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

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It is a distinct privilege for me to deliver the Thirteenth Solf Lecture, inasmuch as I had the pleasure of knowing and, to some extent, collaborating with Colonel Waldemar Solf for almost an entire decade—from the mid-70s to the mid-80s. He was the Department of Defense (DOD) representative to the international conference, which culminated in the two Additional Protocols to the Geneva Conventions of 1949.[3] Personally, I was most unhappy with the main outcome of the conference, *i.e.* Protocol I relating to international armed conflicts. To this very day, when consulted, my advice is to not ratify Protocol I, owing to its intrinsic flaws. All the same, one cannot deny that many of the clauses of the Protocol are incontrovertible and/or reflect customary international law. I met Colonel Solf on numerous occasions in connection with the Protocol. He was always good-natured, usually smiling, and had a tendency to always look at the glass as half full where others (like myself) would see it as half empty. We were having lengthy discussions as to what ought to be done about the Protocol. One of the ideas that emerged from those deliberations is only now materializing. There is a current effort in Geneva to identify those provisions of the Protocol which are either declaratory of customary international law or are otherwise acceptable to countries (like the United States) opposed to the Protocol as a whole. When I participate in the Geneva sessions, striving to produce a consensus along these lines, I often

1. This article is an edited transcript of a lecture delivered on 1 March 2000 by Professor Yoram Dinstein to members of the staff and faculty, distinguished guests, and officers attending the 48th 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 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.

think of Colonel Solf, who regrettably is not there to contribute to the intellectual exercise. He is sorely missed by all those who knew him.

For this presentation, I have chosen a topic which might have been appreciated by Colonel Solf: the present challenges to the international law of war (the *jus in bello*). Of course, I cannot cover every aspect of the law of war. I shall therefore focus on only three challenges (with an emphasis on the first): (a) the issue of "humanitarian intervention" in the specific context of Kosovo; (b) the law with respect to non-international

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2. Presently, Dr. Yoram Dinstein is a Humboldt Fellow at the Max Planck Institute, Heidelberg, Germany. Dr. Dinstein served as the Stockton Professor of International Law at the Naval War College (1999-2000); President of Tel Aviv University (1991-1999), Rector of the University (1980 - 1985), and Dean of its Faculty of Law (1978-1980). He is also Professor of International Law and Yanowicz Professor of Human Rights at Tel Aviv University.

Professor Dinstein was born in Tel-Aviv in 1936 and obtained his legal education at the Hebrew University in Jerusalem and New York University. He started his career in Israel's Foreign Service and served as Consul of Israel in New York and a member of Israel's Permanent Mission to the United Nations (1966/1970). Even subsequent to becoming a full-time academic, Professor Dinstein has represented his country in various international fora, ranging from the United Nations Human Rights Commission through International Red Cross Conferences to Interpol. He served as Counsel in the Taba Arbitration with Egypt (1986/1988).

Professor Dinstein is a member of the prestigious Institute of International Law. He has been a visiting Professor of Law at the University of Toronto (1976/1977) as well as Meltzer Visiting Professor of Law at New York University (1985/1987). He has given guest lectures in dozens of leading universities across the world. The University of Buenos Aires, the University of Chile, and the Hebrew Union College conferred on him honorary doctorates. The National University of Mexico (UNAM) awarded him the title of Distinguished Professor.

Professor Dinstein has written extensively on subjects relating to international law, human rights and laws of armed conflict. He is the founder and Editor of the *Israel Yearbook on Human Rights* (twenty-eight volumes of which have been issued–in English–since 1971). His other publications include a six-volume treatise (in Hebrew) on international law. His principal book in English is *War, Aggression and Self-Defense* (2nd ed. 1994). Professor Dinstein's numerous writings are widely cited, and several have been translated into Spanish and French. His works are frequently referred to by the Supreme Court of Israel.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, 1977 U.N. Jur. Y.B. 95 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977. *Id.* at 135.

armed conflicts; and (c) the theme of air and missile warfare, especially in the context of targeting.

I shall start with "humanitarian intervention." Under present-day international law, the use of inter-State force is prohibited by Article 2(4) of the Charter of the United Nations.[4] As proclaimed by the International Court of Justice, in the *Nicaragua* case of 1986, Article 2(4) of the Charter must be viewed as a reflection of contemporary customary international law.[5] Indeed, the prohibition of the use of force in international relations may be considered the cornerstone of modern international law.

