In Fear of International Law (The George P. Smith Lecture in International Law)

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In Fear of International Law

Ivan Shearer*

The thesis of this paper is that governments of some otherwise enlightened states are increasingly fearful of acknowledging the restraints imposed on them by existing international law. They are also reluctant to enter into new commitments by way of international conventions that would expand the reach of international law. The paper asks whether these fears are based on a true understanding of international law or on some distorted view of it. It will draw comparisons and some contrasts between Australia and the United States in their reactions to a number of recent events as well as to some enduring situations of contemporary relevance. Had time (and the limits of my research) permitted, one might also have examined public attitudes toward international law in China, Japan, and Russia in this context, where similar fears appear to be entertained. France, Germany, Italy, and the United Kingdom, also enlightened states, appear by contrast to belong to a group more dedicated to international law. As Robert Kagan has recently remarked, the experience of two world wars at close quarters, and the formation of the European Union, have made the European countries more dedicated to process, where the United States is more interested in results.¹

I. The Nature of International Law

As the Latin adage has it, ubi societas ibi jus: “where a society exists, law exists also.” It is a natural consequence of men and women living in society that they must necessarily be governed by rules. Whether those rules are just or even rational is another question. As Sir Thomas More, King Henry VIII’s chancel-

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¹ Robert Kagan, Power and Weakness, Pol’y Rev., June–July 2002, at 3. Or is it that the U.S. government is split between those supporting vigorous, decisive, and unilateral action, and those supporting multilateral approaches, including working through the United Nations, as declared by David Frum and Richard Perle in their recent article Beware the Soft-Line Ideologies, Wall St. J., Jan. 7, 2004, at A12. Those in the first camp are said to include Vice-President Cheney, Defense Secretary Rumsfeld, and Paul Wolfowitz. Those in the second include former Secretary of State Colin Powell, Deputy Secretary Richard Armitage, and Brent Scowcroft.
lor, and revered now as a martyr and saint, once declared, it is better to have bad law than no law at all. A reminder of this is the near anarchy that has prevailed in recent times in such places as Somalia, Rwanda, and Liberia, where any idea of civil society broke down.

We date the emergence of a clear concept of a society of nations bound by international law to the recognition of the independent states of Europe in the Peace of Westphalia, 1648, following the end of the wars of religion. International law is thus a relatively new phenomenon. It is dynamic in nature as the rules necessarily emanating from the fact of states living in society are made more numerous and complex in order to deal with changing circumstances and new needs. Moreover, in addition to the rules found necessary in any society, a whole host of new rules has come into existence as the result of political efforts to transform international society into an international community.

The primary reflection of this transition from society to community lies in the creation of the League of Nations after the First World War and the United Nations (U.N.) after the Second World War. Yet some nations stood aside from the former, notably the United States, or later withdrew from it. They feared a diminution of their sovereignty. Even today, deep-seated reservations are held in certain influential quarters in both Australia and the United States in relation to the United Nations. There are also new areas of law developing in what has been called the international law of cooperation, such as in the regulation of trade, the protection of natural resources, and the control of the environment.

In order to evaluate this fear, it is important to have a clear view of the sources of international law. As confirmed in article 38 of the Statute of the International Court of Justice, those sources are: (a) treaties, conventions, and other forms of international agreement between states that bind them (contractually) in their relations; (b) customary international law based on general state practice; (c) general principles of law common to national legal systems; and (d) judicial decisions of international and national courts and tribunals and the opinions of learned writers, as subsidiary sources of law.

It can be seen that international law is essentially a voluntarist system of law. The first source is most obviously voluntarist. No state is obliged to enter into a treaty with any other state, but if it does so it accepts the rights and obligations flowing from that treaty. For example, the United States has chosen not to be-

2. The German theorists of the nineteenth century expressed this as a transition from Gesellschaft to Gemeinschaft.
come a party to the Rome Statute for an International Criminal Court. Australia, by contrast, has accepted that treaty. What prior legal principle makes such a treaty binding? That principle is *pacta sunt servanda*—the general principle common to all national legal systems that agreements are to be observed in good faith. Some would buttress this legal justification with a political one. Formal promises are binding because states seek reciprocity and security in relations: no one trusts a person (or a state) who breaks his (or its) promises.

The second source is also essentially voluntarist, but only if understood with a degree of subtlety. Customary international law consists of those principles and rules that have been accepted by the great majority of states, as evidenced by their practice or acquiescence, and provided further that there is a demonstration of their conviction that the posited rule is—or ought by logical or practical necessity to be³—binding on them (*opinio juris*).⁴ As laid down by the International Court of Justice in the *North Sea Continental Shelf* cases,⁵ perfect uniformity of state practice is neither to be expected nor required for a rule to enter into force as customary international law. But it is essential that the rule be accepted by the great majority of states, including those most affected by the existence of such a posited rule. Moreover, the practice of the more powerful states is more significant than that of the smaller states since it is more likely that the practice of the former, by virtue of their widespread interests, would have “brought them that way” previously. Extending the metaphor of the great Belgian jurist Charles De Visscher, likening the field of customary law to a piece of vacant ground, one

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3. This is my preferred interpretation of the Latin expression *opinio juris sive necessitatis* (sometimes rendered as *opinio juris ex necessitate*). For to state that a rule must already be thought to be binding at the same time as initial state practice has occurred presents a logical difficulty in that the first examples of state practice must have been based on a false assumption. If, however, “necessitatis” is conceived of in terms of the natural law or of logical or practical necessity, the difficulty is avoided.

4. Practices unaccompanied by the conviction that they are required by law remain in the realm of courtesy or comity. An example often given is the salute customarily given at sea by the warship of one nation to that of another. Weightier examples include the non-recognition of a duty to extradite criminals in the absence of a treaty obligation, and the absence of a legal duty to grant development assistance to poorer countries, both of which practices are nonetheless widely observed. The latter example is often regulated through the mechanism of memoranda of understanding (MOUs), which are agreements in non-binding form, as evidenced by the avoidance of language normally associated with legally binding intentions.

could say that the footprints of the elephants are more indelibly marked than those of the rabbits.\footnote{Charles De Visscher, Theory and Reality in Public International Law 254–55 (P.E. Corbett trans., Princeton Univ. Press rev’d ed. 1968) (1957).}

The emergence of customary law out of state practice, especially in the form of adherence to international conventions of a normative character, adhered to by a large number of states, but not by the United States, might be ruled out according to the criteria specified by the International Court of Justice (ICJ) in the passages referred to above. Moreover, the Court has also recognized the notion of the “persistent objector,” that is, of the right of a state to opt out of any consensus gathering around a posited rule, provided it makes its contrary position clear early enough and before the rule has crystallized.\footnote{See, e.g., Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).} Nevertheless, fears remain in certain quarters in the United States that political majorities in the United Nations and other forums may conspire to promote rules of customary international law inimical to the interests of the United States. Specific examples of these concerns will be discussed later in this paper.

The third source—general principles of law common to civilized nations—consists of a body of rules of an auxiliary, but necessary character, that would not, owing to their nature, be the normal subject of state practice as such. Examples of such rules or principles are \textit{pacta sunt servanda}, the principle of good faith, notions of equity and of due process of law, estoppel, and methods of proof of facts.\footnote{See The Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 3 (Apr. 9).} Some see in this source of law recognition of the continuing influence of natural law. In practice it seems that the ICJ has been satisfied that a principle is general if it is recognized in both the common law and the civil law traditions.

