THE TWELFTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

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I. Introduction

You have heard about Wally Solf's career accomplishments. He was indeed a man of many parts and many achievements. When he was a young man, he was a combat soldier in World War II. He spent many years in the practice of military justice. He was a negotiator in the field of the law of war, and played an important role in the negotiation of the Additional Protocols to the 1949 Geneva Conventions.[3] Later in life, he became a scholar; he organized many important conferences at American University, and was co-author of the definitive treatise on the Additional Protocols.

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1. This article is an edited transcript of a lecture delivered on 28 April 1999 by Michael J. Matheson to members of the staff and faculty, distinguished guests, and officers attending the 47th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Waldemar A. Solf, who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful effort in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

2. Mr. Matheson is the Principal Deputy Legal Adviser of the U.S. Department of State. Mr. Matheson has worked as an attorney in the State Department since 1972, and before that in the Department of Defense and in private practice. Among other things, he has represented the U.S. before international tribunals in a number of cases, including the *Yugoslavia*, *Nuclear Weapons*, *Oil Platforms*, and *Lockerbie* cases before the International Court of Justice. He has served as Head of the U.S. Delegation (with the rank of Ambassador) to the United Nations (UN) negotiations on conventional weapons (including land mines and laser weapons). He led the successful efforts to create the International Criminal Tribunals for Rwanda and the former Yugoslavia. He has handled legal work for the Department on a variety of matters involving the use of force, including U.S. involvement in the Iran-Iraq War, the Gulf War, and the Panama, Somalia, Bosnia, and Kosovo situations. The views stated during the lecture were not necessarily those of the Department of State.

3. Protocols Additional to the Geneva Conventions of 12 August 1949, 12 December 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol II].

For those of us who had the opportunity to work with Wally, what we remember most is that he was a fine human being. He was a kind, almost grand-fatherly, man. He was a mentor and role model for younger attorneys like myself, and a good friend to all. I am delighted to be able to sit in the Solf Chair this morning and take part in this lecture series. It is a fine way to remember Wally Solf and his contributions to international law.

I have been invited to speak this morning on a topic of my choice. Since we are now coming to the end of the first decade of the post-Cold War world, I thought it might be interesting to look back at the most important developments that have occurred during this period with respect to international law concerning armed conflict. A decade ago, most of us probably thought we were entering a period of relative peace and faithful observance of humanitarian norms. Instead, we have experienced a period of intense violence and incredible atrocities. The international community–and in particular, the international legal structure–has attempted to respond to these events in different ways, some successful and some not. I think it is useful for us to consider these developments and to assess the areas in which significant advances have been made, either in resolving conflicts or at least in building a framework for future action.

I would like to focus on three areas this morning: first, international law concerning the resort to armed force; second, international law relating to the conduct of armed conflict; and third, international law on the consequences of armed conflict, particularly the prosecution of war criminals and compensation for war victims.

II. Resort to Armed Force

During the past decade, there have been several important developments concerning international law on the resort to armed force. First and foremost, the United Nations (UN) Security Council emerged as an effective source of authorization and direction for the use of armed force. Beginning with the Iraqi invasion of Kuwait, and continuing with the situations in Somalia, Bosnia, and Haiti, the Council took a vigorous approach toward the use of armed force to restore and to maintain international peace and security, pursuant to its authority under Chapter VII of the UN Charter. This was, of course, the role intended for the Security Council when the UN system was created, but the Cold War made it impossible to develop consensus among the Permanent Members of the Council, which is a prerequisite for effective action by the Council. However, with the replacement of the Soviet Union on the Council by the Russian Federation,

the Council was again able to act and did so vigorously under U.S. leadership.

Second, in carrying out this new role of peace enforcement, the Council came more and more to turn to states and coalitions of states to carry out the military operations it authorized under Chapter VII. In the Gulf War, and in certain critical phases of the Somalia and Haiti operations, it delegated this responsibility to groups of states led by the United States. In one phase of the Rwanda situation, it authorized French forces to act; and in various phases of the Bosnia conflict, it relied on the North Atlantic Treaty Organization (NATO) forces. This meant that the Council exercised less control over critical phases of these situations. It was obvious, however, that national military forces and command structures were much better able to deal with the task of defeating or deterring hostile armed forces than were traditional UN peacekeeping forces.

Third, during this period the international community showed an increasing willingness to intervene with military forces into internal conflicts and crises. In the cases of Somalia, Rwanda, and Haiti, the Security Council exercised its Chapter VII authority, notwithstanding the internal character of these situations, on the grounds that they threatened the peace and security of their respective regions. In the case of Kosovo, NATO took the further step of armed intervention without Council authorization to deal with an internal humanitarian catastrophe that threatened the security of the Balkan region.