It must be stressed that the proscription of the use of inter-State force is all-embracing and subject only to two exceptions explicitly set out in the Charter: (i) self-defense (under Article 51[6]) in response to an armed attack, and (ii) enforcement action ordained or authorized by the Security Council (pursuant to Chapter VII of the Charter[7]) in any setting of aggression, breach of the peace, or threat to the peace. Many people refuse to reconcile themselves to the narrow scope of these two exceptions. They argue that if genocide is perpetrated, if human rights are systematically violated by a despotic regime, if minorities are harshly oppressed, there is (or there should be) a right for a foreign state–preferably a group of States–to intervene unilaterally (that is to say, even without a go-ahead signal from the Security Council), using force where necessary to prevent or stop genocide and to terminate other types of widespread violations of human rights. This contention may be impelled by the best of intentions. However, forcible intervention on humanitarian grounds is still forcible intervention. Consistent with the law of the Charter, only the Security Council can unleash the use of force against a sovereign State under any circumstances exceeding the bounds of self-defense in response to an armed attack. The Security Council, and only the Security Council, is the policeman of the world.

Evidently, the Security Council too can act only in compliance with the Charter. Under the Charter, each of the five permanent members of the Council (viz. the United States, Russia, China, Britain, and France) benefits from a veto power, so no resolution can be adopted against its wishes.[8]

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4. U.N. CHARTER art. 2, para. 4, 9 INTERNATIONAL LEGISLATION 327, 332 (M.O. Hudson ed., 1950).

5. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), 1986 I.C.J. 14, 99-100.

6. *See* International Legislation, *supra* note 4, at 346.

7. *Id.* at 343 nn.

The system of the Charter was formulated in San Francisco in 1945. Both the venue and the date are of consequence. Much of the text of the Charter is based on American proposals. It was the United States that was primarily interested in the creation of the United Nations. Other big powers at the time were either lukewarm or skeptical. It was definitely the United States which was responsible for the crucial role assigned to the Security Council and to the Permanent Members. The time-frame was equally significant: April-June of 1945, when World War II was drawing to a close yet was not quite over. The five Permanent Members were the leaders of the Grand Alliance winning the War. Conversely, Germany and Japan were still enemy States, naturally excluded altogether from the United Nations at that formative stage. Today it is easy to maintain that Germany and Japan (and perhaps one or two other countries like India) should also become permanent members, but this requires a cumbersome–and difficult-to-achieve–amendment of the Charter.

In any event, if one compares the Security Council to other organs of the United Nations–preeminently, the General Assembly (where every Member State is represented and all States have an equal standing in voting[9])–the Security Council shines by example. The General Assembly is essentially a debating club, lacking the power to adopt binding resolutions in matters pertaining to international peace and security. The glass UN Building in Manhattan serves as a prism deflecting the rays of light of reality. The General Assembly has become a forum often led by minuscule countries that have managed to coalesce into a political bloc whose might is noticed only within the confines of the UN Building. Frequently, the General Assembly is staging a theatre of the absurd, where leading powers like the United States wield as little or less clout than tiny nations with little or no power in the world in which we live. By contrast, the Security Council by and large mirrors the power politics of our planet, warts and all. Certainly, when the Council can act by unanimous support of the permanent members, its decisions have a cachet that no other international organ can emulate. Legally speaking, these decisions (especially when the Council is acting under Chapter VII of the Charter) can be binding on all member States, in accordance with Article 25.[10]

What is the advantage inherent in the Security Council system? The advantage lies in the veto power, ensuring as it does that at least here–

8. *Id.* at 340 (art. 27).
9. *Id.* at 334, 337 (arts. 9(1), 18(1)).
10. *Id.* at 339.