The fourth, and final, source of international law specified in the Statute of the International Court of Justice is the oddly grouped categories of judicial decisions and the opinions of learned writers (quaintly termed in the Statute “the most highly qualified publicists of the various nations”). However, article 59 of the Statute makes it clear that decisions of the ICJ are not binding except as between the parties to the decision. (Decisions, however, do tend to have strong precedent value.) It should not be overlooked that national courts also can make valuable contributions to the understanding and interpretation of international law in the course of decisionmaking on questions of international law that arise as part of domestic law. Examples include the interpretation of such conventions
as the 1951 Refugee Convention, the 1984 Torture Convention, the 1929 Warsaw Convention on International Air Carriage, as well as of the application of customary law, for example the doctrine of sovereign immunity. Perversely, in the last case, national courts by virtue of internal rules of stare decisis can entrench outdated views of customary international law. The U.S. courts have made significant contributions to the development of international law. The awards of international arbitral tribunals have also had a significant impact on the development of international law.

It would be invidious, and probably impossible, to single out writers of authority who have most influenced the development of international law. It is easier to recall the names of some of those authors who have published general treatises on international law, which tend regularly to be cited before both international and national courts and tribunals. Oppenheim springs most readily to mind in the Anglophone literature, in its various editions through to Lauterpacht and now Jennings and Watts. Those works tend not to be argumentative but to state what is clearly established as international law. It is notable that few general works covering the whole of international law have been written in recent times by American scholars. The field seems to have been left mostly clear for British, other European, and Latin-American writers. (I can offer no explanation for this.) Argumentative writers, who propose in specialized monographs or periodical articles a particular view of a disputable question, will be cited in support of whatever interest is espoused in judicial or arbitral proceedings, or in diplomatic exchanges. The qualification “most highly qualified” is

9. In Trendtex Trading Corporation v. Central Bank of Nigeria, 1 Q.B. 529 (1977), Lord Denning M.R. was willing to disregard prior binding decisions of the House of Lords, reflective of the old international law rule of absolute sovereign immunity, in favor of giving effect to the more recently developed rule of qualified, or restrictive, immunity that would not shield the trading or commercial activities of governments from suit in the English courts. His fellow judges in the Court of Appeal, however, shrank from this step and decided the case against immunity on other grounds.


11. An outstanding example is the award of the arbitral tribunal established by Canada and the United States in Trail Smelter 3 R.I.A.A. 1905 (1941).


13. As one of my colleagues is apt to joke, “If it’s in Oppenheim, it’s international law.” By necessary implication, if a rule is not to be found there, it is either not law or not yet clearly established as such (lex ferenda).
not taken literally in practice, although of course the better known the author the more attention is likely to be paid to the opinion. In the extensive (and seemingly ever increasing) periodical literature and number of monographs on particular topics support will be found for almost any proposition. But this is not to say that the discipline of international law is in disarray. The breadth and weight of general opinion must also be taken into account.

It is therefore evident—at least to me—that there is nothing intrinsically threatening to the vital interests of states in the sources of international law. The two major sources are essentially voluntarist in nature. There is no international legislature capable of forcing states to submit to the wishes of a majority. The international community makes laws for itself through persuasion and consent. Insofar as international custom is constitutive of universally binding law, and insofar as practice may be constituted by the *opinio juris* and subsequent concordant practice of states adhering to multilateral conventions, there is always the opt-out possibility of the persistent objector, as mentioned above, or of the abstention from the practice by one or more of the states which would be especially affected by such a rule.  

II. Public Understanding of International Law

I have deliberately begun this essay with an elementary survey of the nature of international law because of the widespread ignorance about its nature in current political discourse. We must understand the basic elements of the international legal system so that we do not fall into the trap of either undervaluing it or expecting too much of it.

We have experienced a public debate recently in Australia (which is likely to continue) on the relevance of international law to the formulation and execution of government policy, and also on the legitimacy of reference to international

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14. See generally North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) [1969] I.C.J. 4 (Feb. 20). It is implied by dicta of the Court in this case that practice based on the execution of treaty obligations should be discounted as practice potentially constitutive of a customary rule; only free-standing practice should count. This view must be questioned, since if there were 99% adherence to a convention, then logically no parallel customary rule could ever crystallize. The better view, in my opinion, is that customary law emanating from widely accepted multilateral conventions merely reverses the historic order of customary law creation. The *opinio juris* comes first, in the form of what states believe is, or ought to be, the law and as expressed by them in the conference negotiations. Practice then follows in the form of application of the convention's provisions.
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law standards by judges in developing the common law and filling in the gaps left by statute law. Misunderstandings of the nature of international law have been very evident. Polemicists either attribute a false certainty to international law, or dismiss it altogether as irrelevant. There are, I think, parallel emanations of that misunderstanding here in the United States.

In relation to the intervention in Iraq, which began in March 2003, and in which Australia played a significant role as a partner of the United States and the United Kingdom in the coalition forces, critics of the Australian Government asserted that the U.N. Charter forbade such an action in the absence of explicit endorsement by the Security Council. This, as will appear from what I shall argue later, is to take an unduly rigorous view of the Charter and ignores possible (and to me persuasive) considerations that the intervention was compatible with international law. To view international law—and indeed the laws of any domestic legal order—as a rigid set of clear rules is a common error made by non-lawyers everywhere. Journalists and opinion and editorial writers abound who share this misunderstanding.

At the other end of the spectrum lie those politicians and commentators who have read somewhere that “international law is not really law” in the sense that it can be enforced against evil-doers through an international police force, international courts, and international jails. So they readily fall for the line that law is merely the projection of power, and we might as well live with that fact. It is distressing that these people have been given comfort by one who understands international law very well but has become cynical about it. Referring to the system of collective security established by the U.N. Charter in the wake of the intervention in Iraq, Professor Michael Glennon of the Fletcher School of Law and Diplomacy at Tufts University has spoken of the end of a grand “experiment.”15 In my view this is a counsel of despair. I hope it is not widely shared in academic circles in the United States.

At the political level we have to consider the similar views of the Honorable John Bolton, Under Secretary for Arms Control and International Security in the U.S. State Department. At the November 12, 2003 National Lawyers Con-

vention, sponsored by the Federalist Society, Mr. Bolton effectively dismissed international law as a necessary element in the justification of foreign policy. He sees the basis of state power as lying in the consent of the people governed, expressed through national law:

Indeed, there's a fundamental problem of democratic theory for those who contend, implicitly or otherwise, that the proper operation of America’s institutions of representative government are not able to confer legitimacy for the use of force. Make no mistake: not asserting that our constitutional procedures themselves confer legitimacy will result over time in the atrophying of our ability to act independently. . . . [This] has been fundamentally misunderstood in the U.N. system. Many in the U.N. Secretariat and many U.N. member governments in recent Security Council debates have argued directly to the contrary. Increasingly, they place the authority of international law, which does not derive directly from the consent of the governed, above the authority of national law and constitutions.

This argument has been raised in Australia under the banner of “the democratic deficit,” but more in relation to international conventions than in relation to customary law or the U.N. Charter. There was disquiet that Australia might, for reasons of diplomatic expediency, be led into unwise commitments engineered by the United Nations and other committees, which are comprised of representatives of a number of countries, not all of them democratic. That debate led in a short time to the establishment of a Standing Committee of the Australian Parliament to review all international agreements which the executive government planned to sign or ratify in order to advise on their desirability, whether or not their implementation was dependent on implementing legislation. This development enjoyed the support of all the main political parties. By contrast, I do not think that any government leader in Australia would argue that the U.N. Charter does not impose restraints on the nation, and that our ability to use force is entirely a matter for the duly elected government of the day and the Constitution and laws of Australia. The view would be taken that we are necessarily constrained in matters as fundamental as peace and war by our membership in the United Nations and the provisions of the U.N. Charter. After all, does not the Charter itself declare in its preamble the determination of all its members to unite their strength to maintain
international peace and security, and “to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . .”16 This is the community that we freely joined. There are rights and obligations of membership. They are set out in the Charter. There are certainly problems in the current workings of the United Nations,17 but they are not resolved by ignoring or circumventing the United Nations.