Fourth, during the 1990s, regional organizations played an increasing role in the use of force, either at the invitation of the Security Council or on their own initiative. For example, NATO has been the main international actor in the use of force in Bosnia and again in Kosovo. The Economic Community of West African States has played a similar role in the conflicts in West Africa.

With these four basic developments in mind, I would like now to review the main conflict situations of the post-Cold War period.

A. The Iraqi Invasion of Kuwait

The Iraqi invasion of Kuwait was in many ways the catalyst for these developments. It was an unambiguous case of aggression by an expansionist state against a weak neighbor, accompanied by a serious threat to

the economic and political interests of most of the world, together with a campaign of brutal oppression that violated all recognized humanitarian norms. It was the ideal case for action by the international community.

In fact, the United States and its closest allies could have conducted the entire Gulf War without the authorization of the Security Council, relying entirely on the right of collective self-defense of Kuwait in accordance with Article 51 of the Charter. However, we saw a number of compelling reasons to seek the Council's authorization.

Action by the Council under Chapter VII provided political cover for many states, which might otherwise have been reluctant to participate in a military operation under the effective command of the United States. It gave clear legal and political blessing for a vigorous military campaign that had as its broad dual objectives the expulsion of Iraqi forces from Kuwait and the restoration of the peace and security of the region.[4] It harnessed the authority of the Council to make possible a series of useful multilateral steps in support of the military campaign, such as the trade embargo on Iraq,[5] the air and maritime interdiction of Iraqi commerce,[6] and the opening of access to the airspace and waters of all states for use by coalition forces.[7] For these and other reasons, the United States sought Security Council action at every phase of Operations Desert Shield and Desert Storm, and benefited greatly from the Council's consistent support.

At the close of military operations, we again found valuable use of the Council's broad Chapter VII authority. The Council's resolutions–and particularly Resolution 687, the "mother of all resolutions"–established, with binding legal force, the terms of the cease-fire and the requirements with which Iraq would have to comply to qualify for the lifting of sanctions. (This in turn provided a legal basis for further military action in the event of Iraqi non-compliance.)

Further, the Council's resolutions established several regimes that were essential to maintaining peace and security in the region. One was the authoritative delimitation of the Iraq-Kuwait boundary (one of the ostensible causes of the War), together with a demilitarized zone and a UN

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4. *See* S.C. Res. 678, U.N. SCOR (1990), para. 2. All U.N. Security Council Resolutions can be found on the Internet at <http://www.un.org/Docs/scres>.

5. S.C. Res. 661, U.N. SCOR (1990).

6. *See* S.C. Res. 665, U.N. SCOR (1990); S.C. Res. 670, U.N. SCOR (1990).

7. S.C. Res. 665, U.N. SCOR (1990), para. 3; S.C. Res. 678, U.N. SCOR (1990), para. 3.

force to patrol it.[8] A second was imposing obligations on Iraq to eliminate its weapons of mass destruction and their delivery systems, together with another UN force to monitor and to facilitate compliance with it.[9] A third was the creation of an extensive operation to collect Iraqi oil revenues and apply them for the benefit of those suffering injury or loss because of the War.[10]

Together, the actions of the Council from the beginning to the end of the Gulf War were by far the most ambitious and comprehensive use by the Council of its Chapter VII authority. It was not self-evident that the Council's authority carried so far, and considerable persuasive effort was needed to convince Members of the Council that these steps were within its authority and were justified under the circumstances. They are, however, an impressive precedent and demonstration of what the Council can do when it has the political will to do so.

B. Iraq after Desert Storm

Unfortunately, the Gulf War cease-fire did not end the problems with Iraq. From time to time, over the rest of the decade, it has been necessary for coalition states to use military force in Iraq to enforce the cease-fire and to keep the peace. This use of force has included creating and enforcing no-fly and no-drive zones, air strikes against Iraqi targets, and the brief deployment of forces into northern Iraq after the end of the Gulf War.

From a legal viewpoint, these deployments fall into three categories. First, were the actions taken by coalition forces in response to Iraqi violations of the terms of the cease-fire established by the Council? These violations included denial of access to UN inspection personnel, retention of weapons of mass destruction or their delivery systems, and violations of the border or the demilitarized zone. On a number of occasions, the Council formally determined that such violations constituted material breaches of the terms of the cease-fire,[11] with the unstated understanding that this would justify proportionate armed action by coalition forces to cause Iraq to halt or reverse its violations.

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8. S.C. Res. 687, U.N. SCOR (1991), para. 2-6.
9. *Id.* para. 7-14.
10. *Id.* para. 16-19.
11. *See, e.g.*, S.C. Res. 707, U.N. SCOR (1991).