where it really counts–the United States (or any other permanent member) has as much say in world affairs as it does outside the United Nations. What is the disadvantage in the system? The disadvantage equally lies in the veto power. It all depends on who is casting the veto. Many Americans are appalled when one or more of the four other permanent members blocks by a veto a resolution advocated by the United States. But it must be observed that the United States itself does not hesitate to exercise the veto power when the need arises. Immoderate use of the veto (mostly by the former USSR) was characteristic of the "Cold War" era. It has been calculated that, over half a century, the veto was cast 242 times as regards 202 proposals (meaning that sometimes more than one Permanent Member voted against a particular proposal); 195 of the 202 proposals defeated by the veto were put to the vote before the collapse of the USSR.[11] The number cited, if anything, is understated. In a host of additional cases, the mere threat of a veto had a chilling effect, precluding a formal vote. Thus, the Security Council has been often paralyzed by the use or abuse of the veto. While the number of vetoes has gone down dramatically since the end of the "Cold War," they still constitute an ever-present obstacle frustrating the adoption of Security Council resolutions. It must be further appreciated that, under the Charter, a permanent member is entitled to cast a veto in a matter affecting itself. In other words, it can serve as a judge in its own case. This is why nobody is going to the Security Council to challenge the Russian conduct in Chechnya: everybody knows that such an effort is doomed to failure because Russia is bound to exercise its veto power against any resolution likely to condemn or even deplore its *modus operandi*.

That brings us to the issue of Kosovo. Undeniably, atrocities were committed in that part of Yugoslavia. Action should have been taken by the Security Council, but it was not–owing to Russian (and Chinese) opposition. What other options were there? The obvious option was diplomacy. The record shows that international intervention can sometimes be carried out by obtaining-through various means of suasion-the prior consent of the State most immediately affected. This is what happened, after considerable international pressure had been brought to bear on Indonesia, in the case of East Timor in 1999.[12] In the case of Kosovo, too, negotiations were held in Rambouillet (France). Regrettably, the negotiations

11. *See* S.D. BAILEY & S. DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 230-37 (3rd ed. 1998).

12. S. C. Res. 1264, U.N. SCOR, 4045th mtg. U.N. Doc. S/RES/1264 (1964), 38 I.L.M. 232, 233 (2000).

failed. Yet, why did they fail? The principal item on the agenda was reinstating the autonomy of the province of Kosovo (abolished by the Yugoslav despot, Milosevic, in 1989) within the sovereign boundaries of Yugoslavia. Curiously enough, on that all-important question, agreement was ostensibly reached. The deal breaker was an ancillary matter, namely, the stationing of troops of the North Atlantic Treaty Organization (NATO) in Kosovo.[13] At that point in Rambouillet, I believe that the Western diplomats made a fundamental error. In Diplomacy 101 the Western negotiators would have been taught to respond to the crisis in a different manner, by exploiting the limited consent gained. In my opinion, the Western negotiators should have said to Milosevic at that point: "Okay, we all agree on the basic principle that autonomy must be reinstated in Kosovo. Let us sign an agreement to that effect and adjourn for three months. If by then we all witness autonomy actually implemented in Kosovo, all is well. But should Yugoslavia renege on its pledge, sanctions would be imposed." I sincerely believe that, had Yugoslavia signed on the dotted line and then reneged on its word, Russia would have been morally compelled to uphold Security Council enforcement action. As it is, after all the bombings, NATO troops are not alone in Kosovo: there are Russian troops in the province as well. Arguably, recourse to force did not really generate better results as compared to what might have been accomplished through diplomacy. But in any event, to my mind, the diplomatic option was not played out.

Another legal option available at the time was awaiting the opportunity to strike in invocation of the right of collective self-defense, in response to an armed attack under Article 51 of the Charter. As long as the Yugoslav army was operating within Kosovo (an integral part of Yugoslavia), clearly no armed attack was committed against any foreign country and there was no room for the exercise of individual or collective self-defense. However, the policy of ethnic cleansing undertaken by the Milosevic regime in Kosovo was bound to reverberate beyond the boundaries of the province into neighboring Albania, which is a sovereign country. The majority of the Kosovars are ethnically Albanians, and most of the refugees from Kosovo were seeking sanctuary in independent Albania. Under the circumstances, there was every reason to believe that in all likelihood, sooner or later, a clash of arms would occur between Yugoslav and Albanian military units at the international frontier. Once that happened, once there was an armed attack by Yugoslavia against Albania, every other country in the world was entitled to come to the aid of Albania in the name

13. *See* FACTS ON FILE 181 (1999).

of collective self-defense. For collective self-defense to be exercised, no previous military alliance is required. Unilateral or coordinated (coalition) action can be taken on the spur of the moment, even by geographically remote States, as long as they are supporting the victim of an armed attack. The NATO could strike in support of Albania (assuming that an armed attack had occurred) without being obliged to get a prior green light from the Security Council. It is true that, under Article 51, the Council is vested with the right to a subsequent review of the action taken and to an evaluation whether or not it constituted genuine self-defense against an armed attack. But had the Security Council been convened, with a view to determining the legitimacy of hypothetical NATO action invoking collective self-defense in response to a Yugoslav armed attack against Albania, it is more than doubtful that the majority of the Council would have wished to override NATO's judgment. In any event, no resolution could possibly be adopted against three permanent members armed with the veto power.