The use of international law, or reference to it as a yardstick, by judges in Australia has come in for criticism. Padraic P. McGuinness is a prolific columnist and is also editor of the widely read conservative magazine Quadrant. In newspaper columns during the past few years, and now most recently in an editorial in Quadrant, he has attacked a distinguished justice of the Australian High Court (the equivalent of the U.S. Supreme Court), Justice Michael Kirby. Some of you will remember that Justice Kirby stood where I am standing before you not long ago giving the Branigin Lecture. Mr. McGuinness attacked what he called “judicial adventurism” which produces decisions that, unlike legislative enactments, have retroactive effect. “Where there is no predictability in the law there is no law, only the fiat of unelected appointees who once appointed are accountable to no one.” (Remember that in Australia we do not elect judges at any level of the judiciary.) Without citing a single case or specific example of Justice Kirby’s adventurism, Mr. McGuinness continued:

But Kirby does not believe that judicial adventurism is without principle. He relies on another theory. This is unclear, but seems to be essentially that there are principles of human rights and justice which are inherently true, and only judicial authorities can define them. Where do the judges find these principles? Either they make them up as they go along, or they rely on a theory of natural moral law, either as defined by, say, Catholic natural law philosophy (as

Justices Brennan\textsuperscript{18} and Deane\textsuperscript{19} did in the \textit{Mabo case}\textsuperscript{20} or some other external doctrine. Kirby calls this "legal policy."\textsuperscript{21}

Taking into account Mr. McGuinness' previous writings on this theme, we can understand his dark reference to "some other external doctrine" as a reference to international law. He had earlier castigated international conventions on human rights, the environment, and other topics of relevance to national policy as having been invented by unelected delegates in Geneva, New York, and other places, often representing undemocratic states. He sees Justice Kirby, and some other judges, as smuggling these principles and ideas into Australian law through the back door.

Justice Kirby has not, of course, responded directly to this attack. Judicial propriety forbids this. His answers must be found in his published judicial opinions, as well as in extracurial speeches and papers, of which he delivers many. He recently delivered the Hamlyn Lectures in England.\textsuperscript{22} In these lectures he reflected on the nature of the judicial function and on the more open acknowledgment today than in the world of forty or more years ago that judges are not mere automatons mechanically applying rules handed down from the past but do indeed make law. But he acknowledges limits to the power of judicial lawmaking. One of Justice Kirby's law teachers, the eminent scholar of jurisprudence and international law Julius Stone, invented a telling expression to describe these limits: "the leeways for judicial choice."\textsuperscript{23} This expression denotes that there are fixed poles between which a judge exercises an interstitial competence. The poles are the provisions of the Constitution or the clear words of a statute. Or they may be the clear rules of courts standing higher in the judicial hierarchy than the deciding judge. Or they may, on occasion, be prohibitions founded on

\begin{itemize}
\item \textsuperscript{18.} \textit{Mabo v. Queensland} [No.2] (1992) 175 C.L.R. 1 (Austl.) (Sir Gerard Brennan, majority opinion).
\item \textsuperscript{19.} \textit{Mabo v. Queensland} [No.2] (1992) 175 C.L.R. 1 (Austl.) (Sir William Deane, dissenting).
\item \textsuperscript{20.} \textit{Mabo v. Queensland} [No.2] (1992) 175 C.L.R. 1 (Austl.). This was the case that reversed the previous understanding of Australian law that the land mass of Australia was \textit{terra nullius} before European settlement, and recognized the subsistence of certain aspects of aboriginal land title that survived settlement. This decision dates prior to Justice Kirby's appointment to the Court.
\item \textsuperscript{22.} Michael Kirby, \textit{Judicial Activism} (2004). Mr. McGuinness very fairly published extracts from these lectures in the same issue of \textit{Quadrant} where his censorious editorial appeared. \textit{See, e.g.}, Michael Kirby, \textit{Beyond the Judicial Fairy Tales}, \textit{Quadrant}, Jan.–Feb. 2004, at 26–33.
\item \textsuperscript{23.} Julius Stone, \textit{Legal System and Lawyers' Reasonings} 234, 274–78 (1964).
\end{itemize}
public policy. The word "clear," of course, invites consideration in some cases, where there may well be room for more than one interpretation of the rule in question. But Justice Kirby recognizes these limits and has demonstrated no desire to move beyond them. In the end, he states, "the duty to deliver and publish reasons compels a judge to engage in a kind of dialogue between the past and the present." Smuggling new law through the back door is alien to his nature.

So it is with international law as a source of guidance or inspiration to modern judges. Where that source is an international convention adhered to by the state, and the state has not seen fit, or found it necessary, to incorporate its provisions directly into national law by statute, it remains a statement of rules and standards that the state has accepted at the executive level. It becomes, therefore, a legitimate consideration for the courts to take it into account when interpreting a statute, or developing the common law, but always within the leeways for judicial choice. The reasons for looking in the direction of international law may not necessarily be that it is a higher or better source of law than any other, but that the judiciary should try, so far as possible, not to embarrass the executive in its conduct of foreign relations by adopting or entrenching contrary positions at the national level. For the courts to ignore treaties and conventions, or customary international law, when not compelled to do so by reason of a contrary prescription of superior force, would thus injure the state's international reputation. A good example is the 1966 International Covenant on Civil and Political Rights. This international instrument has not been given legislative force in Australia. In the United States, by contrast, by reason of Article VI of the Constitution it has the rank of a statute. In Australia, courts increasingly look to the Covenant for guidance in the case of gaps in Australian statute or common law, but only for guidance; the Covenant is not regarded as itself part of national law.


25. See Dietrich v. The Queen (1992) 177 C.L.R. 292, 305 (Austl.). In Dietrich, the High Court reconsidered its previous holdings that there was no absolute right to free counsel by indigent defendants in criminal cases. It now held that a necessary incident of the right to a fair trial included professional legal assistance in cases involving potentially serious penalties. It was not, however, able to implement directly the provisions of article 14 (3)(d) of the Covenant because courts do not, in Australia, dispose of funds out of which legal assistance is provided. These funds are dispensed by other public authorities. The Court therefore held that a trial court should, in cases such as Dietrich, order a stay of proceedings until such time as—by whatever means—the defendant can appear with legal representation. Id. at 311–12.
The so-called "democratic deficit" when international law is cited as a source of such principles, rules, or ideas is an overblown concept. With the possible exception of a United Nations Educational, Scientific and Cultural Organization (UNESCO) convention on the "new international information order," which years ago led to the withdrawal of the United States from that organization and ultimately to the downfall of its director-general (the United States has since rejoined), international conventions reflect generally acknowledged and accepted standards. They are democratic in the sense that a majority (normally two-thirds) of states present at the adopting conference must approve their texts before opening them for general acceptance. They tend to reflect a lowest common denominator. The important thing is that they do reflect the world as a community and put pressure on states to adhere to basic standards. If advanced states, like Australia and the United States, think that these conventions are only for others, they fail in their duty to assist less developed countries in understanding the need to strive for higher standards of behavior, not least in relation to their own citizens. They can do this only by subscribing to those standards themselves. There is nothing, however, to prevent more advanced states parties aspiring to higher standards in their own legislation, where appropriate.26

III. Three areas of fear

I have chosen just three examples to illustrate why certain governments have been fearful of international law in recent times.27 There are others, and even these three must necessarily be treated briefly. Each could be the subject of a lecture in its own right.