On other occasions, the Council was not in a position to make such a determination because of internal disagreements; but in such cases, the United States took the position that proportionate armed action was still justified and acted accordingly. Our view was that there was no need for the Council to make such a determination in each case; if a material breach had occurred, the right to take armed action still applied. It has generally been accepted that a state that is party to a cease-fire arrangement has the right to use proportionate force to compel another party to the cease-fire to stop the material breaches of its terms. There was no reason for a different result here.

The second category of armed actions against Iraq resulted from Iraq's violating Security Council Resolution 688, which found that Iraq's oppression of minority groups in its population–specifically, the Kurds in the north and the Shia in the south–constituted a threat to the peace and security of the region. The resolution directed Iraq to halt such actions. This resolution did not expressly authorize the coalition to use force to compel Iraq to halt. Thus, there was some difference of view as to whether such force was lawful, and if so, on what basis. Some took the view that forcible intervention would be justified by the doctrine of humanitarian intervention. The United States, which had not accepted that doctrine, based its actions on authority implied from the decisions of the Security Council–a combination of Resolution 688 and previous resolutions that had authorized the use of force to restore peace and security to the region.[12]

The third category of armed actions were those justified by self-defense. Many air strikes were–and still are–justified by the need to protect coalition aircraft from attack by Iraqi air defenses. On another occasion, U.S. forces struck Iraqi targets as a self-defense response to the Iraqi attempt to assassinate former President Bush. Further, the no-fly zones have been justified in part as measures necessary to protect other coalition aircraft or–in the case of northern Iraq–international personnel on the ground.

Differences continue as to whether coalition states may lawfully use force against Iraq without express Security Council authorization. These differences focus largely on the question of whether and when states may imply a right to use force from a previous determination by the Council that certain actions would constitute a threat to peace and security. With

12. *See* S.C. Res. 678, U.N. SCOR (1990), para. 2; S.C. Res. 687, U.N. SCOR (1991), para. 1.

the increasing differences that we see among Council members, this question continues to be an important one.

C. Bosnia

The next major international conflict of the decade was in the former Yugoslavia, particularly Bosnia. As political authority broke down and armed conflict erupted, the Security Council began by exercising its authority in the traditional way. It created a UN peacekeeping force.[13] It gave that force various functions of a non-combat character to protect civilians, to reopen the Sarajevo airport, and the like.[14] But these measures proved inadequate, and the Council began to exercise its authority under Chapter VII by authorizing states and organizations of states to use force when necessary. In particular, it authorized states to use force to halt and inspect maritime shipping as a means of enforcing the arms embargo,[15] to protect the safe areas,[16] and finally to enforce the Dayton Agreements.[17]

You may recall that the Dayton Agreements included a remarkable grant of authority to a multinational force (essentially consisting of NATO elements). This force had the authority to use armed force at any time when necessary to enforce the agreement, to control and disarm local military and paramilitary forces, and generally to keep the peace. This arrangement had the dual legal authorization of consent by the states and factions involved in the fighting, and the authorization of the Security Council under Chapter VII.

D. Internal Conflicts

We then saw a series of conflicts that were essentially internal in character, but were regarded by the Security Council as such a threat to peace and security that they warranted armed action. In each case, the United States took the view that the Council had the authority under Chapter VII to make such a determination, notwithstanding the internal nature of the situation. In each case, the Council was persuaded that this was correct, notwithstanding the doubts or reservations of some members.

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13. S.C. Res. 743, U.N. SCOR (1993).
14. *See, e.g.*, S.C. Res. 776, U.N. SCOR (1993); S.C. Res. 758, U.N. SCOR (1993).
15. S.C. Res. 787, U.N. SCOR (1992), para. 12.
16. S.C. Res. 836, U.N. SCOR (1994), para. 10.
17. S.C. Res. 1031, U.N. SCOR (1995), para. 15.

The first of these situations was in Somalia, where a traditional UN peacekeeping force was present at the time of the total breakdown of political authority and the threat of a severe humanitarian catastrophe. By the end of 1992, it was obvious that this UN force was totally unable to cope with the situation. The United States offered to send 20,000 troops. The Council accepted the offer, and authorized the use of all necessary means to restore order and deal with the humanitarian situation.[18] This part of the Somalia operation was successful, but at a later point, when the mission had been returned to a traditional UN peacekeeping force, the situation deteriorated badly and UN forces were withdrawn.

The next of these internal conflicts was in Rwanda. When severe genocidal violence broke out in 1994, a small UN peacekeeping force of the traditional kind was present, but was unable to cope with the situation. This time, France offered to intervene with national forces to establish a protected zone to shelter civilians in that area. The Council authorized France to use all necessary means to take these steps.[19] While the French intervention was temporary and limited in scope, it did save a considerable number of lives.