Like it or not, these two options were not availed of. Instead, NATO resorted to an air campaign, relying merely on the argument that the Security Council had twice determined (in Resolutions 1199 and 1203 of 1998) that the situation in Kosovo constituted "a threat to peace and security in the region."[14] This argument sounds attractive but is untenable. The Charter allows States–acting individually or in a coalition–to exercise their own judgment as regards the use of force only in conditions of self-defense, in response to an armed attack. Absent an armed attack, that freedom of unilateral action disappears. When a threat to the peace looms on the international horizon, it is the exclusive prerogative of the Security Council not only to determine (as it did in the case of Kosovo) the existence of the threat, but also to activate enforcement measures. Article 53(1) of the Charter specifically refers to the possibility that the Security Council, where appropriate, would use regional organizations for enforcement action under its authority; still, the provision expressly adds: "But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[15]

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14. S. C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998), 38 I.L.M. 249, 250 (1999); S. C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203 (1998).

15. *See* International Legislation, *supra* note 4, at 347.

What was conspicuously lacking in the Kosovo operation was the authorization of the Security Council.

To fully comprehend what went wrong in Kosovo, it is useful to compare the scenario with what had happened in another part of the former Yugoslavia, *i.e.* Bosnia-Herzegovina. In Resolution 816 (1993), the Security Council (having determined earlier the existence of a threat to the peace in the area) decided that member States, "acting nationally or through regional organizations or arrangements" could, "under the authority of the Security Council" take "all necessary means" (a common euphemism meaning the use of force) in the air space of Bosnia-Herzegovina.[16] In Resolution 836 (1993), the same call was made with a view to supporting the United Nations force operating in Bosnia (UNPROFOR) in the performance of its mandate, including the protection of safe areas for civilians.[17] Accordingly, in 1994-1995, NATO aircraft repeatedly conducted air strikes in Bosnia, in coordination with the UN. The Bosnia situation is a prime example of NATO forces acting on the basis of a specific and explicit Security Council authorization to do so. The NATO should have conducted itself in Kosovo in the same way that it did in Bosnia. Having failed to do so, NATO acted in breach of the Charter.

One of the salient arguments of the advocates of "humanitarian intervention" is that, no matter what happens in other contexts, one cannot sit idly by in the face of genocide. They conveniently ignore the text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[18] Article I of the Convention prescribes that genocide, whether committed in peacetime or in wartime, is a crime under international law which the Contracting Parties undertake to prevent and to punish.[19] But it is not sufficient to read Article I in isolation. How do you prevent or terminate genocide perpetrated on foreign soil? Article VIII lays down that any Contracting Party may call upon "the competent organs of the United Nations" to take such action under the Charter as they consider appropriate.[20] In other words, when genocide appears to be imminent or has already started, the legitimate remedy is not to use unilateral force but to go to the compe-

16. S. C. Res. 816, U.N. SCOR, 3191st mtg., U.N. Doc. S/RES/816 (1993), 48 Resolutions and Decisions of the Security Council 4. *Id.*

17. S. C. Res. 836, U.N. SCOR, 3228th mtg., U.N. Doc. S/RES/836 (1993), 48 Resolution and Decisions of the Security Council 13, 14 (1993).

18. Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 U.N.T.S. 277.

19. *Id.* at 280.

20. *Id.* at 282.

tent authorities of the United Nations (an indirect reference to the Security Council). What happens if the Council is paralyzed by the veto power or is otherwise unable to stop the conflagration? The answer is provided by Article IX, establishing the compulsory jurisdiction of the International Court of Justice in case of disputes relating to the application or interpretation of the Convention (including the issue of State responsibility for genocide).[21] Thus, there are two choices. You can go either to the Security Council or to the International Court of Justice. Nowhere does the Convention imply that there exists a third choice of a unilateral air campaign.