26. However, in relation to higher national standards that may cause difficulty for other states, there may be a duty not to exceed the conventional limits. For example, the U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, provides in a number of articles that national laws bearing on freedom of navigation, controlling pollution, and the arrest of vessels may not exceed the standards agreed to in generally applicable international regulations (principally IMO instruments).

A. The International Law of the Sea

The international law of the sea is of obvious importance to countries like Australia and the United States with long coastlines and lengthy lines of communication and commerce by sea. It specifies the permitted breadths of territorial seas, contiguous zones, and continental shelves, and establishes the new exclusive economic zone and the regime of archipelagic waters. The law of the sea is also of strategic importance, insofar as it places limits on the power of coastal states to interfere with navigation and overflight. Issues of protection of the marine environment and the rational management of fisheries, even of previously unregulated high seas fisheries, are also dealt with.

It might be thought, therefore, that the United States would have been an enthusiastic adherent to the U.N. Convention on the Law of the Sea, 1982, which resulted from a long process of negotiation from 1973 to 1982. Most of the issues of importance to the United States, particularly of freedom of navigation and overflight, were satisfactorily resolved through the negotiation of a balanced package. However, the United States has abstained from signing or ratifying the Convention, notwithstanding that more than 140 countries have become parties. The sticking point was Part XI of the Convention, dealing with the exploitation of the seabed beyond national jurisdiction, i.e., the deep seabed beyond the limits of the continental shelves and exclusive economic zones of states. This difficulty emerged late in the Conference, only just after the election of the Reagan Administration, which had ordered a complete review of the draft text as it stood at the end of 1981. There was insufficient time for the Conference to consider the many objections raised by the United States to this part of the draft Convention, which was pledged to hold its concluding sessions in 1982. Thus the signing ceremony went ahead without the United States.

Without the participation of the United States there was less incentive for other developed states to ratify the Convention, especially since they would bear the full weight of the financial contributions required to support the administration of the Convention. (Under the U.N. formula, contributions are assessed in relation to GDP. The United States, therefore, pays about 25 percent of the U.N. budget, and the same percentage in relation to separate funds such as that under the Law of the Sea Convention; the least developed states pay about 0.06% each.) Ten years after signing the Convention, the number of ratifying states had still not reached the minimum number of sixty required for it to enter into force. These were overwhelmingly developing states. Worse still, it seemed that in
1993 the Convention was likely to enter into force with the bare number of sixty, after which the opportunity to amend the Convention would be governed by the provisions of the Convention that state that a review conference can not be held for at least fifteen years after entry into force. A group of “Friends of the Convention,” which included Australia, looked for a way out of this difficulty. The group formulated a series of texts, which were designed largely to remove the objections to Part XI that had been raised by the United States too late in the Conference. These texts made the regime of the deep seabed more responsive to free market principles, less bureaucratic in administration, more equitable in its treatment of entrepreneurs, less able to overrule the views of major interest groups such as the United States, and more restrictive of third party access to technology, especially technology having a military value. These texts were then placed in a free-standing draft “Agreement for the Implementation of Part XI of the Convention.” The Agreement provides that, notwithstanding any contrary or inconsistent provisions of the Convention, parties to the Agreement will implement the Convention only in accordance with the new Agreement. In 1994, the U.N. Secretary-General, who had originally been excluded from the group, endorsed the proposals and put them to a vote in the U.N. General Assembly for approval. The text was approved, and the Implementing Agreement became an integral part of the Law of the Sea regime.

The way then seemed clear for the Convention to move ahead with the United States coming aboard, its earlier objections now having been largely met. But this was not to be. The other major powers ratified the Agreement, but not the United States. The Clinton Administration put the Convention and Implementing Agreement to the Senate for approval, but the submission was not even brought forward for discussion, let alone approval. The then-Chairman of the Senate Foreign Relations Committee, Senator Jesse Helms, refused to place it on the agenda. Now, at last, under new Committee leadership, the issue is being debated. On October 14, 2003, University of Miami School of Law Professor Bernard H. Oxman, a member of the U.S. delegation to the Law of the Sea Conference throughout its negotiation, and other supporters, gave important testimony to the Committee urging ratification of the Convention. We await the result.

Professor Oxman rightly pointed out in his testimony that the provisions of the Law of the Sea Convention have, in most of their principles (save for the original text of Part XI—the U.S. “footprint” in De Visscher’s metaphor being
absent), achieved a parallel status as customary international law.\textsuperscript{28} Thus the United States was able to rely on the customary status of the Convention to assert navigation and overflight rights and to claim an Exclusive Economic Zone for itself. But there was still clear advantage to the United States in being able to rely on specific provisions as binding treaty commitments vis-à-vis other states, as well as being able to participate and bring influence to bear on the institutions established under the Convention.\textsuperscript{29} These advantages would come only with ratification of the Convention.

I have put this example first because, even in relation to a subject that—while important—does not go to the heart of American concerns about world order, there seems to be a fear of becoming tied down to international agreements and international regimes. The objections to the 1994 Agreement, if any, were never articulated. It seemed to be an objection to binding international agreements as such.

\textbf{B. The Use of Force Against Iraq}

This example concerns the restraints of an international treaty that undoubtedly bind all states: the Charter of the United Nations. There are those who say that the power and influence of the central guardian of the system of collective security established by the U.N. Charter, the Security Council, has been irreparably broken by the events of 2003.\textsuperscript{30} There are others who consider that the Charter has been breached, but not broken, by the intervention in Iraq by the coalition led by the United States. After all, rules are often broken in do-

\textsuperscript{28} Achieving such parallel status as customary international law was recognized and discussed in depth by the I.C.J. in the \textit{North Sea Continental Shelf} cases. See \textit{North Sea Continental Shelf} (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42–46 (Feb. 20).

\textsuperscript{29} It is disappointing that the customary law character of much of the Convention failed to be noted as relevant in a recent decision of a U.S. federal court. In a suit brought by an environmental group against the U.S. government regarding the use by the U.S. Navy of new sonars causing injury and death to whales, dolphins, and other marine life, the customary law concept of due regard in the use of the oceans was not raised as a relevant consideration. See Natural Res. Def. Council v. Evans, 279 F. Supp. 2d. 1129 (N.D. Cal. 2003). In \textit{United States v. Alvarez-Machain}, 504 U.S. 655, 669 (1992), international law was swept aside as “a matter for the Executive Branch,” not for the courts, by the majority led by Chief Justice Rehnquist. In dissent, Justice Stevens, with whom Justices Blackmun and O’Connor joined, argued the relevance of international law in the courts. \textit{Id.} at 670–71.

mestic as well as international law. That does not necessarily mean that the system no longer has force or value.