The third internal situation was in Haiti. The breakdown of democratic government and serious human rights abuses had caused heavy refugee flows into neighboring countries and threatened other destabilizing effects in the region. The Security Council responded at first with partial measures, including an economic embargo.[20] In the end, however, the Council was compelled to authorize the use of force by a multinational coalition of states under the leadership of the United States,[21] which restored the elected government and carried out other actions to relieve the humanitarian situation.

The last of this series of interventions into internal situations was in Kosovo. Here, because of fundamental differences among the Permanent Members, the Security Council was unable to authorize the forcible intervention that was necessary to deal with a serious humanitarian catastrophe for the Albanian population of Kosovo. The Council did a number of important things, including the finding that the actions of the Milosevic regime were a threat to peace and security and a direction to the Federal

18. S.C. Res. 794, U.N. SCOR (1992), para. 10.
19. S.C. Res. 929, U.N. SCOR (1994), para. 3.
20. S.C. Res. 841, U.N. SCOR (1993).
21. S.C. Res. 940, U.N. SCOR (1994), para. 4.

Republic of Yugoslavia (FRY) to take steps to halt its repression of Kosovar Albanians.[22] But, the Council was unable to adopt an express authorization for the use of force to implement its directions.

Nonetheless, NATO found it essential to act. In justifying its use of force on its own authority, NATO pointed to various factors. These included the severe humanitarian catastrophe caused by Serb conduct, the threat to the stability and security of other states in the region, the actions taken by the Security Council, the special role of NATO as a regional organization in securing the peace in Europe, the extensive violations by the FRY of its past commitments, and the extensive violations of international humanitarian law. These factors taken together justified armed intervention in these unique circumstances. Although some individual NATO members adopted new doctrine, such as the doctrine of humanitarian intervention, NATO as a whole did not do so.

In some ways, we have now come full-circle to a situation that bears some resemblance to that which prevailed at the end of the Cold War. Specifically, the Permanent Members of the Security Council have serious differences about the situations under which a resort to armed force is lawful and appropriate. In the Kosovo situation, these differences have prevented the Council from taking action that has proved necessary to deal with the situation. Whether these differences will prove to be an ongoing impediment to effective action by the Council remains to be seen.

III. Conduct of Armed Conflict

I now turn to the second area I would like to cover today: conduct of armed conflict. There have been important developments in this post-Cold War decade concerning the international rules that govern the conduct of armed conflict, particularly with regard to the protection of the civilian population.

A. Landmines

First, the threat to the civilian population that was perceived by the international community to be the most severe was that posed by the indiscriminate use of anti-personnel landmines. During the armed conflicts of

22. *See, e.g.*, S.C. Res. 1199, U.N. SCOR (1998).

the 1980s, it was obvious that civilians were at tremendous risk, particularly in rural areas in Third World countries. In many of these conflicts, landmines were used as a means of terrorizing civilians or compelling them to leave certain areas. Such practices caused severe casualties among non-combatants and seriously disrupted normal life and economic survival in many communities.

In 1980, an international agreement had been adopted to regulate the use of mines and booby-traps.[23] But, it became clear that this agreement was inadequate, particularly in that it had no real effect on long-lived anti-personnel mines that could cause casualties for decades. Thus, negotiations were resumed in the 1990s to produce a more effective regime.

When the State and Defense Departments considered what position the United States should take in these negotiations, we realized that the U.S. military had, for military reasons, already adopted a number of limitations on the design and use of mines that would provide important protection for civilians. Specifically, U.S. landmines are detectable by standard mine-detection equipment, and all U.S. anti-personnel mines are either kept within marked and monitored fields or are equipped with self-destruct devices that ensure that the mine will be rendered harmless after a very brief period and with very high reliability.

Our mines have been configured in this way for good military reasons. United States forces intend to take the offensive in any conflict and to make both offensive and defensive use of landmines. In such circumstances, military commanders obviously want to avoid casualties to advancing friendly forces that would result from the presence of mines on the battlefield that cannot be readily detected or that remain active after their mission has been served. At the same time, we realized that these characteristics would significantly reduce civilian casualties: detectable landmines can be found and cleared, and reliable self-destructing mines would not present a continuing risk to civilians long after the conflict had ended.

Therefore, the United States proposed that these requirements be the core of the revision of the Mines Protocol. At first, other states were skep-

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23. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 19 I.L.M. 1529. This Protocol is also known as Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to Be Excessively Injurious or to have Indiscriminate Effects.

tical. They feared that the United States was simply trying to perpetuate its technological superiority by banning simpler mine designs, or to create new markets for its own products. However, we were able to convince these states that our proposals would meet their legitimate military requirements without a great deal of technical sophistication. The most difficult task was to convince China, Russia, and India–each of which had large stockpiles of non-compliant mines–that the military and economic burden of converting their inventories was not unduly burdensome, in light of the humanitarian and political advantages of accepting our proposals.

