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ARTICLE

LAW AND WAR AFTER THE COLD WAR

LOUIS HENKIN*

When I selected the subject for this lecture, I intended to address the impact on the law of the United Nations Charter of forty years of cold war — of surrogate wars, of interventions and counter-interventions, of Korea and Vietnam, Afghanistan and Panama. In the intervening months, we lived through a “hot war” in the Persian Gulf, which awakened different, long dormant, issues of law and war — the law of collective self-defense and collective security, the authority of the United Nations Security Council, and the rights, responsibilities and obligations of members of the United Nations. Within the United States, the Gulf crisis also stirred fundamental constitutional issues as to the respective “war powers” of Congress and the President, constitutional questions that became entangled with the international law governing the use of force and collective security.

“Law and War After the Cold War” thus now suggests additional, larger, more complex issues. And so, I offer two — or two and a half — mini-lectures. First, I address the substantive law on the use of force between states, the law of the U.N. Charter. I ask: What was the law of the Charter as framed? What have forty years of cold war done to that law? What is likely to be the law of the future? In my second lecture, I address the Charter system of collective security, the impact of the Cold War on that system, and the revival of collective security in the Gulf War. Finally, in a brief *coda*, I glance at war powers under the U.S. Constitution after the Cold War and the Gulf War.

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In this lecture, I have drawn on my previous writings, notably *HOW NATIONS BEHAVE, LAW AND FOREIGN POLICY* (2d ed. 1979), Chapter 7; *Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed., Council on Foreign Relations 1991); also *The Invasion of Panama Under International Law: A Gross Violation*, 29 *COLUM. J. TRANSNAT'L L.* 293 (1991); and *Congress, the President and the United Nations*, 3 *PACE Y.B. INT'L L.* 1 (1991).

I. THE SUBSTANTIVE LAW OF THE U.N. CHARTER

In 1945, the end of the Second World War brought new international law and new international institutions designed "to save succeeding generations from the scourge of war."¹ To that end, the U.N. Charter prohibited the use or threat of force between states and established international institutions to maintain international peace and security.

At birth, the law of the Charter and the U.N. institutions were universally supported and unanimously acclaimed. Within two or three years, however, the world was riven by "cold war." *Inter arma*, the ancients told us, *silent leges*.² Forty years of ideological conflict between nuclear superpowers have tested whether law is silent during cold war as it is during the clash of arms. Ideological conflict between superpowers frustrated the post-war expectations that the Big Powers would themselves scrupulously respect the law of the Charter and that they would cooperate in U.N. institutions to assure that others would respect that law and maintain international peace and security. The U.N. institutions for maintaining peace, notably the Security Council, fell victim to the Cold War early on; however, the substantive law of the U.N. Charter prohibiting the threat or use of force between states survived.

Cold war did not silence the law of the Charter. No state insisted that the U.N. collective security system was an essential condition of that substantive law, so that the failure of collective security as a result of the Cold War vitiated that law. The Cold War, however, did tempt powerful adversaries to push against the restraints of law. The Cold War also tempted smaller states to test whether tensions between superpowers might afford them impunity from harsh consequences for flouting those legal restraints.

During the forty years of cold war there were clear violations of the law of the Charter, though far fewer than is commonly believed. Violations have not been so frequent or so serious as to destroy the law. Some violations indeed reaffirmed the law by paying it the homage of hypocrisy: states falsified facts or distorted the significance of those facts in order to conceal violations or to confuse and mollify condemnations of violations.

During the Cold War attempts to escape the law of the Charter sometimes took the form of claims that armed forces had entered the territory of another state by invitation of its government. The U.S.S.R.

1. U.N. CHARTER, preamble.

2. "In war the laws are silent." Cicero.

claimed that its forces were invited by the government of Czechoslovakia in 1948 and again in 1968, by the government of Hungary in 1956, and by the government of Afghanistan in 1980. The United States claimed that its troops entered Grenada in 1983 pursuant to invitation by the Governor General of the territory. There were echoes of claim of invitation when the United States declared that its invasion of Panama in 1989 was approved by the person who had been duly elected President and had been welcomed by the people of Panama.

I do not stop to examine the authenticity of any particular claim of invitation, or the authority of those who issued the invitation in a particular case.³ In principle, however, introducing forces into the territory of another state pursuant to an authentic invitation by the proper authorities of that state does not violate the law of the Charter. The Cold War did not affect that law in that respect. Some might suggest that claims of invitation as well as rejections of such claims give evidence of the abiding vigor of the law of the Charter.