But has the Charter been breached? Here we see an interesting difference in approach to the justification of the use of force against Iraq in 2003 by the United States and two of its coalition partners, the United Kingdom and Australia. The latter two found legal justification in prior resolutions of the Security Council. If that was correct, then there was clearly no breach of the Charter because the Security Council has the power to authorize the use of armed force. Those prior resolutions were the resolutions that brought to an end the active hostilities, but not the right of enforcement action, of the first Iraq war. In 1991, the Security Council demanded that Iraq meet a large number of conditions relating to its future conduct, including full disclosure of its programs of development of weapons of mass destruction and submission to inspections for verification. Security Council Resolution 1441 of 2002 found Iraq to be in material breach of those earlier resolutions in view of its failure to cooperate fully with the inspection missions. This resolution, in the view of the United Kingdom and Australia, revived the right to use force originally mandated by the Security Council in 1991; the enforcement action suspended twelve years earlier could resume.31

Although this argument is valid, in my view, taken by itself, it is rather spoiled by the fact that, when speaking on the adoption of Resolution 1441 in 2002, both the U.S. and U.K. representatives in the Security Council explicitly disavowed any automatic effect of that resolution to resume hostilities.32 This was done to encourage other members of the Council to endorse the resolution. Many members (including China, France, and Russia) would not have voted in its favor if they had thought they were voting to use force against Iraq without giving Iraq further time to conform to the inspection regime. They might well argue estoppel in law, or at least bad faith in political terms, against the coalition governments.

The United States did not advance the same ground of justification. It advanced its case principally on the basis of self-defense (particularly anticipatory


or "preemptive" self-defense) and on the need to secure regime change in Iraq in order to promote both regional and global security and the human rights of the oppressed population groups of Iraq.\textsuperscript{33}

I want to examine both these grounds with an eye more toward the future than to the past.

1. Humanitarian Intervention

Does such a doctrine exist in international law, compatible with the Charter? Writing before the intervention in Iraq in 2003, Professor Ian Brownlie of Oxford stated that the so-called right of humanitarian intervention was contrary to the U.N. Charter, but that in extreme cases of humanitarian need, where the Security Council had been unable to agree to act owing to political divisions in its ranks, intervention might be excusable, even though unlawful. In this he drew the rather curious parallel of how prosecutors overlook some cases of euthanasia under domestic law.\textsuperscript{34} "Illegal but excusable" also appears to be the position of Australian scholar Simon Chesterman in his recent widely noted study of humanitarian intervention.\textsuperscript{35}

I find this a deeply unsatisfying conclusion. The law must surely make sense and must ultimately conform to what is right. There is sound political sense in the justification given by British Prime Minister Tony Blair for the earlier intervention by NATO in Kosovo and the bombing of Serbia without the authorization of the Security Council: "We did it because it was right to do so."\textsuperscript{36} The law should try to conform to what is politically and morally sound. There can, of course, be no right of states to take the law into their own hands and to make judgments about humanitarian intervention lightly, or as a mere pretext to act in advancing their own particular interests. The tests of true humanitarian intervention have been persuasively articulated by the Report of the International Commission on Intervention and State Sovereignty, co-chaired by the former Australian Foreign Minister, Gareth Evans, and Ambassador Mohamed Sahnoun.


\textsuperscript{34} Ian Brownlie, Thoughts on Kind-hearted Gunmen, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 146 (R. Lillich ed., 1973).

\textsuperscript{35} Simon Chesterman, Just War or Just Peace? 87 (2001).

of Algeria. The Report, sponsored and published by the Government of Canada in 2001, makes a powerful case for humanitarian intervention, but as a responsibility rather than as a right. The Report stresses the need to base humanitarian enforcement actions within chapter VII of the Charter, and calls upon the Security Council to exercise its powers and duties responsibly and on an objective view of the facts of each case. Nevertheless, the Report does envisage, even while deploiring the need for, actions by individual states or coalitions of states to intervene where the Security Council fails to act.37

Humanitarian intervention was not a primary ground of justification for the intervention in Iraq, although it was sometimes mentioned as a secondary ground or a desirable by-product. No one defends the regime of Saddam Hussein or fails to acknowledge the horrific abuses of human rights inflicted by his regime on the people of Iraq. Whether it could have been justified on that ground alone involves weighing a number of factors, including prudential considerations. It is unnecessary to do that here, other than to point to the Report of International Commission which outlines the relevant factors.38 It is enough to say that humanitarian intervention as an exception to the prohibition of the use of force under the Charter has inevitably demanded renewed consideration following events in Somalia, Rwanda, Kosovo, Sierra Leone, the Congo, East Timor, and Sudan, among others.

Where the Security Council fails to act by endorsing forcible intervention in cases of extreme humanitarian need, I would find authority in article 2(4) of the U.N. Charter for coalitions of the willing, or even—under still stricter conditions—of individual states, to act without a mandate from the Security Council. That paragraph reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political indepen-


38. Id. at 32. These conditions owe much to traditional just war theory. A brief modern restatement of the just war theory (which goes back to St. Augustine) is contained in the document of the Second Vatican Council, Pastoral Constitution of the Church in the Modern World, also known as Gaudium et Spes. Second Vatican Council, Pastoral Constitution of the Church in the Modern World ¶ 79 (1965). A more lengthy exposition, applied to the case of Iraq, was given by the Anglican (Episcopalian) Chief Chaplain to the Australian Armed Forces, Bishop Tom Frame, in an article in The Australian. See Tom Frame, Battle Hymn for a Three Week War, Australian, Feb. 11, 2003, at 11.
dence of any state, or in any other manner inconsistent with the Purposes of the United Nations."\(^{39}\)

This is a curiously worded paragraph. It owes much to the drafting of Australia’s Foreign Minister, Dr. H.V. Evatt, at the San Francisco Conference in 1945. Why did it not say simply “No Member shall threaten or use force against any other state” (except, of course, in self-defense or under the authority of the Security Council, which is implicit under either wording)? Most authorities on the Charter maintain, on the basis of the travaux préparatoires, that this was indeed the intention of the delegates to the San Francisco Conference. But it has to be conceded, at least on the face of it, that the words following “force” would then be mere verbiage. If, however, those words were not mere verbiage or surplusage but were intended to clarify the meaning of the first part of the sentence, then the additional words can well be read as words of qualification. Thus it can be postulated that if a threat or use of force were aimed not at territorial integrity or political independence (as would be the case of naked aggression, invasion, annexation, or occupation), but were intended to right a manifest injustice where peaceful methods had failed, it would not be prohibited by the Charter. This more elastic reading of article 2(4) is favored by a number of scholars, albeit a minority, as allowing for forcible intervention in order to prevent grave and widespread abuses of human rights, such as genocide.\(^{40}\) The scholars who support this position include Julius Stone,\(^{41}\) Derek Bowett,\(^{42}\) and Anthony D’Amato.\(^{43}\) A justification for the intervention by NATO in Kosovo in 1999, based on article 2(4), was advanced by Belgium in the case brought by Yugoslavia before the International Court of Justice.\(^{44}\)

Although a number of current scholars, including Simon Chesterman, consider this interpretation of article 2(4) unsupported by past state practice, the ques-

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40. See Chesterman, supra note 35, at 47–48 (critically reviewing these views).
44. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO’s intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.

tion now is whether such an interpretation should be admitted in order to give to individual states (or—better in political terms—coalitions of states) the necessary legal basis under the Charter to do what is morally right, where the Security Council has failed in its duty to address the humanitarian situation dispassionately and reasonably. It is a general legal principle that a document, be it a contract, a statute, or a treaty (as here the U.N. Charter), is open to purposive interpretation in order to respond to new circumstances or needs, so long as that interpretation can fairly be regarded as within the meaning of the words of the document. The fact that a more restrictive interpretation may have been given in the past is not an insuperable obstacle. Moreover, the U.N. Charter should be viewed similarly to a constitution. To adhere to rigid interpretations or to be unwilling to allow growth and development in understanding is to render the instrument brittle and may lead to rupture and disillusion. In my view, a wider interpretation must be given to article 2(4) in order to make the Charter relevant to the present and foreseeable future needs of the international community. In adopting that view, I would fully endorse the precautionary conditions set out in the Report of the International Commission on Intervention and State Sovereignty as giving valid guidance as to the occasions on which such intervention may be justified. These conditions are principally: right intention, last resort, proportional means, and reasonable prospects of success.\(^{45}\) In other words, intervention should not be embarked upon if the remedy would likely be worse than the disease.\(^{46}\)


