, who won 88% of the vote in the most free elections witnessed in the region in the last decade.\textsuperscript{391}

\textsuperscript{384} Supra Sections II.G and II.H.
\textsuperscript{385} Supra Section II.F.
\textsuperscript{386} See generally Mackey, supra note 12. This is not an innate violence or an expression of some Iraqi national character. Rather violence is a response to the particular centrifugal political forces characteristic of a young state with unnatural borders. \textit{Id.}
\textsuperscript{387} \textit{Id.} at 393.
\textsuperscript{390} Zunes, supra note 10, at 8.
\textsuperscript{391} \textsc{United Nations Information System on Palestine, Chronological Review of
As to Iraq itself, one of the constituent groups that has been active in the U.S.-backed opposition seeks restoration of the monarchy, which was swept away in the first republican coup in Iraq in 1958. Of the two leaders most actively promoted by the U.S. government over the last year or so, former general Nizar al-Khazraji has been implicated in the gassings of Kurdish villages in 1988 and is now under house arrest in Denmark facing charges of war crimes. The other U.S. champion of democracy is Ahmad Chalabi, who, after his conviction on bank fraud charges in Jordan, fled that country in the trunk of a car. Nor is it clear that the Bush administration neo-cons will be ready to accept the kind of democracy envisioned by the Iraqis themselves. Four points of potential divergence seem immediately probable.

First, democracy for the neo-cons, on the face of it, seems to involve elections, the rule of law, and free enterprise—the classic, liberal version of participatory democracy. To the Iraqis, this might look very much like a formula for neocolonialism where local elites, protected by a government and legal system, are "free" to engage in commercial deals with international corporations to their mutual enrichment (benefits trickling down to the masses, of course). Given past history, ideology, and prevailing conditions in the country, Iraqis might prefer something more along the lines of a command economy and welfare state, as had served them well before their long, and still continuing, nightmare. Iraqi democracy might privilege economic and social rights over civil and political rights, the latter being seen as a luxury for more stable conditions and more prosperous states. Whether the neo-cons will be open to such a version of Iraqi democracy, should it emerge, is open to question. Of course, we know what to call a "democracy" that is not chosen by the governed.

Second, an Iraqi democracy that is genuinely representative of the country's population will be dominated by Shi'a Muslims. Ideologically, such a government may be more closely aligned to Iran than to the U.S. What will happen when a democratically elected Shi'a Iraqi government politely and

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395. Supra Section II.B.

396. As we have noted Shi'a population of Iraq is upwards of 50% of the total. LINDHOLM, supra note 25, at 167.
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firmly asks U.S./coalition troops to leave, as they surely will?397 Any refusal would reveal the lie, while any agreement would open the door for increased Iranian influence. There may be less to fear in that than we imagine, but somehow one does not imagine the neo-cons viewing this all with equanimity. In their view, Iran is the most consequential country in the area.398 How we finesse this easily predictable dilemma will say much about the U.S. commitment to Iraqi democracy.

Third, Iraqi democracy must come to some accommodation with the legitimate aspirations of the long-suffering and long-exploited Kurdish people.399 Torn by infighting, their precise goals have not always been clear, but at a minimum they will demand and deserve some form of autonomy within the Iraqi state. This will unquestionably arouse extreme agitation in Turkey, which has violently opposed Kurdish autonomy anywhere out of fears of heightened agitation within its own Kurdish minority. It will be interesting to see how the neo-cons, for whom Turkey ranks second only to Israel in regional strategic importance, finesse this contradiction between the demands of Iraqi democracy and the demands of a treasured strategic ally.

Finally, any Iraqi democracy that accurately reflects the sentiments of the Iraqi people will be more resolutely pro-Palestinian than the regime of Saddam Hussein.400 This does not mean that a democratic Iraqi government will do anything effective to aid the Palestinians in their struggle with Israel in the short term (neither has Saddam Hussein, notwithstanding his politically calculated but functionally insignificant contributions to families of Palestinian "martyrs").401 But there is deep and abiding sympathy for the Palestinians throughout the Arab world and there is a specific Iraqi-Palestinian solidarity that derives from a sense of common victim-hood at the hands of Israel and the U.S. Quite apart from these emotional ties, there is very little in U.S.-Israeli hegemony over the region that is favorable to the national interests of Iraq, as these are likely to be defined by Iraqi leaders. None of these facts jibe well with the commitments of the "Israelo-centric" neo-cons.402

In light of the above considerations, Iraqi democracy under the aegis of a

397. Fisk, supra note 337, at 2.


399. The history of U.S. dealings with the Kurds, to which we have alluded occasionally, is another tragic story in itself. See BLUM, supra note 1, at 244-44.