The Meaning of Article 2(4)

During the Cold War, some sought escape from the restraints of the law of the Charter by pressing for new interpretations of, and exceptions to, Article 2(4). That article provides:

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

The meaning of Article 2(4) seems clear, yet, perhaps inevitably, ambiguities appeared early. For example, it is not obvious from the text whether Article 2(4) prohibits the threat or use of economic force, such as the "oil weapon" wielded by Arab states in 1973-74. As regards the use of armed force, it is arguable whether the provision forbids only the use of force to seize and annex territory, or whether the Charter prohibits any penetration of another state's territory by force, no matter for how long or for what purpose. Similarly, it is not clear whether, in prohibiting the threat or use of force against the political independence of another state, the Charter forbids only the use of force to impose a puppet government or otherwise make the government of another state wholly subservient, or whether, more stringently, the Charter prohibits

3. In fact, the authenticity of the alleged invitations was widely rejected in almost all the instances cited.

the use of force to impose the will of one state upon another even in a single instance with regard to a particular decision.

Those ambiguities have been suggested by writers, but during the Cold War no government seriously espoused or exploited them. Neither adversary in the Cold War pressed for narrow interpretation of "territorial integrity" or "political independence." Smaller states also eschewed the narrow interpretation. The more restrictive meaning of Article 2(4), I conclude, prevailed during the Cold War and prevails today. It is a violation of the U.N. Charter for a state to penetrate the territory of another state by force, for any purpose and no matter how briefly; it is a violation of the Charter for a state to use or to threaten force to impose its will on another state even temporarily or for a limited purpose.

Intervention and Counter-Intervention in Internal Wars

The Cold War highlighted uncertainties as to the applicability of the law of the Charter to internal wars. Before the U.N. Charter, international law permitted military support by an outside state for an incumbent government to help it maintain or restore governmental authority, but it was unlawful for a state to support either side in internal hostilities that had acquired the character of civil war. The Charter did not explicitly address this issue, but a case can be made that Article 2(4) forbids any external intervention in internal hostilities by military force that might help determine the political future of a country. Some have suggested that a state ought to be permitted to intervene in a civil war to counter an intervention by another state that might otherwise determine the political future of the target country. These questions are a subject for another lecture.⁴

Proposed Exceptions to Article 2(4)

Article 2(4) has not remained unscathed. Both sides in the Cold War avoided narrow interpretation of the prohibitions of Article 2(4), but both sides sought other escape from that article, notably by claiming exceptions to its prohibitions or by stretching the explicit exception recognized by the Charter, the right of self-defense provided by Article 51.

4. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed., Council on Foreign Relations 1991). That subject is one of several addressed also in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (Lori Damrosch and David Scheffer eds., 1991).

“Humanitarian Intervention”

The years of the Cold War saw states claiming and invoking an unwritten exception to Article 2(4) that would permit the use of force against another state for certain “benign purposes.” One such exception would permit force in “humanitarian intervention.” In particular, it was argued, the Charter could not have intended to forbid a state to send armed forces into the territory of another state to save human lives. That proposed exception was strongly supported by the dramatic, successful action of the Government of Israel in 1978 at Entebbe in Uganda to rescue hostages held there by terrorists with the acquiescence (if not the complicity) of the government of Idi Amin. The Israeli exploit may indeed have succeeded in establishing an exception to Article 2(4): a state may use limited force if necessary to rescue hostages and save their lives.⁵

The *Entebbe* principle did not result from the tensions of the Cold War, though terrorist activities, and responses to such activities, inevitably reflected the Cold War and its consequences in the international system. However, some states were tempted to extend the principle of humanitarian intervention to justify not only minimal force to extricate hostages but also invading a country to topple a repressive government that had killed people, or to prevent it from threatening lives in the future. A right to use force to save lives was among the justifications claimed by the United States for invading and replacing governments in Grenada in 1983 and in Panama in 1989. In those cases and others, however, the international system condemned the use of force, implicitly rejecting the alleged exception to the law of the Charter.⁶ The United States itself rejected that justification when claimed by others. For example, the United States was prominent in the decision to refuse to recognize the new government in Cambodia imposed by neighboring Vietnam, which justified eliminating the previous Cambodian regime on the ground that it had been guilty of genocide.

Academics continue to argue the scope of an exception for humanitarian intervention, but the law at the end of the Cold War, I believe, continues to reject any justification for humanitarian intervention by a

5. The United States might have invoked this principle to justify its unsuccessful attempt to extricate its diplomatic hostages from Iran in 1980.

6. Perhaps the states condemning the use of force believed that a desire to save threatened lives was a pretext and not in fact the reason for the invasion.

In the *Nicaragua* case, at ¶ 268, the International Court of Justice said that “the use of force could not be the appropriate method to insure” respect for human rights. See *infra* note 9 and accompanying text.

state on its own authority (beyond the *Entebbe* principle). A different question is the permissibility of collective humanitarian intervention on the authority of the United Nations or of a regional body such as the Organization of American States. Humanitarian intervention in Iraq in the aftermath of the Gulf War was justified as part of the collective self-defense action against Iraq, discussed below. There may be other circumstances in which genocide or other gross violations of human rights pose a threat to international peace and security and may warrant action by the Security Council. Humanitarian intervention by military force on the recommendation of the General Assembly or a regional organization such as the Organization of American States raises more difficult issues. But that too is a subject for another lecture.⁷

Ideological Intervention: Socialism and Democracy

The principal exceptions to Article 2(4) claimed during the Cold War were manifestations of the Cold War itself. In 1968, the U.S.S.R. asserted what came to be known as "the Brezhnev doctrine": a socialist state was entitled to intervene by force in another socialist country to preserve socialism there. Needless to say, the United States rejected the Brezhnev doctrine. The rest of the world also rejected it.