The result, after a considerable expenditure of time and effort, was general agreement on an Amended Mines Protocol[24] based on the U.S. proposals. Under that Amended Protocol, all anti-personnel mines must be detectable. All remotely-delivered anti-personnel mines (those delivered by aircraft or artillery) must have self-destruct devices and backup self-deactivation features that render the mine harmless within a very brief period and with very high reliability.[25] All hand-emplaced anti-personnel mines either must have such self-destruct devices, or be kept within marked and monitored fields to keep civilians out of danger.[26] In addition, states that emplace mines must assume responsibility for their clearance or maintenance within the new Protocol standards.[27] Thus far, the United States, China, and Pakistan have ratified the Amended Protocol (along with most of our NATO allies); and we are encouraging Russia and India to do likewise.

Since the conclusion of the Amended Mines Protocol, there has been a movement to ban anti-personnel mines altogether, which culminated in the conclusion of the Ottawa Convention.[28] A large number of states have signed this Convention, but not the major landmine users, such as Russia, China, and India. The United States was not able to subscribe to the Ottawa Convention, partly because it continues to have a requirement for landmines in Korea, and partly because it has a general continuing requirement for the use of anti-personnel devices to protect our anti-tank mines

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24. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206 [hereinafter Amended Protocol II].

25. *Id.* art. 6.

26. *Id.* art. 5.

27. *Id.* arts. 3(2), 10.

28. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 2, *opened for signature* Sept. 18, 1997, 36 I.L.M. 1507.

from interference by enemy personnel. The Department of Defense is looking for alternatives to these systems to perform the same military function, but we do not yet know whether that will be possible.

Quite apart from the U.S. situation, the other major landmine users, such as Russia, India, and China, are not going to ratify the Ottawa Treaty in the foreseeable future. Therefore, it continues to be essential, notwithstanding the Ottawa Treaty, to have an alternative regime to impose reasonable restrictions, consistent with legitimate military requirements, that offer real humanitarian protection against the devastating consequences that the improper use of landmines can have on the civilian population. That alternative regime is the Amended Mines Protocol.

B. Internal Armed Conflicts

The second issue for the law of armed conflict during this decade has been the question of the applicability of the rules of international humanitarian law to internal armed conflicts. It has been clear from the experience of the past few decades that it is internal conflicts rather than international conflicts that have posed the most serious danger to the civilian population and the highest incidence of atrocities.

As you know, there are instruments of international law that apply to internal conflicts, but they tend to be limited in scope. Article 3 common to the four 1949 Geneva Conventions[29] does cover all internal armed conflicts, but provides only certain basic–albeit very important–humanitarian protections. Additional Protocol II[30] to the Geneva Conventions is more expansive in substance, but is limited in scope. It covers only those internal conflicts which involve an insurgent group that is under responsible command and exerts such control over national territory as to be able to carry out regular military operations. You can see from this definition that many guerrilla wars would be excluded from Additional Protocol II.

Why do these limitations exist? Primarily, limits exist because of objections raised by the non-aligned countries, and by former Soviet bloc states, that applying international rules to internal groups would enhance the status of those groups; because it was unrealistic to expect groups of

29. Geneva Conventions for the Protection of 12 August 1949, 75 U.N.T.S. 3, 116 I.L.M. 1391 (1977).

30. *See* Additional Protocol II, *supra* note 3.

this kind to comply with such rules, which would put their national forces at a disadvantage; and because such rules could give outside powers an excuse for armed intervention for the ostensible purpose of enforcing them.

In the case of the Amended Mines Protocol, the United States fought this issue for a considerable period before it was able to convince China, India, and others to accept that the Protocol should apply to internal as well as international conflicts. In part, we succeeded because there was a clear humanitarian need to apply the rules on landmines to internal conflicts, where the great majority of the civilian casualties had occurred. But in addition, we had to include language in the Amended Protocol to address the concerns I just described: that applying the rules would not change the legal status of the conflict or the parties to the conflict; that the provisions would apply equally to all parties to the conflict, including the insurgent group; and that applying the rules could not constitute an excuse for intervention by outside powers.[31]

Further, although the other delegations did accept that the Protocol would apply in internal conflicts, this may have limited our ability to obtain certain provisions that we wanted. For example, we wanted a much more rigorous regime for compliance in the Amended Mines Protocol, including some provisions for inspections. The non-aligned countries were simply not interested in having such a degree of international intrusion into internal armed conflicts. Consequently, the United States will have to pursue this issue at the next amendment conference.