401. HIRO, supra note 33, at 191.

402. Christison & Christison, supra note 302.
post-war, American supervised occupation seems at best to be a distant proposition. A puppet regime pliable to U.S. direction, similar to that of Karzai in Afghanistan, seems the more probable outcome, at least in the short- to medium-term.\(^\text{403}\) Were we not to go to war, and the U.S. suddenly "got democracy" and sincerely committed to promoting a democratic Iraqi government wherever that process might lead, is there anything that could be done to advance the cause while the Hussein regime remains in power? Unfortunately, the chances are low. This may mean that another half-generation of Iraqis and beyond is consigned to life under Hussein's repression.

However, we should not forget that many Iraqis tolerated that repression as a necessary cost of economic growth and their own material advancement.\(^\text{404}\) We also cannot discount the possibility that some share of the repression stems from the leadership's sense of embattlement and insecurity.\(^\text{405}\) Thus, renouncing regime change may have the residual effect of diminishing the worst of the Iraqi regime's excesses.

There are some modest initiatives that can be taken: intergovernmental dialogue, educational and cultural exchange, conditioning aid on democratization, technical support, diplomatic pressure, and other such techniques, all tempered with a light hand and a large dose of patience. These measures may seem pathetically inadequate in the short-term, and laughably naive as well. A cooling off period of some duration will surely be needed before any such initiatives may be taken. But authentic democratization is a process of decades, rather than months.\(^\text{406}\) We cannot know how the Iraqi regime might respond under a vastly transformed, non-threatening atmosphere without trying.

Democracy should be promoted not just in Iraq, but in the Middle East as a whole. The region needs it and a recent Saudi initiative signals growing readiness for it.\(^\text{407}\) Democratization in Iraq would be invigorated were it to become part of a popularly embraced regional transformation, rather than the lone experiment in American nationbuilding. That raises yet another problem: distrust of the United States in the Arab and Muslim worlds currently runs so deep that, even though we may possess the best democratic ideas and know-how, we may not, at this point, be their most effective purveyors.\(^\text{408}\) Instead, a


\(^{404}\) Supra Section II.B.

\(^{405}\) Supra Section II.G.

\(^{406}\) See generally, Ottaway ET AL., supra note 389.


\(^{408}\) Indeed, Colin Powell's announcement in December, 2002, that the U.S. would devote $29 million as a first installment to promote democracy in the Middle East was greeted in the region
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multilateral democratic support project will be needed, with the U.S. perhaps playing a secondary or hands-off role.409

Regional democratization may produce its uncomfortable moments for us as Islamist groups that have long been building grassroots strength may sweep to electoral victory in a number of countries of the region.410 Bumps in the road will have to be endured as the rhetoric of these groups is put to the test of performance. Candidly, the U.S. may be forced to give up some of its "privileges" in the region, for example sharing a greater portion of the resource wealth with the peoples of the region than in the past.

But real democratization that is not a sham or a cover for American indirect rule, may repay us in spades if it ultimately abates conflict and promotes regional stability. It is, with all its difficulties, a prize worth striving for - for the sake of the Iraqi people and for our own long-term interests.

B. Immediately End Enforcement of No-Fly Zones

This policy shift is mandated by our first animating principle above. The no-fly zones have no basis in international law and should be ended immediately and without condition.411 As a practical matter the zones have never worked to accomplish their stated objectives, have been costly in human lives and property, and have been hugely costly to maintain, requiring approximately $1 billion per year.412 Ironically, they have also given the Iraqi regime a tool with which to ratchet up tensions by the simple expedient of firing a few rockets at overflying U.S.-British warplanes-a tool which it has used at several points in the past.413

C. End Comprehensive Sanctions in Favor of Arms Embargo and Continued Inspections

A rigid arms embargo against Iraq is also a valid tool of U.S. policy. Given Iraq's track record of aggression, continuing weapons inspection under a UN-sanctioned program is more than reasonable. It is even possible that the arms


409. This, given the unilateralist tendencies of the neo-cons, introduces another wrinkle into the "democracy after war" scenario.


411. Supra Section II.H.

412. GRAHAM-BROWN, supra note 213.

413. Walden, supra note 382, at 7.
embargo should be extended to cover more categories of weapons, including conventional ones, although adequate consideration must be given to Iraq's legitimate needs for self-defense.