Later, over time, the United States began to develop an exception of its own, sometimes denominated the "Reagan doctrine." According to that doctrine, the United States — and presumably any state — has the right to use force to help preserve democracy in a country where it exists, and even to introduce and maintain democracy where it does not exist. Some such doctrine was invoked by the United States to justify its invasion of Grenada in 1983. In 1989 — after the Cold War had ended — the United States made similar claims to support its invasion of Panama. The Soviet Union rejected the claim that the United States had a right to invade either Grenada or Panama. The international system condemned both invasions in overwhelming votes in the United Nations Security Council and in the General Assembly.⁸ The Organization of American States adopted no resolution on the United States invasion of Grenada, but its members generally expressed disapproval.

In 1986, in the *Nicaragua* case, the International Court of Justice

7. That lecture might address also the possibility of multilateral intervention to establish, maintain or restore democracy or a particular, legitimate, democratically elected government.

8. On Grenada, see Henkin in *MIGHT V. RIGHT*, *supra* note 4, at 54 n.27, 68 n.29. See generally the articles in 28 *AM. J. INT'L L.* 131-75 (1984). In regard to Panama, see sources cited in Henkin, *infra* note 11, at 312 n.76.

in effect rejected both the Brezhnev doctrine and the Reagan doctrine. The Court said that it could not

contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. . . . to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a state.⁹

The Cold War, I conclude, did not establish any exceptions to Article 2(4) that would permit unilateral use of force against another state, other than the *Entebbe* principle.

The Exception for Self-Defense: Article 51

The U.N. Charter itself explicitly recognizes one exception to the prohibitions of Article 2(4). Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .

The Cold War saw repeated efforts to extend that exception.

Article 51 seems clear and unambiguous: A state may use force in self-defense in response to an armed attack. Early during the Cold War years, however, some writers argued that by referring to the inherent "right" of self-defense, Article 51 intended to reaffirm the right of self-defense as it existed before the U.N. Charter, which permitted use of force in self-defense even in circumstances that did not include an armed attack. That Article 51 expressly permits the use of force in self-defense when an armed attack occurs, they argued, did not limit the traditional, inherent right of self-defense even when there had been no armed attack.

Interpretations of permissible self-defense under Article 51 were not impervious to the tensions of the Cold War. The United States, for example, rejected the permissive interpretation of Article 51 by its al-

9. See *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14 (June 27).

lies at Suez in 1956, in part because the United States feared military involvement by the U.S.S.R. In its confrontations with the U.S.S.R., the United States itself for many years was careful not to diminish the restraints of the law of the Charter and resisted claiming the right of self-defense where there had been no armed attack, as in the Cuban Missile Crisis. Beginning with the Reagan Administration, however, the United States began to advance expansive interpretations of the right of self-defense. The Reagan Administration took a broad view of the meaning of "armed attack" when it justified mining Nicaragua's waters as an action in collective self-defense with El Salvador because Nicaragua was supplying arms to rebels in El Salvador. To justify its bombing of targets in Libya, the Reagan Administration defined armed attack to include a terrorist act at an establishment frequented by U.S. soldiers in Germany for which the United States held Libya responsible.

In Panama — after the Cold War had ended — the Bush Administration attacked more fundamentally both the prohibitions of Article 2(4) and the limited exception in Article 51. The Panama invasion was a particular disappointment to supporters of the rule of law in international relations. The end of the Cold War had relaxed the stresses on the law of the Charter and had raised hopes for a new order based on respect for international law. Neither the U.S. nor the U.S.S.R., it was assumed, would be tempted henceforth to flout or distort the law as they had sometimes done for cold war ends. Yet in 1989, after the Cold War, the United States invaded Panama. Sending 25,000 troops into Panama clearly violated that country's territorial integrity. Toppling the Noriega regime and kidnapping Panama's Head of State constituted clear violations of Panama's political independence.

The justifications invoked by the United States compounded the blow to the law of the U.N. Charter.¹⁰ The United States asserted a right to use force when there was no armed attack, seeking to justify the invasion of Panama as in self-defense against harassment of U.S. nationals and against drug smuggling into the United States. The United States could be understood as justifying the use of force even if it was not in self-defense, so long as there was "just cause." The United States seemed to justify use of force if "the people" later welcomed the invasion.¹¹

10. I have discussed the unfortunate consequences of extravagant justifications in my Panama article, cited *infra* note 11, at 314. See also note 81 of that source, quoting the concurring opinion of Justice Jackson in *Korematsu v. United States*, 323 U.S. 214, 244-48 (1944).