The right of self-defense, which is part of general international law, is recognized in article 51 of the U.N. Charter. It is stated there to be an "inherent" right of states to act in individual or collective self-defense pending the taking of effective action by the Security Council to deal with an act of aggression. Article 51 speaks of this right as arising "if an armed attack occurs." No one reads these words today so literally as to require that a state remain passive until after the first blow has been delivered by an aggressor. Since April 1945, when the Charter was adopted, the advent of nuclear and other weapons of mass destruction has rendered such a narrow interpretation untenable. Some degree of anticipation must be allowed in deciding when an armed attack begins, so that a potentially catastrophic attack may be averted. The degree of danger must be assessed in light of the capabilities of modern weaponry. Moreover, the degree of anticipation allowed must take into account the existence of increasingly sophisticated devices that can detect and give warning of imminent threats. In other words, the law must keep pace with modern technology.

"Anticipatory self-defense" has been criticized as too broad and self-judging a doctrine to be left to the unfettered discretion of states. For example, does the development of nuclear weapons by a likely aggressor constitute grounds for

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47. It is important to understand that the right of self-defense did not originate in the U.N. Charter but is part of customary and general international law. This was clearly recognized by the International Court of Justice in Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

48. U.N. CHARter art. 51.

49. Id.

50. Id.
seeking to remove that threat before the aggressor has had time to activate and deploy them? Such was the justification given by Israel of its attack on the Osiraq nuclear reactor in Iraq in 1981, when intelligence reports gave strong grounds for believing that Iraq was developing nuclear weapons for use against Israel.\(^5\) A widespread opinion at that time was that this action drew too long a bow. Professor Yoram Dinstein believes that the action went beyond the boundaries of legitimate self-defense. In recognizing that article 51 must allow for some degree of anticipation, he seeks to confine it to actions in immediate self-defense, in cases where the aggressor has shown that it is unmistakably and irrevocably committed to an attack. He calls this “interceptive self-defense.”\(^2\) It is proper to seek to confine the right narrowly, but it is difficult to do so except in light of particular circumstances. In the end, at least as exercised by a permanent member of the Security Council (which may veto a condemning resolution), it is a matter for judgment by the wider international community whether the action was justified.

The resolutions adopted by the Security Council after the attacks on the World Trade Center and the Pentagon (and the foiled attack on the White House) on September 11, 2001 are notable for the recognition, in their preambular paragraphs, that the right of self-defense under article 51 of the Charter extends beyond attacks by states to attacks by non-state actors, such as terrorists. It is therefore possible to consider together defensive action against both.

Much has been made in recent comments of the alleged promotion by the U.S. government of a novel doctrine of “preemptive attack.” It is necessary to examine exactly what has been said in the relevant documents. What the United States has announced—and which might be regarded as new doctrine—is that it may take preemptive action against terrorists. It is not stated as an extension of the right of self-defense against states. In *The National Security Strategy of the United States of America*, published by the White House in September 2002, it is stated thus:

We will disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and our interests at

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52. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 189–91 (2d ed. 1994).
home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions.\footnote{53}

These remarks were clarified in January 2003 by the Legal Adviser to the State Department, William Howard Taft IV:

The United States, or any other nation, should not use force to pre-empt every emerging threat or as a pretext for aggression. We are fully aware of the delicacy of this situation we have gotten into. After the exhaustion of peaceful remedies, and after careful consideration of the consequences, in face of overwhelming evidence of an imminent threat, though, a nation may take preemptive action to defend its nationals from catastrophic harm.\footnote{54}

Note the prudential character of the words "overwhelming," "imminent," and "catastrophic." These are consistent with a conservative reading of the right of self-defense in an era of weapons of mass destruction, whether we are speaking of actions against terrorists as such, or against hostile states.


\footnote{54. William Howard Taft, \textsc{IV}, Remarks at the Foreign Policy Association discussion, Pre-emptive Force: When can it be used? Implications for Iraq and North Korea, transcript available at \url{http://www.fpa.org/topics_info2414/topics_info_show.htm?doc_id=142893}, quoted in Andru E. Wall, \textit{Lawfully Defending the Peace: The Bush Doctrine and the Global War on Terrorism}, 4 ENGAGE 95, 100 (2003).}
Terrorists cannot operate from bases outside the territory or jurisdiction of any state. So how may measures of self-defense be taken against terrorists without affecting the territorial sovereignty of the country from which they operate, or in which they may be found? In cases of immediate (and "interceptive") self-defense, it must be that the territorial sovereignty of the place from which the attack has been, or is immediately about to be, launched, is unavoidably infringed as a matter of necessity. The principles agreed to in the correspondence between Great Britain and the United States following the Caroline incident of 1837 still have application today, where the victim state can show a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."55 "[The action taken must also involve] nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."56 The defense of immediate necessity thus excuses the breach of territorial sovereignty.

In the case of preemptive self-defense, however, greater circumspection is required. Professor Dinstein proposes a category of self-defense that can be applied to such cases. He terms it "extraterritorial law enforcement."57 He considers that where a terrorist, who has committed criminal acts in the territory or jurisdiction of a state, is found in any other state, the authorities of the latter state are to be called on by the victim state to surrender or prosecute the terrorist in accordance with international law.58 If the state is unwilling, or unable, to take these measures of international law enforcement, then the victim state may itself undertake the task of capturing the terrorist or destroying the terrorist base, as the case may be.59 Clearly this doctrine cannot be applied except where the state from which the terrorist attack was launched or directed has been given sufficient opportunity to enforce the law itself. And it must be exercised only with the

55. Letter from Lord Ashburton to Mr. Webster, U.S. Secretary of State (July 28, 1842) reprinted in 30 Brit. & Foreign St. Papers, 1841–1842, 195, 196 (1858). The language of this formula, although sometimes closely parsed as though it were a statute, overlooks the hyperbole common in pleading a partisan cause. The essence of the formulation is contained in the notions of necessity, reasonableness, and proportionality. For a cogent analysis of the Caroline formula, see Wall, supra note 54, at 98–99.

56. Letter from Mr. Webster, U.S. Secretary of State, to Mr. Fox (Apr. 24, 1841) reprinted in 29 Brit. & Foreign St. Papers, 1840–1841, 1129, 1138 (1857).

57. Dinstein, supra note 52, at 237–45.

58. There are a number of international conventions criminalizing acts of terrorism and requiring international cooperation in their suppression. See infra note 63.

59. See Dinstein, supra note 52, at 237–41.
utmost care for observance of the *jus in bello* (i.e., the principles and rules of international humanitarian law), especially for the protection of innocent civilian lives and property.

While Professor Dinstein links this doctrine to the right of self-defense, which is certainly arguable, I prefer to locate it, as earlier argued, in article 2(4) of the U.N. Charter. I see it as an example of a use of force that is not directed "against" territorial integrity or political independence but as a use of force consistent with the Purposes of the United Nations. It is true that, in the case of an unreasonable refusal by a state to prosecute or hand over a terrorist, extraterritorial law enforcement would necessarily breach the territorial integrity of that state and would also, for the moment, take the power of political control out of its hands, but these would be necessarily incidental effects rather than the object of the use of force in itself. An earlier example was the raid by Israeli forces on Entebbe Airport in Uganda in 1976 in order to free hostages being held there by Palestinian hijackers with the apparent connivance of the Ugandan authorities. A more recent example is the intervention by coalition forces in 2001 to 2002 in Afghanistan in pursuit of Al-Qaeda, after the Taliban government had been called upon to surrender Osama bin Laden and had refused—indeed had joined forces with Al-Qaeda.