In December 2002, after a four-year hiatus, weapons inspectors resumed work in Iraq, under the stricter UN mandate laid out in UNSCR 1441. Skeptics of the approach advocated here are likely to see the return of inspectors to Iraq as the latter's last gasp effort to avoid invasion and thus, a vindication of President Bush's tough diplomacy in the preceding months. There is little question that, given the generally bellicose atmosphere prevailing in U.S.-Iraqi relations, little other than the figurative "gun to the head" would have achieved this result. We will never know, however, whether a similar result might have been achieved years ago had we scaled back our anti-Saddam words and deeds and adopted a more broadly conciliatory approach.

Be that as it may, the inspectors are on the ground and working, and despite some inadequacies in the level of cooperation of the Iraqis, there is every reason that they should remain for as long as it takes to complete their mission.414 Their very presence deters Iraq from any attempt to use or develop proscribed weapons, and a thorough course of inspections is the best existing means to uncover direct evidence of the current status of Iraq's WMD capabilities.

Assuming against all odds that war is averted, reevaluation of the current inspections regime will be necessary within the next six months to a year. This is because the current inspections regime is highly intrusive against Iraqi sovereignty, authorizing what amounts to a small-scale roving military occupation of the country.415 This intrusion is legal, however, in light of Security Council backing, and it is justified by Iraq's past behavior. But such a compromise of sovereignty is undoubtedly humiliating to the Iraqi government and will wear over time. Resentment breeds resistance and, if the inspections continue indefinitely without modification, we will be headed at some point for another high-stakes confrontation. The inspections regime should therefore be scaled back, and then phased out at the earliest practicable date.

Experts in sanctions enforcement maintain that means exist to enforce a long-term, strict arms embargo, primarily through technology-enhanced policing of Iraq's borders.416 Iraq may not be pleased with this development, but the occasions for confrontation will be much diminished if enforcement of


415. Bennis, supra note 287, at 33.

the embargo can be done less intrusively. Of course, a condition of the success of this program would be the cooperation of the countries surrounding Iraq. Multinational support for border enforcement may also be necessary. Both may be gained by offering an end to economic sanctions against Iraq. Countries such as Jordan and Syria have ties of affinity to, and burgeoning trade relations with, Iraq, at this point illicit, that make them exceptionally anxious to see the sanctions chapter closed.

Comprehensive sanctions that have had such ruinous effects against the Iraqi people should be ended under any circumstances. They have been ruinous to innocent Iraqis, taking hundreds of thousands of lives. They have strengthened the Hussein regime by causing increased dependence on the central government. They have violated a number of basic and sacred principles of international law. Dual use restrictions, in particular, should be dropped in their entirety. Some risks are involved that make these goods open to misappropriation, although enhanced tracking of them is also technically feasible. That is required to unblock the flow of goods essential to rebuilding the crumbling Iraqi civilian infrastructure. As we have seen, it is infrastructural reconstruction that is the real key to ending unjustified Iraqi civilian misery.

Ending sanctions will also remove one of the prime sources of enmity toward the United States in the Arab and Muslim world—a political benefit of incalculable value.

D. Aggressively Promote Regional Disarmament

Why do countries in the contemporary era pursue weapons of mass destruction? Why, in particular, has Iraq sought weapons of mass destruction? These are important questions, one would think, in understanding the root causes of the problem of WMD, which might well be essential to eliminating WMD. Our all-too-facile operating assumption seems to have always been that Saddam Hussein's drive to gain weapons of mass destruction, and his acts of aggression, are an outgrowth of his unquenchable ambition for regional dominance, or more simply, of his "evil nature." That theory cannot be entirely discounted.

417. See id., at 16.
418. See id., at 14.
419. Supra Section II.F.
420. Id.
421. Cortright, supra note 416, at 15.
422. Supra Section II.F.
423. National Security Advisor Condoleezza Rice articulated the perspective well in a BBC interview in August, 2002, and reported in the Washington Post. See Glenn Kessler, Rice Lays Out
Another interpretation is possible as to the Iraqi WMD that is equally, and in some respects, more at home with the facts. The interpretation is that the Iraqis have sought WMD in the first place as a deterrent against stronger neighbors, such as Iran and most of all, Israel. Iran is a large, populous country and has not hidden its resentments of the Iraqi regime. Israel is, after all, the only nuclear power in the Middle East, and it attacked Iraq in 1981. We have already seen that Saddam Hussein's 1990 threat to use chemical weapons against Israel was posed as a response to a hypothetical nuclear attack from that country. This interpretation is thoroughly consistent with what we know about arms races in other parts of the world, namely that weapons acquisitions by one country inevitably lead to the same or greater weapons being sought by its competitors.