11. See Abraham D. Sofaer, *The Legality of the United States Actions in Pan-*

In Panama, the end of the Cold War may have led not to a reaffirmation but to a subversion of the law of the Charter. Fortunately for the rule of law, the invasion of Panama, and by implication the justifications claimed for that invasion, were overwhelmingly rejected by governments and by international lawyers. The expansive view of permissible self-defense promoted by the United States during the past decade had been rejected by the International Court of Justice in the *Nicaragua* case.¹² The Court expressly stated that the right of self-defense is available only when there has been an armed attack.¹³ The Court also espoused a strict view of what constitutes an armed attack.¹⁴

Governments and international lawyers generally have accepted the principles enunciated by the International Court of Justice. It is fair to say that an impartial, authoritative judgment as to the state of international law today — after the Cold War — would reaffirm the strict view of Article 51: a state may use force in self-defense only in response to an armed attack, strictly construed.

The Law of the Charter and the Gulf War

Fortunately for the rule of international law, the strict view of the law of the Charter, including a strict view of the law as to self-defense, was reaffirmed in the Persian Gulf crisis in 1990. In that case, Iraq's invasion of Kuwait was a clear violation of Article 2(4). Iraq sought to justify its invasion by emphasizing the need to end feudal government in Kuwait, though — not surprisingly — Saddam Hussein did not claim he would bring "democracy." Iraq claimed the right to act in self-defense, in defense of its vital interests. Iraq claimed its cause was just, perhaps echoing the claim of the United States which had used "just cause" as the code name for its invasion of Panama.

The United States led the Security Council and the world community in dismissing Iraq's justifications for invading Kuwait. Understandably, the United States attempted to distinguish Kuwait from Panama, though many critics did not see compelling differences between them. I wish to believe that taking the lead to vindicate the law of the Charter against its violation by Iraq will help the United States revert to the original meaning of Articles 2(4) and 51 on which the United States insisted during the first decades of the Cold War. I hope

ama, 29 COLUM. J. TRANSNAT'L L. 281 (1991), and my response, *The Invasion of Panama Under International Law: A Gross Violation*, *id.* at 293.

12. See *supra* note 9 and accompanying text.

13. *Nicaragua*, 1986 I.C.J. at ¶¶ 193-95, 210-11, 232.

14. *Id.* ¶ 195.

that leadership in the Gulf War will help the United States disown the distortions of the law in which it engaged in the case of Panama. I hope that U.S. pride in its victory in the Gulf will be transmuted into pride in maintaining the law of the Charter.

Law and the New International Order

The law is clear, after the Cold War as during the Cold War. I sum it up: A state may use force against another state only in self-defense against armed attack. Perhaps a state may use minimal force against the territory of another state if necessary to extricate hostages, but a state may not, on its own authority, invade another state to replace its government even if that government had been guilty of gross violations of human rights. A state may not use force against another to preserve, impose or promote any political or economic system, not even freedom of enterprise, not even democracy.

That is the law; in my view it is also what the law ought to be. Proponents of a more relaxed law conjure up hard hypothetical cases, urging, for example, that one state should be free to invade another country to prevent a holocaust or to depose a genocidal regime. That argument is seductive but specious. In fact, though writers have argued otherwise, no state has pressed for an exception to the law of the Charter that would permit invading another country to remedy even the grossest of human rights violations. In fact, no state has gone to war against another state for the purpose of ending human rights violations. In the 1930's neither the European powers nor the United States went to war against Hitler because of his genocidal policies. In the 1970's no state went to war against the Pol Pot regime in Cambodia because of its notorious practice of massive genocide. In 1981, no state did more than voice disapproval when the Syrian Government reportedly killed tens of thousands of its citizens at Hama. The fact is that states will not go to war to prevent or terminate atrocities, but a state that has its own reasons of perceived national interest for invading its neighbor will often cite the latter's human rights record as a pretext for its invasion.¹⁵

Just as the law of the Charter does not, and ought not, permit a state to use force against another state to remedy human rights violations, the law does not and ought not permit the use of force against another state to impose or preserve democracy. The Reagan doctrine grew out of the Cold War; in fact, its commitment was not to democ-

15. As did the Government of Vietnam to justify its invasion of Cambodia. See text following note 6.

racism but to anti-Communism. During those years, the United States continued to support repressive, anti-democratic regimes, so long as they were not Communist. In fact, no country has invaded another to bring democracy to that state. In fact, in every instance in which the United States has gone to war — Korea, Vietnam, the Persian Gulf — it has done so for reasons other than democracy, and no one believes that the United States invaded Panama to vindicate an election or to bring democracy. After the Gulf War the United States did not use its armed forces or the influence they carried to establish democracy either in defeated Iraq or in liberated Kuwait.