I also believe that the attacks by the coalition against Iraq in 2003 can be explained best as extraterritorial law enforcement. Whether Iraq really had weapons of mass destruction at the time the attacks were launched in March 2003 is now a highly controversial issue. It would appear that they did not, and that the intelligence upon which the United States and the United Kingdom acted was faulty. That, however, does not serve retroactively to invalidate the attacks as legitimate self-defense. There is no doubt that Iraq did possess weapons of mass destruction. The evidence of their use against Iran and against the Kurdish population of Iraq between 1980 and 1990 is unchallenged. Moreover, U.N. weapons inspectors from 1991 onwards discovered and neutralized many such weapons, or material capable of making such weapons, until their inspections were halted by Iraq. The real point is that Iraq failed to cooperate with the inspection missions mandated by the Security Council, and behaved (out of bravado or for whatever reasons) as though they had something to hide. Iraq stood in flagrant violation of resolutions of the Security Council, binding upon it, through its failure to cooperate. This conclusion was reaffirmed by Security Council Resolution

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1441. Seeing no prospect of compliance, and after numerous warnings, the coalition went in to enforce those resolutions. The fact that Iraq resisted the enforcement changed the action from law enforcement to armed conflict, with the result that it could then be defeated and occupied like any party to an armed conflict. But that does not affect the initial character, and validity, of the action.

C. Anti-Terrorist Legislation

Both Australia and the United States have enacted new anti-terrorist legislation since the events of September 11, 2001. In the United States there is the USA PATRIOT Act, among other pieces of related legislation. In Australia there are the amendments to the Criminal Code and the Australian Security Intelligence Organization (ASIO) Act, the latter of which for the first time has given powers of arrest and detention for questioning to officers of Australia’s intelligence organization. In addition, military tribunals have been established by the President, under executive powers given to him by Congress, to try persons detained on the battlefields of Afghanistan and kept for the present in custody at U.S. Naval facilities at Guantánamo Bay, Cuba.


62. These “battlefield detainees,” of uncertain legal status, include two Australians: David Hicks and Mamdouh Habib. The trial of the first was announced, in January 2004, as imminent. He has been assigned U.S. military counsel, Major Mori. Whether the U.S. Naval Base at Guantánamo Bay, leased from Cuba, is a place to which the U.S. Constitution—and thus a right to the writ of habeas corpus—applies has been answered differently by U.S. courts. The Supreme Court has now ruled that a right to habeas corpus is enjoyed by detainees at Guantánamo Bay. See Rasul v. Bush, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004). The Human Rights Committee of the United Nations, in a draft General Comment on article 2 of the International Covenant on Civil and Political Rights, has declared that States Parties to the Covenant are required by article 2, paragraph 1, to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party.

Time does not permit a review of this legislation, or of the critical comment on it that has come from many quarters that include, but are not limited to, civil liberties groups. I intend to focus, consistently with the theme of this address, on the international law dimensions of the legislative reactions to the events of September 11, 2001.

The need for adequate legislation worldwide to respond to terrorism was endorsed, in urgent terms, by the United Nations itself within days of the attacks. In Resolution 1373 (2001), the Security Council called upon all members of the United Nations to report, within ninety days, on the steps they had taken to ensure that “terrorist acts are established as serious offenses in domestic laws and that the punishment duly reflects the seriousness of such acts.” The resolution further required states to criminalize the provision of funds to terrorists, and to freeze the financial assets of persons who commit terrorist acts. The resolution also required states to review their laws relating to banking practices, arms control, law enforcement, cooperation in the suppression of terrorism, and other matters concerned with security.

The intention of the United Nations is obviously to ensure that a tight network of reciprocating laws is in place to deal with the prevention and punishment of terrorist acts. Provided that the laws of a state in which a terrorist suspect is located provide that the terrorist’s acts are contrary to the law of that state, the state has a choice either to prosecute the person itself or to extradite him or her to a state requesting surrender and that has jurisdiction over the act committed. In international law this is known as the principle *aut dedere aut judicare* ("either extradite or prosecute"), and has been a standard feature of all international conventions on international criminal law since the 1970 Hague Convention on the hijacking of aircraft.63

The formula “either extradite or prosecute” has a greater significance than might at first sight be thought. Although there is no obligation in general to extra-

dite criminals under customary international law, extradition being governed by
treaties and domestic law, the obligation to do so, or to prosecute, under interna-
tional criminal conventions meets three particular difficulties. In the first place,
terrorist acts are normally committed for political motives and might therefore
come under the exception, found in extradition treaties, of political offenders or
those who might, if extradited, face prosecution for political motives. Efforts are
underway at the United Nations to draft a comprehensive definition of terrorism
that would exclude it altogether as a political offense for the purposes of extradi-
tion. But, these efforts have bogged down owing to a split of opinion in the Com-
mittee in relation to the characterization of Palestinian liberation groups. Failing
an accepted definition, if the present laws of some states would characterize a sus-
pect as a political offender, then it is absolutely required to investigate with a view
to prosecute the suspect. The second difficulty it avoids is that the laws of many
states exempt their own citizens from extradition. This is not so in the cases of
Australia, the United States, and the United Kingdom, but is so in the European
countries. Thus if a French citizen is accused of a terrorist offense committed in
the United States, he or she cannot be extradited to the United States, but under
international conventions, France will be obliged to submit the case to its own
prosecution authorities. The third difficulty is the death penalty, which is appli-
cable under U.S. federal law to many terrorist offenses. The laws of a large num-
er of countries now exclude extradition to a place where the death penalty may
be imposed or carried out. One way around the difficulty is for the requested state
to offer extradition conditionally upon an assurance that the death penalty, if im-
posed, will be commuted to a sentence of imprisonment.

This last is perhaps the most difficult hurdle of all. The United States is be-
coming increasingly isolated among the developed nations by reason of its ad-
herence to the death penalty. I shall not here take sides on this contentious

64. See Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17
Committee resumed its consideration of the draft convention at its session in 2003 but made no
progress in resolving the deadlock, which it decided to refer to the U.N. Sixth Committee.

65. See the scathing comment by Justice Scalia on Justice Stevens’ invocation of the views of the
world community in relation to the death penalty in Atkins v. Virginia, 536 U.S. 304, 335, 370
(2002). For an example of a parallel clash of judicial views occurring in the High Court of Austra-
issue. I shall merely observe that it can be expected that there will be cases in the future of terrorists found in foreign countries where the executive branch of the federal government, having requested extradition, may be obliged to give assurances to a requested state that the death penalty, if imposed, will be automatically commuted, as the price of justice. The political consequences of this are manifest, where people convicted of less serious non-terrorist offenses are regularly executed.

Is there a standard against which one can measure the necessity and reasonableness of the laws passed in Australia, the United States, and other countries to combat terrorism? I wish to suggest that, far from being a nuisance or an irrelevance, international law does offer both guidance, and—to a degree—validation of, measures necessary to combat the scourge of terrorism.

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966 as one of a trilogy of instruments that makes up the “International Bill of Rights” (the others being the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights). It has been adhered to by 150 countries, including Australia and the United States. It is a statement in precise terms of the basic rights of the human person. As such, it stands as a benchmark against which the laws and practices of members of the international community are to be measured. These members must appear before the Committee on Human Rights, established under the Covenant, every five years (or more often if called upon) to give an account of their observance of these standards.