Viewed in this light, singling out Iraq for disarmament in a region saturated with high-end military hardware is unfair and more than likely will be unsuccessful in the long run. It is naïve to expect Iraq, or other Arab countries for that matter, to accept life under the pall of Israeli military superiority in perpetuity, or to tolerate other threats to their security, that we would never accept ourselves. If overwhelming military superiority is seen as necessary to ensure Israel's survival, that belief should be checked against the facts: this military superiority, instead, is the mantle under which Israeli expansionism into the West Bank has unfolded. The results of that expansion may ultimately be more threatening to Israel, although in political rather than military ways, than a less unequal balance of power with its neighbors coupled with a peace that adequately addresses Palestinian national interests.

This logic has not always escaped us. Article 14 of UN Security Council Resolution 687, which laid out all of the post-Gulf War cease-fire conditions, construed Iraq's disarmament as a first step in the direction of establishing the Middle East as a zone free of weapons of mass destruction. No action has ever been taken to effectuate that provision and an important opportunity has lain dormant. Among the first steps that should be taken, as a part of a

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424. U.S. military analysts who had contact with the Iraqi military prior to the Kuwait invasion reported that the Iraqis considered Israel to be their most powerful and implacable foe. STEPHEN C. PELLETIERE, ET AL., IRAQI POWER AND U.S. SECURITY IN THE MIDDLE EAST 45 (1990).

425. Supra Section II.B.

426. Supra Section II.D.

427. ZUNES, supra note 10, at 169-70. As an aside, Israel should be a cautionary example for the neo-con's vision of perpetual global military domination; it is, after all, the same model writ small. The results should be troubling. We will return to the importance of the Israel/Palestine conflict in infra Section IV.F.

comprehensive program of regional disarmament, is demanding that Israel sign and comply with the Treaty on the Non-proliferation of Nuclear Weapons. There is simply no justification for the U.S. having turned a blind eye toward Israel's nuclear weapons program for years. There is either one law for all or no law at all. That leads us to our penultimate recommendation.

E. Consistently Support International Law and UN Resolutions

As we have seen, U.S. policy-makers have repeatedly and sanctimoniously assailed Iraq for its defiance of previous UN resolutions and have cited it as a justification for using military force to compel Iraqi compliance. We have been told repeatedly that Iraqi resistance to the resolutions, we have been told repeatedly, threatens to render the UN "irrelevant." The U.S. government has also periodically called for a war crimes tribunal to try Saddam Hussein and other members of the Iraqi leadership.

UN resolutions should indeed be enforced and those who violate them, including Iraq, should not be immune from consequences. Yet the U.S. appears unconcerned, if not complicit, in the flaunting of the UN by a number of its allies, including Turkey, Morocco, Indonesia, and most prominently, Israel. The latter nation has, for more than thirty-five years, stood in violation of dozens of UN resolutions and has, by one count, been rescued from further censure some twenty-seven times by U.S. veto. A particularly poignant example of the perceived U.S. double standard was manifested in the spring of 2002 when the U.S., after years of excoriating Iraq's non-cooperation with UN inspections, idly observed Israel's defiance of a UN-mandated inspection of possible war crimes in the Jenin refugee camp.


430. See generally, Zunes, supra note 10, at 48-54.


434. Williams, supra note 400, at 2.

The legitimacy of international law, as any law, turns on the universality of its application. There cannot be one law for our "friends," or those whose actions are perceived to suit our interests, and another law for our "enemies," or those whose actions displease us. The sincerity and legitimacy for the U.S. insistence that Iraq respect international law and institutions would be boosted immeasurably by a consistent policy of meaningful support for UN resolutions and firm resolve to ensure their enforcement in all cases. Even Iraq itself will accept UN authority differently when it is applied consistently across the board and can no longer be mistaken for a mere shell for the imposition of U.S. foreign policy interests.

Similar considerations should govern our approach to the question of a war crimes tribunal for the Iraqi leadership. Certainly there is ample evidence to justify such an initiative and ending the sense of impunity enjoyed by many governing elites should be a paramount goal of the international community.\(^{436}\) U.S. credibility in leading such a venture, unfortunately, is diminished by our government's refusal to ratify the statute of the International Criminal Court.\(^{437}\) It is also undercut by our failure to promote similar initiatives with respect to possible war crimes and other human rights violations by leaders of such allies as Turkey and Israel.\(^{438}\) A tribunal constituted in the aftermath of a war, victor's justice, is also far less likely to meet wide acceptance and legitimacy than one that does not. Thus, a war crimes tribunal for the Iraqi leadership should be pursued. However, this must be a first, rather than last step, in a campaign to end impunity within the Middle East and elsewhere for those who commit egregious crimes against humanity. Our last policy alternative may be the most important of all.