After the Cold War, any assertion by the United States that it is using force to preserve, restore or impose democracy will be seen as a design for *Pax Americana*. Even if the world recognized that U.S. democracy is healthy and that democracy in some other countries is absent or deficient, the world would not agree to law that would permit the United States to invade another country to bring democracy there. Even if, more generally, all the world were capable of distinguishing democratic from non-democratic governments, and were persuaded that some state might be prepared to invade another country to bring democracy there, the world would not, and ought not, accept law that would permit such an invasion. The costs of military invasion, for invader and for invaded, are too high, the dangers of abuse too great. In the age of weapons of mass destruction, in a system of states, the law governing the unilateral use of force must continue to favor peace and the independence of states even above democracy. Democracy will have to be promoted by means other than war.¹⁶

After the Cold War, too, there is no reason for loosening the restraints of law to permit force in “self-defense” when there has been no armed attack. To permit force to defend other “vital interests” would be to permit force anywhere; claims of vital interest have been available to every aggressor from Hitler to Saddam Hussein. Law must reflect a “categorical imperative”: The only norm that states can accept as a general principle applicable to all states in all circumstances is the provision set forth in Article 2(4), subject only to the limitations set forth by Article 51; a state may use force only in self-defense against an armed attack.

In short, in my view, any new international order after the Cold War and the Gulf War should be the old order of 1945. It is reasonable to demand, and to expect, that deviations previously justified by the

16. A different subject is whether the U.N. or the OAS might authorize force to restore or preserve democracy. See *supra* note 7 and accompanying text.

Cold War will be abandoned. In particular, there is reason to hope that the United States will recommit itself to the rule of law, including the law against war; that the United States will itself scrupulously respect that law; and that it will insist on adherence to it around the world, as it did when Iraq invaded Kuwait.

I have been discussing the law of the Charter governing the use of force by a state on its own authority. A different question — a series of questions — involve the collective use of force to maintain or restore international peace and security pursuant to authorization by the U.N. Security Council. That is the subject of my second lecture.

II. COLLECTIVE SECURITY AFTER THE COLD WAR

In addition to outlawing war and the use of force, the United Nations Charter established institutions with authority to maintain or restore international peace and security. The Cold War, I have said, subjected the substantive law of the Charter to strains and stresses, yet that law has survived and may regain its intended vigor. The institutions designed for maintaining international peace and security, notably the United Nations Security Council, were never fully developed, and have not exercised the principal functions intended for them. During the Cold War, the Security Council sometimes contributed to international peace by providing peaceful settlement of disputes and auxiliary forms of peacekeeping, but the Council provided only modest “collective security” actions to restore international peace and security after it was breached. During the Cold War, one must conclude, the Security Council did not serve as a significant deterrent to aggression or breaches of the peace. It remains to be seen whether after the Cold War — and after the Gulf War — the Security Council might come to play the role intended for it.

The Charter Plan

It is important to recall the original plan of the framers of the Charter. By Article 24(1) Member states have conferred upon the Security Council primary responsibility for the maintenance of international peace and security and have agreed that the Council is acting on their behalf when it carries out its duties. Under Article 25 Member states have also agreed to accept and carry out the decisions of the Security Council in accordance with the Charter.

The Charter sets forth the authority and the responsibilities of the Security Council in two chapters. Under Chapter VI the Council has authority to pursue the pacific settlement of disputes. Our concern is with Chapter VII, “Action with Respect to Threats to the Peace,

Breaches of the Peace, and Acts of Aggression.”

The plan of Chapter VII is reasonably clear and its language careful and purposeful. Under Article 39 the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” By Article 39 the Council can either recommend or decide on measures to be taken. Security Council recommendations have important weight but do not impose legal obligations on Member states. In contrast, Security Council decisions as to measures to be taken are generally mandatory and Member states are legally obligated to implement them.

Article 40 authorizes the Security Council to call for provisional measures “to prevent an aggravation of the situation.” Under Article 41, the Security Council may decide on measures not involving the use of armed force, including economic sanctions, and may call upon states to apply such measures. If the Security Council considers that sanctions under Article 41 would be inadequate, or if such sanctions have proved to be inadequate, Article 42 authorizes the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

Article 42 does not indicate which air, sea, or land forces the Security Council may use in its actions. However, Article 43 provides that all members of the United Nations “undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.” Clearly, the framers contemplated that the Security Council would take actions under Article 42 using forces provided by states pursuant to Article 43.

Collective Security During the Cold War

Thanks to the Cold War, no Article 43 agreements were concluded and therefore no forces were made available to the Security Council “on its call.” That failure raised the question whether the Security Council could take action under Article 42 in the absence of Article 43 agreements. During the Cold War, that question remained hypothetical since the Security Council could not agree on any military action against aggression. In one instance, in June 1950 — thanks to the temporary absence of the Soviet Union from the Security Council so that it could not exercise its veto — the United States led the Security Council in mounting an action in support of South Korea against

aggression from the north. The Security Council recommended that states come to the assistance of the Republic of Korea and requested that states put their forces under a unified command headed by the United States. The Security Council, I note, *recommended* military action; it did not purport to order states to come to the assistance of Korea. Whether, in the absence of Article 43 agreements, the Security Council has legal authority to order states to provide forces to help defend a victim of aggression is open to serious question. In Korea, the Security Council did not do so.