I regard what happened in Kosovo not only as bad law but also as a dangerous precedent. I have no doubt in my mind that, in Kosovo, the "children of light" were confronting the "children of darkness." Differently put, NATO was acting in Kosovo with the best of motivations and intentions, albeit in breach of the Charter. But what is sauce for the goose is sauce for the gander. Who can guarantee that in future it would not be the "children of darkness" who would fight the "children of light" in the name of the self-same principle? And can it always be appraised clearly who the "children of light" and the "children of darkness" are? Suppose that China would send troops to Indonesia, claiming that it is acting in the face of massive violations of human rights in Aceh (Sumatra). Will the United States concede China's right to act unilaterally, even though the area is relatively adjacent to China and many people of Chinese extraction live there (whereas the Balkans are far away from the United States and scarcely any Americans reside in Kosovo)? The pivotal point is that when a State–or even a group of States (like NATO)–intervenes unilaterally with force in the affairs of another country, its action is automatically suspect. Only the seal of approval of the Security Council can remove doubts concerning the sincerity of the intervenors. Precisely because of that organ's complex composition and the omnipresence of the veto power, when a consensus emerges in the Security Council it commands respect and credibility. There is certainly no better procedure to ensure that a forcible intervention from the outside lacks a hidden agenda.

The second challenge to the international law of war emanates from the current proliferation of non-international armed conflicts. I have already pointed out that Article 2(4) of the Charter deals with the use of inter-State force. There is no prohibition in the Charter on the use of intra-State force: force being used by one faction against another within a single country. Unfortunately, when one studies history one finds that the most

21. *Id.*

sanguinary and traumatic armed conflicts are usually internal in character. Every American knows that the worst war in the history of the United States was the Civil War. In terms of casualties, more blood was shed in the four years of the War between the States (1861-1865) than in all America's foreign wars combined (including two World Wars) until almost the last phase of the War in Vietnam. The American experience is by no means unique. Other countries–like Spain–have gone through similarly disastrous civil wars overshadowing their international conflicts in recent memory. Still, civil wars are not forbidden by international law.

There is some international humanitarian law governing non-international armed conflicts. Protocol II Additional to the Geneva Conventions is a case in point.[22] More significantly, there is common Article 3 of the four Geneva Conventions of 1949.[23] This is a minimum standard, which has been held by International Court of Justice to reflect general international law.[24] Violations of common Article 3 are incorporated as crimes (for which perpetrators are individually accountable) in Article 4 of the Statute of the International Tribunal for Rwanda, established by the Security Council in Resolution 955 (1994).[25] Moreover, Article 8(2)(c) of the 1998 Rome Statute of the permanent International Criminal Court expands the concept of war crimes to include serious violations of common Article 3 of the Geneva Conventions.[26] The occurrence of "war crimes" in internal armed conflicts does not detract from the cardinal fact that the conflict itself does not amount to an inter-State war.

The trouble is that in many instances it is not clear whether a particular conflict represents a civil war or an inter-State war. Yugoslavia is a good illustration for the proposition that the same conflict can change its nature more than once. Thus, Bosnia used to constitute a part of the former Yugoslavia. The conflict there started as a civil war between Serbs, Croats

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22. Protocol II, *supra* note 3, at 135.

23. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 U.N.T.S. 31, 32-34; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949. *Id.* at 85, 86-88; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949. *Id.* at 135, 136-38; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949. *Id.* at 287, 288-90.

24. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), 1986 I.C.J. 14, at 114.

25. S. C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600, 1604 (1994).

26. Rome Statute of the International Criminal Court, 1998, 37 I.L.M. 1002, 1008 (1998).

and Muslims. Once Bosnia-Herzegovina became an independent country, the conflict transmuted into an inter-State war by dint of the cross-border involvement of Serbian (former Yugoslav) armed forces in military operations conducted by Bosnian Serbs rebelling against the Bosnian Government (in an effort to wrest control over large tracts of Bosnian land and merge them into a Greater Serbia). Then a withdrawal of the Yugoslav troops was announced in May 1992. Did the conflict revert to being non-international in nature? That was the conclusion of the majority of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its 1997 decision in the *Tadic* case.[27] Yet, an Appeals Chamber of the ICTY reversed that decision in 1999.[28] From the perspective of the individual soldier on the ground, perhaps not much has altered. By contrast, legally speaking, each time there was a sea change giving rise to a completely different set of rules governing the conflict.