**F. Aggressively Pursue a Just Resolution of the Israel/Palestine Conflict.**

Every policy move that we make with respect to the Arab and Muslim worlds occurs in the shadow of our overwhelming support for Israel, and is seemingly insensitivity to the needs, aspirations, and rights of the Palestinian

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\(^{436}\) See generally NAOMI ROHT-ARRIAZA, IMPUNITY IN INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (1997).


\(^{438}\) Current Israeli Prime Minister Ariel Sharon, for example, was found by an Israeli government commission to have been "indirectly responsible" for the murders of hundreds of Palestinians in the Sabra and Shatila refugee camps in Lebanon in 1982. A case filed against him and other Israeli military and Lebanese militia members is being litigated in a Belgian court, although Sharon himself has been ruled to have temporary immunity as a sitting head of state. See Chibli Mallat, et al., The 12 February, 2003 Decision of the Belgian Supreme Court Explained, International Campaign for Justice for the Victims of Sabra and Shatila, at http://www.indictsharon.net/ (last visited Mar. 13, 2003).
people. Nothing more inflames passions against us in the Middle East, or elsewhere, than this support. Thus, our credibility with respect to every other issue confronted in the region, including Iraq, would be enhanced immeasurably by both speaking and acting in such a manner as to demonstrate our commitment to a just resolution of the conflict.

Thus far, we have commenced on the "speaking" part of this shift. President Bush has taken the laudable first step in making support for a "Palestinian state" an official objective of U.S. foreign policy. The administration has also clearly recognized the link between Israel/Palestine and Iraq and the necessity of attending to the former, in order to credibly address the latter. That is why the administration has orchestrated meetings of the "Quartet" (the U.S., Russia, the European Union, and the UN) and spoken of a new "road map" to a peace agreement and Palestinian state. There is much cynicism, however, regarding the sincerity of the U.S. commitment to a resolution of the conflict that adequately accommodates Palestinian rights and interests. The suspicion is that the Bush administration commitment only may be to maintaining an appearance of progress toward a peace agreement, and to a Palestinian "state" shorn not only of viable territory but also of meaningful sovereignty. Such an eventuality will engender, not deflect, anger against U.S. policies.

IV. CONCLUSIONS: TOWARD A JUST AND DEMOCRATIC U.S. POLICY IN THE MIDDLE EAST

There is no reason that U.S. relations with Iraq, or with other countries of the Middle East, must remain "frozen in antagonisms," to recall the phrase of Zbigniew Brzezinski. Notwithstanding differences in religion, American and Arab societies share some core values, including a strong veneration of equality and a vigorous commitment to personal autonomy and individualism. Even societies that are very different can have fruitful relations based on mutual respect.

Needless to say, the kinds of policy changes proposed here require a radical reorientation in our thinking about our policies toward Iraq and the broader Middle East. We have long pursued policies of support for anti-democratic forces in the region, out of strategic and other realpolitik considerations. Yet such figuring often has a self-reproducing quality - our problem with Iraq started, in a sense, with our support for the coup reinstalling the Shah of Iran in 1953. That, in turn, begat the 1979 Iranian revolution with its strong anti-American overtones, thus creating the impetus to build up Saddam Hussein. Now we reap the consequences of these policies in the seemingly inevitable war, which is, in the end, the surest marker of our policy failures. There will always be short-term risks attendant with a transition away from this dangerous cycle. But pure self-interest demands that we begin this reevaluation apace and seriously consider the merits of policies based on justice, democracy, international legality, and a sympathetic consideration of the rights, interests, and aspirations of the peoples of the Middle East.

U.S. actions toward Iraq for more than two and a half decades have inflicted immense and unnecessary suffering on the Iraqi people and in a number of respects, have violated international law. Now we stand at the precipice of a dangerous descent into blatant unilateralism and illegality. This descent is not inevitable, nor is it necessary, to vindicate legitimate U.S. interests. We must decide whether international law is a deeply held value or merely a quaint anachronism. Should we choose the latter, we will have no moral refuge when we are next struck, still less when the tides of power shift and the sword is one day at our throat. Having already suffered the flick of that blade, we should aspire to better for ourselves and for our children.