There was no military action under the auspices of the Security Council between 1950, the date of the Korean action, and 1990, the date of the Gulf War. In the Gulf crisis, the Security Council first demanded that Iraq withdraw from Kuwait. Then it decided on an embargo and other economic sanctions against Iraq and called upon — that is, ordered — states to comply with them. Then the Security Council called upon “those Member states cooperating with the Government of Kuwait” to monitor and secure compliance with the embargo, by force if necessary. Finally, the Security Council authorized states cooperating with Kuwait “to use all necessary means, including armed force, to liberate Kuwait” and to restore international peace and security in the area.

In law and in fact, the action in the Gulf was different from that in Korea in important respects. Strictly, the military action in the Gulf appears to have been not a collective security action by the Security Council under Article 42, but a collective self-defense action pursuant to Article 51. Acting presumably within its authority under Articles 39 and 42, the Security Council authorized, or confirmed the right of, the victim of an armed attack and its friends, acting in self-defense under Article 51, to liberate territory conquered by an aggressor. In the Gulf — unlike Korea — the Security Council did not even *recommend* military action; the Council merely *authorized* it. The Council resolution did not address all U.N. members, but only Kuwait and its allies. The forces sent to the Gulf were not denominated United Nations forces; they were the forces of “states cooperating with Kuwait.” They had no U.N. command and used no U.N. flag.

International lawyers have debated the legal character of the action against Iraq and the legal significance of the Security Council resolution authorizing it. Since Kuwait had been the victim of an armed attack, Article 51 permitted Kuwait to use necessary force against the aggressor in self-defense, and permitted any states invited by Kuwait to do so to act with Kuwait in collective self-defense, “until the Security Council takes action to restore international peace and security.” During the early weeks following invasion and conquest by Iraq, neither

Kuwait nor other states attempted to use force to liberate Kuwait; instead they sought and obtained Security Council measures, pursuant to Article 41, "not involving the use of armed force," including an embargo and other economic sanctions.

Lawyers have debated whether the right of Kuwait and its allies to use force in collective self-defense survived the Security Council's embargo resolutions. In my view that was for the Council to decide. Since Article 51 authorizes the use of force in self-defense "until the Security Council takes action to restore international peace and security," and since Article 24 gives the Council primary responsibility for the maintenance of international peace and security, I think the Security Council had authority to preclude or postpone military action to liberate Kuwait.¹⁷ The question is whether the early resolutions, including those imposing sanctions, intended that effect. In the end, the resolution authorizing Kuwait and its allies to use force to liberate Kuwait eliminated any limiting effect of the "until" clause in Article 51 and rendered moot whether the earlier resolutions intended to preclude military action.

Law and Collective Security in the Decades Ahead

Kuwait was liberated and fighting in the Gulf War ended in 1991. The Security Council adopted, and may adopt in future, additional resolutions directed to and against Iraq that may further illuminate the reaches of Security Council power.

The Gulf War afforded the Security Council its first opportunity to impose economic sanctions against an aggressor¹⁸ and to authorize Member states to enforce them by military action. The Gulf War also

17. Article 51 authorizes action in self-defense "until the Security Council takes action to restore international peace and security." I read that to mean "until the Security Council assumes responsibility." It is arguable that Article 51 permits the use of force by the victim until the Security Council mounts an "action" under Article 42, or even until — by such action — the Security Council succeeds in restoring international peace and security. That issue also became hypothetical when the Security Council authorized the military action.

The Security Council authorized Kuwait and its allies not only to liberate Kuwait but also "to restore international peace and security in the area." U.N. SCOR (2936rd mtg.), U.N. Doc. S/RES/678 (1990). That suggests that the right to use force in self-defense is not limited to liberating conquered territory but includes the right to prevent or deter resumption of the aggression. Perhaps it suggests, too, that the Security Council saw the use of force it was authorizing as not merely action by the victim in self-defense but also as action by the Security Council under Articles 39 and 42.

18. The Security Council had previously ordered economic sanctions against South Africa in 1963 and Rhodesia in 1966.

provided a precedent for Security Council support for the right of states to use force in self-defense in response to an armed attack even after a lapse of time and intervening economic sanctions. Perhaps the Gulf War will bring no more to the future than those particular precedents. But in a system no longer paralyzed by cold war, the successful end of the Gulf War may inspire a quest for a new world order that will include a more effective system of collective security. An obvious possibility is to revert to the system contemplated in 1945 and to try to make it effective. But the world of 1991 is not the world of 1945. In 1945 the world consisted of some fifty states, all prepared, however reluctantly, to recognize the special status of the Big Powers and to accord them special authority and responsibility, including permanent membership on the Security Council with a right of veto. Today, the world consists of 170 states, many of which resent the Big Powers, and whose numbers and solidarity have inspired them to claim a voice in the international political system. During the Cold War, the majority of these states expressly committed themselves to non-alignment; in fact, many of them tilted against the United States. With the end of the Cold War and the assumption by the United States of leadership in the Security Council, many "Third World" states are likely to be particularly resistant to anything that might smack of U.S. hegemony.