Aspects of anti-terrorist measures inevitably give rise to questions of their compatibility with provisions of the Covenant, in particular those provisions relating to length of detention after arrest (article 9), the right to a public trial before an independent and impartial tribunal, the right to be tried without undue delay, the right to counsel (article 14), and the right to privacy (article 17). All of these rights are subject to exceptions or qualifications that are reasonable in all the circumstances. The term “arbitrary,” which appears in many of these provisions, such as “no person shall be subjected to arbitrary or unlawful interference with his privacy . . .” (article 17), means “unreasonable” in the understanding of the Committee.66

It might be thought that the Covenant is sufficiently elastic through its "reasonableness" criteria to accommodate the inevitable inroads on personal liberties made by recent anti-terrorism legislation. Neither Australia nor the United States have yet availed themselves of the right to derogate from their obligations under the Covenant, which is allowed under article 4:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin.

The article then goes on to specify certain non-derogable rights, such as the right to life and the prohibition of torture, and also to require that any derogations be notified to other parties through the Secretary-General of the United Nations.

There would be an understandable reluctance to make a public proclamation of an emergency necessary to trigger these provisions, even after such catastrophic events as those of September 11, 2001, for fear of spreading panic in the community, or appearing to confess the inability of the government to take effective measures against terrorists within existing law, or within the framework of special laws considered to be compatible with basic norms of human rights. Nevertheless, by contrast to Australia, both the United States and the United Kingdom declared states of emergency after September 11th. The United Kingdom additionally gave notification of derogation from article 9(1) of the Covenant in respect of the detention of foreign nationals intended to be deported from the United Kingdom under the 2001 Anti-Terrorism, Crime and Security Act. The fact that the United Kingdom has taken this step, in conscientious adherence to its international obligations, may also be a reflection of the fact that the United Kingdom has, in the past, made declarations of emergency and derogation in relation to Northern Ireland, and to that extent the British public are not unused to them.

The fact that article 4(2) lists certain articles of the Covenant as being non-derogable (e.g., the right to life and the prohibitions of torture and slavery) and

that the non-derogable rights do not include articles 9 and 14, considered above, does not mean that those provisions can be set aside entirely when an emergency is proclaimed and the derogation is communicated to the U.N. Secretary-General. On this the Human Rights Committee made an important pronouncement in 2001, just prior to the events of September 11th. In General Comment No. 29 on Derogations During a State of Emergency, the Committee explained that:

[T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a state party.... The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.

The Committee also emphasized that measures derogating from the provisions of the Covenant “must be of an exceptional and temporary nature.” It must be wondered whether, in an age of terrorism, special measures, if they are of such a nature as to require formal notification as derogations, could ever be regarded as “temporary.” It is likely that they are here to stay. In light of the events of September 11, 2001, the Committee may have to revisit this aspect of its General Comment in a future Comment.


69. General Comment No. 29, supra note 68, ¶ 4, 6.
In my opinion, knee-jerk reactions of horror at restrictions on certain rights are not helpful to the general cause of human rights in an age of terrorism. There must be a sober analysis of the dangers posed by terrorists, and of the measures necessary to forestall and combat them. We in Australia and the United States are more alive to the importance of human rights and civil liberties than the peoples of many other countries, as our histories show. Nevertheless, while we may feel ourselves to be qualified and equipped by our laws and political traditions to face these challenges, useful guidance is to be found in the international standards outlined above. Above all, the considerations of strict proportionality set out in General Comment No. 29 of the Human Rights Committee should be pondered. There is, unfortunately, no indication that such guidance has been sought in the counsel of our governments or even, so it would seem, in public debate.

Conclusion

It has been evident that at many points international law has been ignored or pushed to the sidelines by the governments of the United States and—to a lesser extent—Australia. My thesis has been that this is not only wrong, but unnecessary, since the objectives we strive to attain may be made compatible with international law. Our security is made stronger if we can bring the rest of the international community with us and show that we are prepared to live by the same rules as all.

Some years ago when I was a new faculty member of a certain law school in Australia, I attended my first staff meeting, at which the dean outlined a certain proposal for adoption. He spoke very eloquently and persuasively in favor of its approval. When the time came to vote I put up my hand, but noticed that the colleague sitting next to me, and several others, did not. I asked the colleague later, “why did you vote against such a sensible motion?” His answer was, “I wasn’t really against it, and I knew it would be passed, but I just can’t stand how the Dean is always so very right.” I was reminded of this when last year Libya was elected to the Chair of the U.N. Human Rights Commission (the political body of fifty-three, not to be confused with the Human Rights Committee of eighteen independent experts, mentioned earlier). How could the representative of a rogue state be elected to the chair of a body dedicated to the advancement of human rights? The answer, it would seem, is that a substantial number of delegates simply wanted to do something to annoy the United States, feeble and scarcely important in its practical consequences though it might be, by remind-
ing it that there were others out there. Much has been muttered "out there" about the refusal of the United States to adhere to the Rome Statute of the International Criminal Court, the rather heavy-handed pressure on states to conclude so-called article 98 agreements for the non-surrender of U.S. nationals to the International Criminal Court, opposition to the Kyoto Protocol on Global Warming, and some other popular international proposals. This has been termed "American exceptionalism." And it is resented.

Australian scholar and commentator Owen Harries has recently written that Americans are presently divided over their nation's core beliefs, and that "American exceptionalism" is a key factor. On the one side there are those who believe that the intentions of the United States are benign and can only bring good to the rest of the world. Everyone should recognize this. On the other side are those who recall that even the founding fathers of the United States were not prepared to trust in benign intentions, but instead established a constitution in which there was a balance of powers, each capable of curbing and restraining the other. "It is that same distrust that underpins the concept of balance of power in international politics." Professor Harries concludes that "[t]he really interesting and important debate is not between anti-Americans and pro-Americans; it is between two different American traditions concerning how the US can best promote its values and ideals." 70

I have argued today that international law is a necessary curb and restraint on the exercise of power, and that it should be recognized more widely as such, not only at the executive level but also at the judicial and legislative levels. 71 I have also argued that international law is sometimes enabling and empowering; it should not always be seen in terms of prohibiting or restraining. In whichever


71. Recall the extraordinary action of Congress in passing legislation blatantly violating the U.N. Headquarters Agreement, which was the subject of an Advisory Opinion by the I.C.J. See Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12 (Apr. 28, 1988). Two months after the I.C.J. had ruled unanimously that the United States was thereby in dispute with the United Nations and was required to arbitrate the difference, a federal court managed to interpret the offending legislation, which had been used to order the closure of the Observer Mission to the United Nations of the Palestine Liberation Organization, as not applying to a mission accredited to the United Nations and covered by the Agreement. See United States v. PLO, 695 F. Supp. 1456, 1460 (S.D.N.Y. 1988) ("It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other construction remains."' (quoting Weinberger v. Rossi, 456 U.S. 25, 32 (1982)).
regard, our governments need to be more attentive to the claims international law justly make on our allegiance (my own government especially in relation to the treatment of asylum seekers in detention— in which respect the United States has a much better record).

At the World Economic Forum held at Davos, Switzerland in January 2004, speakers were invited to answer a simple question: what advice would they give the next president of the United States? “Listen to others,” said Thierry de Montbrial, head of a French policy research institute. Irene Khan, secretary-general of Amnesty International, said, “Look around the world. And remember the impact of your power.”