It is also the case that arms control agreements may affect military operations in internal conflicts, although one would not normally have expected this. For example, the 1972 Biological Weapons Convention[32] effectively precludes the use of biological weapons in internal conflicts because it prohibits their possession and use for any hostile purposes. Similarly, the 1993 Chemical Weapons Convention[33] prohibits all use or possession of chemical weapons, which effectively precludes their use in internal as well as international conflicts.

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31. Amended Protocol II, *supra* note 24, art. 1(3-6).

32. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583; T.I.A.S. 8062; 1015 U.N.T.S. 163.

33. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993.

IV. Cases before the International Court of Justice

A third area of developments in the law of armed conflict during this decade has come in litigating cases before the International Court of Justice (ICJ). The most prominent of these was the *Nuclear Weapons* case.[34] This case arose from requests by the World Health Organization and the UN General Assembly for an advisory opinion on the legality of the threat or use of nuclear weapons. The United States opposed both requests and tried unsuccessfully to convince the court not to answer them.

In the end, the court did give an opinion, and for the most part, it was quite satisfactory. In particular, the court rejected a number of arguments made by others against the legality of nuclear weapons, and parts of the court's opinion may have a desirable effect on the way in which the same issues are treated with respect to conventional weapons. Let me give some examples.

Opponents of nuclear weapons argued that their use was prohibited by international human rights law–particularly to so-called right to life, and by international environmental law–particularly the prohibition on damage to the environment of other states. We argued, and the court agreed,[35] that these peacetime legal concepts could not be applied directly and absolutely in time of armed conflict. Rather, they had to be treated as factors to be considered in accordance with the law of armed conflict, particularly with the rule of proportionality. That is, loss of life and environmental damage were factors to be weighed against the military advantage to be achieved by a particular operation, rather than treated as a basis for absolute prohibitions.

Nuclear opponents also argued that the use of nuclear weapons was prohibited under customary law because of their non-use since the end of World War II. We argued, and the court agreed,[36] that this was not so, for the reason that the non-use of nuclear weapons had nothing to do with any perception by the nuclear-weapon states that such use would be illegal, but was attributable to other good and sufficient political and military reasons. In fact, nuclear weapons have been and still are an important part of the

34. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of July 8, 1996), 35 I.L.M. 809.

35. *Id.* paras. 24-34.

36. *Id.* paras. 64-67.

deterrent posture of a great many important states, including the United States and our NATO allies.

Similarly, nuclear opponents argued that the illegality of nuclear weapons is demonstrated by the many international agreements that have imposed progressively tighter restrictions on their use, possession, transfer, and delivery systems. We responded, and the court agreed,[37] that if anything, these agreements proved that there was no general prohibition on nuclear weapons use, since partial restrictions would have no purpose if all use of these weapons were illegal. The court said that at most these agreements indicate a trend toward a possible ultimate prohibition, but in and of themselves cannot demonstrate a current prohibition.

Further, nuclear opponents argued that the use of nuclear weapons is prohibited as a result of a series of UN General Assembly resolutions over the years, which characterized nuclear warfare as illegal. We argued, and the court agreed,[38] that General Assembly resolutions do not have independent force of law, and only have legal significance to the extent that they reflect customary law established by the practice of states. Here, there was no such customary practice.

Having disposed of these arguments, the key question before the court was whether nuclear weapons could be used in a manner that complied with the law of armed conflict; in particular, the rules on proportionality and discrimination between civilian and military objectives. Clearly and understandably, the court was troubled by this question. In the end, the court ruled by a 7-7 vote, with the tie broken by the vote of the Algerian President, that the use of nuclear weapons would "generally" be contrary to the law of armed conflict.[39]

However, the court declined to rule on the legality of nuclear weapon use in three important situations. The first was what the court called "the extreme circumstance of self-defense in which the survival of a state was at stake."[40] As we know, this circumstance has arisen many times during the past century, and nuclear weapons were created and have been retained for the specific purpose of deterring or stopping aggression that might

37. *Id.* paras. 54-63.
38. *Id.* paras. 68-73.
39. *Id.* para. 105(E).
40. *Id.*

threaten the survival of a state–for example, the feared Soviet invasion of western Europe.

Second, the court declined to rule on whether nuclear weapons could lawfully be used in belligerent reprisal[41]–that is, in proportionate response to a serious violation of the rules of armed conflict by another state. Such a situation might, for example, arise if an enemy used weapons of mass destruction and the threat or use of nuclear weapons was necessary to bring such action to an end. This, of course, is another fundamental reason why nuclear weapons have been acquired and retained.

Third, the court declined to rule on the legality of what it called "the policy of deterrence,"[42] by which it apparently meant the retention of nuclear weapons by one state with the avowed intent to use them if necessary to prevent aggression by another state. This, of course, is a third major reason for maintaining nuclear arsenals.