If the Security Council is to be revitalized it may be necessary to restructure it. In 1945, the parties to the U.N. Charter accorded permanent membership in the Security Council to five members. Only two of those members could claim "super-status" in recognition of their dominant military power; the others claimed it in large part as a reward for membership in the alliance that had resisted and defeated Hitler. Today the Second World War is history and many states — if they accepted permanent membership in principle — might ask whether France and the United Kingdom are entitled to permanent member status more than, say, India, Germany, Japan, Brazil.¹⁹ Over the years, moreover, there has been increasing resentment of the veto. The permanent members will not agree to give up their veto power; but might they be induced to accept some limitations on its use, for example, that it shall not be used by a permanent member to frustrate Security Council measures directed against itself when it is charged with a violation of the Charter?

There are reasons to doubt, too, whether other elements in the original Charter plan can be revived. Despite the end of the Cold War,

19. The disintegration of the U.S.S.R. may raise other complex issues as to the composition of the Security Council.

it is not obvious that the Big Powers are prepared to conclude Article 43 agreements with the Security Council, nor is it clear that other states are prepared to negotiate such agreements. Article 43 agreements are legally binding undertakings to provide a "standing U.N. army" on call of the Security Council. Today, in 1992, states may not be ready to make commitments of such major political, military and economic importance. Most likely, I guess, a new world order will have to continue without Article 43 forces. Now it may be necessary to plan for collective security on the basis of less-than-binding commitments for less-than-permanent forces, for actions that the Security Council might recommend rather than command. Perhaps it would be less difficult to negotiate agreements that would enable the Council to provide limited forces or weapons to national forces acting in self-defense. Perhaps it would be somewhat less difficult to negotiate Article 43 agreements on a regional basis, with states providing troops to maintain international peace and security in the region under the authority of the Security Council.

Even these possibilities seem unlikely, and the end of the Cold War and the lessons of Kuwait will probably suggest only less radical measures. The responses by the Security Council in Korea and Kuwait, 40 years apart, provide two models for Security Council action. In Korea, the Security Council mounted a U.N. force of national contingents provided *ad hoc* by willing states to defend a victim of aggression and to restore international peace and security. In future, the Security Council might again recommend that Member states provide contingents to a U.N. force under a U.N. command. Indeed, the Security Council might also consider waking the dormant Military Staff Committee established pursuant to Article 43 and have it make plans for such an eventuality. Activating the Military Staff Committee even in this limited way might contribute something to deterring aggression.

The Gulf War has provided a second model, for an action not of collective security but of collective self-defense. As in Kuwait, the Security Council might again carry out its primary responsibility for international peace and security by allowing the victim of aggression and its allies to take the lead in deciding how to counter that aggression. The Security Council might monitor such military action to assure that the states engaged in it respect principles of necessity and proportionality.

Both the Korean model and the Gulf model depend on forces supplied voluntarily by cooperating states, thus putting the onus on the few states willing to bear it. Ordinarily, these states would have some particular interest in peace and security in the circumstances and, perhaps inevitably, that special interest would tend to obscure the larger, collec-

tive motives and purposes of the military action. In Kuwait, in fact, the United States failed to persuade the world that it was acting for the purpose of restoring international peace and security and erasing aggression, rather than to assure the flow of oil and other U.S. interests in the Middle East. Perhaps it is not possible to disentangle complex webs of national interest; perhaps there is no need to try to do so. In any event, relying on forces contributed *ad hoc* rather than on permanent Article 43 forces may be the only realistic option available, and the essentially voluntary character of "Article 51 forces" may have advantages.

III. A CONSTITUTIONAL *CODA*: WAR POWERS

In the Gulf crisis, questions under international law as to the authority of the United States to use force to liberate Kuwait became entangled with issues under the U.S. Constitution as to the authority of the President to engage U.S. armed forces in that enterprise without authorization by Congress.

The war powers of Congress and the President is a big subject.²⁰ In brief, except in response to an attack upon the United States, the President has no authority to go to war without authorization by Congress. Presidents do not like to be reminded of that limitation, but there is no support for any Presidential War Power in constitutional text, in "original intent," in history, in principles of democratic government, or even in good sense. In the Persian Gulf crisis, however, the argument was made, as it had been made earlier in Korea, that the President had authority to use force to liberate Kuwait because of U.S. responsibilities under the U.N. Charter. Essentially, the Bush Administration argued, the Charter is a treaty of the United States and it is the President's duty to take care that treaties, like other laws, be faithfully executed.²¹ Thus, Presidential spokesmen reasoned, in the circumstances of Kuwait, the Charter gave the President authority to go to war even if he lacked such authority in the absence of the treaty.