We are now living in a period in which there is a striking upsurge in the number of borderline cases between internal and international armed conflicts. It is becoming increasingly difficult to tell what the nature of the conflict is and therefore what rules apply. If that is not enough, there is the phenomenon of "failed States." In a "failed State," like Sierra Leone or Somalia in Africa, there is no longer any central government. Usually, in a civil war, there are two factions fighting each other. On the one hand, there is the central (constitutionally legitimate) government. On the other hand, there is a group of rebels trying to overthrow that government. In a "failed State," the central government has vanished. All that remains is a multiplicity of groups of irregular combatants fighting each other. The consequences for civilians have been shocking in their barbarity. Thus, one of the horrid aspects of the civil war in Sierra Leone has been the phenomenon of child fighters trained to maim civilians belonging to other tribal groups by chopping off their arms. What is the point in developing elaborate rules of international humanitarian law in internal armed conflicts if they are allowed to be utterly ignored? Who is bearing the equivalent of State responsibility when total chaos reins or when the country is ruled by irresponsible "warlords"? Who is going to impose law and order in such circumstances? The international community usually relies on domestic courts and agencies to enforce the law. The breakdown of the State system means anarchy, and anarchy is the antonym of law. One of

27. Prosecutor v. Tadic, No. IT-94-1-T (1997) (Trial Chamber) , 36 I.L.M. 908, 933 (1997).

28. Prosecutor v. Tadic, No. IT-94-1-A, (1999) (Appeals Chamber), 38 I.L.M. 1518, 1549 (1999).

the challenges to contemporary international law is to develop special rules governing the situation in a "failed State".

The third challenge to the present-day international law of war concerns air and missile warfare. It is astounding to note that the last time that a systematic attempt was made to codify the rules of air warfare was in 1923.[29] Needless to say, in 1923 air warfare was in its infancy and missile warfare was not even conceived as a serious possibility. Technologically and operationally, we live in an entirely dissimilar age. Yet, no attempt has been made to conduct a systematic review of the law since 1923.

Air warfare has many dimensions, but the most significant issue is targeting. The United States has consistently adhered to the position that the best thing to do is to not have a binding list of legitimate targets for aerial attack. The argument is that, should a binding list be drawn up, it would in time become obsolete and then–should American aviators wish to take out a target not envisaged in the past-they would be faulted for deviating from the straight and narrow. To paraphrase, circumstances change. We do not know now what military objectives would warrant being hit ten or twenty years down the road. Therefore, we are better off without a fixed list of potential targets. On the face of it, this is a persuasive position. Yet, when one undertakes an empirical study of the evolution of air warfare, the argument proves entirely counterproductive: a real boomerang. The historical record demonstrates that, after every major war, the United States-instead of gaining new objectives for air strikes-has actually lost a few previously legitimate targets. Let me cite a few examples.

During World War II, the idea of strategic bombing was linked to the notion that a belligerent party could legitimately attack any and all enemy military targets, regardless of the extent of collateral damage to civilians. Hence, Dresden, which was a major German railroad center, could be subjected to a massive bombing. The fact that tens of thousands of people lived in close proximity to the railroad station and to the railroad lines was not factored in. That was the law of the time. The outcome was the devastating bombing of Dresden by both United States and United Kingdom air forces, resulting in higher numbers of civilian casualties than in either Hiroshima or Nagasaki. After the War, there came a backlash. Article 51(5)(b) of Protocol I forbids an attack where the incidental injury to civil-

29. *Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Rules of Aerial Warfare (The Hague, 1923)*, 32. AM. J. INT'L L. (Supp. 1, 12, 34 (1938)).

ians "would be excessive in relation to the concrete and direct military advantage anticipated."[30] As enunciated by Judge Higgins, in her Dissent in the International Court of Justice's Advisory Opinion of the 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, there is in customary international law a "principle of proportionality," whereby "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."[31] Indeed, the United States no longer contests this principle.[32] Consequently, today the bombing of Dresden would have been in breach of international humanitarian law.