In short, the court declined to rule on the legality of the three main reasons for possessing and using nuclear weapons: to deter aggression, to prevent total defeat if war starts, and to deal with enemy use of weapons of mass destruction. In declining to answer these questions, the court avoided seriously upsetting either the opponents of nuclear weapons or the many states that rely on nuclear weapons for their ultimate security. In any event, avoiding these questions meant that the court's opinion does not require any change in the nuclear posture of the United States or of NATO.

One other case involving the Unites States and the use of force is currently before the court–the *Oil Platforms* case[43] against Iran. This case arose out of the so-called tanker war that occurred during the Iran-Iraq War of the 1980s. Iran had been conducting attacks on the U.S. shipping and other neutral shipping in the Gulf. In response, the U.S. Navy destroyed certain Iranian oil platforms that had been used to assist those attacks. Some years after the incidents, Iran sued the United States in the ICJ for the damage to the platforms and, for want of any better basis for jurisdiction, brought their action under an old bilateral treaty of commerce and navigation.[44]

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41. *Id.* para. 46.

42. *Id.* para. 67.

43. *Case Concerning Oil Platforms (Islamic Republic v. United States of America), available at* <www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>.

44. Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93.

Of course, we argued to the court that this treaty was never intended to govern the conduct of armed conflict. After lengthy proceedings, the court agreed with us in part, but kept for further litigation one of the parts of the Iranian complaint, in which Iran alleged that our attacks had interrupted maritime commerce protected by the treaty.[45] We then filed a counter-claim, based on Iran's attacks on U.S. shipping.[46]

The case will continue to the merits on that part of the Iranian complaint and the U.S. counter-claim. It will probably take years to complete the process of briefing and arguing the case, but in the end, the court may rule on some important issues concerning military operations, particularly, the scope of the right of self-defense, the interpretation and application of the rules of naval warfare, and the duties of neutral states in an armed conflict. This case may therefore produce some important international law in the end.

V. Results of Armed Conflict

Finally, I would like to turn to the third topic I wanted to cover this morning–namely, developments during the post-Cold War decade in the international law relating to the consequences of armed conflict.

A. War Crimes

Let me make a few basic points about the fundamental choices that the Security Council faced in the creation of the two ad hoc war crimes tribunals. In 1993, when the United States decided that we would support some form of mechanism to prosecute the egregious war crimes that were being committed in the former Yugoslavia, there was only limited precedent to guide us. The war crimes trials in Nuremberg and Tokyo had been carried out by the victorious Allied states, essentially in their authority as occupying powers in Germany and Japan, and that authority was not available in 1993 in the case of the former Yugoslavia.

Most of the proposals posited others for the creation of a war crimes tribunal would have done so by the negotiation and ratification of a treaty.

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45. *See Case Concerning Oil Platforms*, Judgment on Preliminary Objections, Dec. 12, 1996.

46. *See id.* Order on Counter-Claim, Mar. 10, 1998.

This had a number of disadvantages. First, we knew that negotiating such a treaty would be difficult and its ratification by sufficient states to bring it into force even more so. This would have resulted in a long process that would take many years, as has been demonstrated by the experience in trying to bring a permanent International Criminal Court into being. We simply did not have that kind of time in the case of the conflict in the former Yugoslavia.

Second, when such a treaty was brought into force, there was no reason to assume that the states that were the objects of war crimes allegations would ratify. The regime would therefore have been wholly ineffective. We did not have a guarantee that states that supported the process, including the United States, would be able to timely ratify such a treaty.

Third, such a treaty would only have mandatory legal effect to the extent that it was agreed by the particular ratifying states. The states that were the object of war crimes accusations could readily ignore the tribunal. There would be serious difficulty in convincing states that had not ratified the treaty to turn over indicted persons who might be found in their territory. The political, economic, and military power of the members of the Security Council would not necessarily support the tribunal's operation.

We therefore turned to another alternative and proposed that the tribunal be created by action of the Security Council under Chapter VII of the UN Charter. It was not self-evident that the Council had this authority, because there is nothing in Chapter VII referring specifically to the creation of judicial bodies, and some took the view that the creation of such a tribunal would be outside the Council's mandate. We were able to persuade the Council that this was not so, that in fact the tribunal would only be enforcing law that already existed by reason of the customary law created by the Nuremberg and Tokyo tribunals, and that there was nothing in the Charter that prevented the Council from creating such a tribunal if it determined that this was necessary to restore and preserve the peace. In due course, the Council unanimously acted to create the Tribunal for the former Yugoslavia,[47] and later created such a tribunal for Rwanda as well.[48]

There were many important advantages to this course of action. All states had an immediate obligation to cooperate with the tribunals. Some

47. S.C. Res. 808, U.N. SCOR (1993).
48. S.C. Res. 955, U.N. SCOR (1994).

did not fully cooperate, but at least the presence of such an obligation strengthened the United States and others in applying diplomatic and economic pressure to encourage compliance. Many states found it much easier to implement their obligations when they had the authority of the Council. The tribunals were in principle created immediately, and in practice came into operation as soon as administrative considerations made that possible.