That argument is not persuasive. In general, the President has a duty to carry out U.S. obligations under a treaty and that duty may imply authority to do so. Therefore, in the Gulf crisis, if the United States had a legal obligation deriving from the Charter to use force to liberate Kuwait, the President's claim to constitutional authority to use such force would have substantial plausibility. The Charter, however,

20. I draw here on HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972), and *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990).

21. U.S. CONST. art. II, § 3.

did not impose any legal obligation on the United States to come to the aid of Kuwait; Article 51 merely permitted the United States to do so. Since the United States had no legal obligation to use force, the President had no constitutional authority based on treaty obligations to commit U.S. forces to the enterprise.

Similarly, the United States had no legal obligation to come to the assistance of Kuwait as a result of any binding Security Council resolution. The Security Council's resolution authorized — therefore permitted — the United States to use force. The Security Council did not, and probably could not, order the United States to come to the assistance of Kuwait. Only a mandatory resolution of the Security Council, legally binding on the United States, might give the President constitutional authority to take care that it be faithfully executed.

CONCLUSION

Now my title, "After the Cold War," means also after the Gulf War. In that war, victory was quick and less costly to the United States than we had feared it would be.²² But the United States has not yet clarified the purpose of its involvement and leadership in the war. We have been told that victory in the Gulf has ushered in a new world order, but we have not been told what kind of order it will be, or what will be new about it, or how the United States hopes to achieve it.

After the Cold War and victory in the Persian Gulf we must ask ourselves what principles we are prepared to preach, live by, and promote as the law governing the use of force in international relations. Skeptics may ask, as George Kennan did 40 years ago, whether there should be a rule of law governing the use of force between states.²³ In my opinion, nothing that has happened in the past half century suggests that the world would be more peaceful, more democratic, or more just if we abandoned the effort to maintain international peace by law and collective security. Nothing that has happened in the past half century persuades me that peace, democracy, or justice would flourish better under different law or fundamentally different (and practicable) arrangements for maintaining international peace and security.

Victory in the Gulf War has given the United States new prestige, opportunity, and responsibility. It is in the interest of the United States, and of all other states, that the United States commit itself to

22. We have not reflected sufficiently on the costs in death and destruction in Kuwait and in Iraq.

23. GEORGE F. KENNAN, *AMERICAN DIPLOMACY: 1900-1950*, at 95-99 (1951). Compare my response in *HOW NATIONS BEHAVE* 322-39 (2d ed. 1979).

peace through law as the basis for the new international order. Such a commitment will require leadership. It will require self-restraint. It will require that we make clear to ourselves and to others our commitment to international law. The United States will have to persuade the world that in Iraq it fought for law rather than for oil only. It will require the United States to reject the Reagan doctrine, and to live down U.S. "victories" in Panama and Grenada and the justifications it claimed for those actions. The United States has proclaimed a new world order hospitable to constitutionalism, the rule of law, democracy, and respect for human rights, but it must make clear that those goals too can be achieved only through peaceful means.

In its principal, essential commitments, the new world order of the decades ahead, I hope, will resemble the old world order of the months following the Second World War. I hope the new world order will bring a recommitment to the Law of the U.N. Charter as it was intended, as the United States helped to conceive it in 1945 — the law of Article 2(4), which prohibits the use of force between states subject only to an exception for self-defense in response to armed attack.

A new world order must also include arrangements for collective security. Again, the new order might well be the old order of 1945, at least as a starting point. One cannot assume that what was agreed in 1945 is necessarily appropriate for 1991 in all its detail, but until states can reach agreement on improvements, the law and institutions of the Charter as conceived in 1945 appear to provide the best hope today for saving successive generations from the scourge of war. Even that system is expensive — in resources, in lives, and in political sacrifices — and may require planned improvisation and *ad hoc* modification to make it acceptable.

After the Cold War, and after the Gulf War, one may hope also for an expansion of other law not unrelated to war. The end of the Cold War, the end of the Gulf War, and what we learned of Iraqi nuclear plans might strengthen the hands of the Big Powers to enforce a more stringent nuclear non-proliferation treaty. But nuclear weapons do not pose the only or even the greatest threat to world peace. One lesson of the Gulf crisis, surely, is that the proliferation of armaments of any kind disrupts the international order and threatens international peace and security. The U.N. collective security system will not be secure so long as weapons are freely and extravagantly bought and sold beyond any authentic needs of national security.

After the Cold War and victory in the Persian Gulf, the United States can pursue a new world order that resembles the old world order in a new light. That order is one in which nations recommit themselves to refrain from the use of force; to pursue collective rather than unilat-

eral action; to join in collective security or in collective self-defense if collective security fails; to control arms and prevent arms proliferation. Pursuing these commitments will also serve to promote respect for human rights, and justice, and decency in international life.