You are probably familiar with the history of the tribunals since that point. They have had their "ups and downs." The most obvious problem was clear from the beginning, namely that the tribunals can only try persons over whom they have custody. In fact, the tribunals have now obtained custody over dozens of accused persons, but it is still the case that many indictees remain at large.

Nonetheless, compared with the prospects for this operation when it started, the situation is much improved. At the beginning, there was extreme skepticism that defendants of any significance would appear before the tribunals and considerable concern that its mere existence would disrupt the negotiation of settlements to the conflicts in the region. However, diplomatic negotiations have not been hampered by the tribunal process, and it is reasonable to predict that, before the tribunals have finished their work, a very substantial number of significant defendants will have been duly tried and convicted.

B. Compensation for War Damage

Finally, let me turn briefly to the question of compensation for the loss and injury suffered by victims of armed conflict. The aftermath of the Gulf War produced a major new development in this area.

Prior to the Gulf War, there had been claims commissions and tribunals, but nothing that could have coped effectively with the vast number of victims and size of losses that resulted from the Iraqi invasion and occupation of Kuwait. These commissions and tribunals tended to be bilateral adversarial proceedings that took an inordinately long time and to have limited resources at their disposal.

The Gulf War made it essential to develop an alternative regime. In addition to those killed and injured by Iraqi forces, there was wholesale theft and destruction of property in occupied Kuwait, many contractual

arrangements were terminated or disrupted, and millions of foreign workers were expelled, resulting in the loss of their property and livelihood. The destruction of oil wells and the spilling of oil into the Gulf caused tremendous damage to the Kuwaiti environment and natural resources.

Thus, we decided to take a fresh approach relying, once again, on the authority of the Security Council under Chapter VII of the Charter. Based on the argument that compensation for this damage was essential to maintaining long-term peace in the region, we proposed that the Council exercise its Chapter VII power to impose liability on Iraq for all the direct consequences of the war, and to create a UN Compensation Commission to adjudicate damages. The Council agreed.[49] The Commission which emerged was not an adversarial tribunal of the traditional sort, which Iraq could have tied up for years in procedural maneuvers. Rather, it was designed to function like an administrative body, to render decisions quickly and effectively on large categories of claims, and without the need to decide in each case whether Iraq was or was not responsible.

To finance the operation, we proposed that the Council levy a thirty percent deduction from future Iraqi oil export revenues, to be transferred into a compensation fund for payment of approved claims. The Council agreed, but actual revenues still depended on Iraq's willingness to resume oil exports under these conditions. After resisting this regime for years, Iraq finally began pumping oil under UN control, with the revenues going partly for compensation of war victims, partly for humanitarian relief in Iraq, and partly to finance UN operations.

After a slow start, the results of this effort are coming in nicely. To date, more than a million awards have been issued for a total of more than seven billion dollars, and more than two billion dollars have been paid from Iraqi oil export revenues. This, however, is only a start, since the total damage caused by the Gulf War certainly exceeded one hundred billion dollars, and recovery of that amount will still take a great many years. As the years go by, there will undoubtedly be political pressure from others to restrict or to terminate the deduction from Iraqi oil export revenues for these purposes. The United States will have to stick this process out with the same determination it has shown to date.

All in all, this claims program is unique, and is one or two orders of magnitude larger than any other international claims program ever

49. S.C. Res. 687, U.N. SCOR (1991), paras. 16-19.

attempted. At the same time, we have to recognize the unusual combination of circumstances that made such a program possible in the case of Iraq. First, Iraq was totally defeated in the war and was not in a position to demand or bargain for better terms. Second, we were able to harness an extremely large flow of resources–Iraq's oil exports–that has a very high margin of profit, above and beyond the costs of production, that could readily be tapped. Third, this flow of resources has been relatively easy for the international community to control, since it mostly flows out by way of tanker traffic on the high seas.

It is unlikely that such a serendipitous combination will occur very often in the future. For example, no comparable source of revenue has been available to finance compensation for the victims of the conflicts in the former Yugoslavia. Nonetheless, I think that important precedents are being created in terms of the methods by which the Compensation Commission is operating and the law on compensation issues that it is creating.

VI. Conclusion

I think you would agree that this first post-Cold War decade has been an interesting and hopefully fruitful period in terms of the development of international law and practice to meet the monumental problems presented by the armed conflicts of this new age.