Furthermore, throughout World War II and thereafter, American aviators resorted to the use of incendiary bombs. However, in 1980 a Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) was formulated, prohibiting attacks by air-delivered incendiary bombs against military objectives located within a concentration of civilians.[33] The United States has not ratified Protocol III. However, it does not seriously object to the core of the instrument: the President has actually recommended advice and consent by the Senate, subject merely to a reservation relating to the case when the use of an incendiary device is judged to cause less collateral damage than alternative weapons.[34] That means that the bombing of Dresden would have been prohibited twice today: once because of disproportionate civilian losses, and the other owing to the use of firebombs in that air raid. Indeed, an air raid similar to Dresden would be illicit at the present time. The same applies to the bombing of Tokyo and other prime targets of World War II.

If that is not enough, one of the basic tenets in World War II was the freedom to attack "target areas," such as the Ruhr valley in Germany. The Ruhr basin is the heartland of German steel and coal heavy industry. The idea was that Bomber Command could send a thousand planes to drop bombs on the Ruhr from a high altitude. The region was very effectively

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30. Protocol I, *supra* note 3, at 114.

31. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 936 (1996).

32. COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 73 INT'L L. STUD. 404 (Naval War College, A.R. Thomas & J.C. Duncan eds., 1999) (Supp.).

33. 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, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, 19 I.L.M. 1524, 1534, 1535 (1980) (Article 2(2)).

34. COMMANDER'S HANDBOOK, *supra* note 32, at 452 n.44.

defended and was also often covered by clouds, so that pinpointing a specific target was both difficult and dangerous. Absent adequate precision-bombing devices, the aviators were not required to risk their lives unnecessarily. All that they were required to do was release the bomb loads once the aircraft were over the Ruhr. The entire valley was regarded as one huge legitimate target. If the bombs did not hit Dortmund, perhaps they would hit Essen; if they did not strike at the Krupps works, they might strike at Thyssen. Yet, Article 51(5)(a) of Protocol I no longer permits treating "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects."[35] Obviously, what was done at the Ruhr cannot be replicated nowadays.

During the Vietnam War, there was a great deal of public outcry against the United States bombing dams and dikes. I belong to a generation that grew up on a famous British film, entitled "The Dam Busters," portraying how the RAF successfully undertook to bomb the Ruhr Dam in the course of World War II. The result was a huge flood with lots of civilian casualties, but more significantly grave damage to German industry supporting the war effort. Today, such an attack would we illegal under Article 56(1) of Protocol I, which disallows attacks against dams, dykes and similar installations.[36] The United States does not accept this provision of the Protocol. Nevertheless, I do not know that since Vietnam the United States has dared to attack a single dam or dike. If you ask me, the United States has lost another legal battle.

In Vietnam, the main problem along the Ho Chi Minh Trail was to identify the targets underneath the jungle's foliage. The United States used herbicides as defoliants. Again, there was much criticism of recourse to these chemicals. Afterwards, the United States took the lead in initiating the 1993 Chemical Weapons Convention (CWC).[37] The United States opposed the inclusion in the text of an outright ban of herbicides, but the opposition ended in a dubious victory. There is no operative clause in the CWC dealing with the topic. All the same, the Preamble recognizes "the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare."[38] If that is not enough, the United States issued a unilateral declaration, which

35. Protocol I, *supra* note 3, at 114.

36. *Id.* at 115.

37. Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993, 32 I.L.M. 800 (1993).

38. *Id.* at 804.

is fully binding, whereby it has formally renounced first use of herbicides in time of armed conflict.[39] Thus, another item has been dropped from the air warfare arsenal.

I do not want to belabor the point. Altogether, the United States–as the foremost air power in the world-has already lost a large number of legitimate targets for air attack, only because of the non-existence of a fixed list which would have legitimized their use (and such a list was fairly easy to work out in the past). Paradoxically, the United States has lost these concrete targets today only because of the curious belief that the availability of a binding list might restrict its freedom of action tomorrow, should it wish to strike at unspecified theoretical targets that are over the horizon of time. Thus, while dreaming of expansion of the range of potential military objectives open to air attack, what we witness is contraction of the actual targets open to attack by American aviators. I find it ominous that during the air campaign in Kosovo voices have been heard criticizing the United States for the destruction of bridges. In my considered opinion, bridges are among the clearest of military targets. But as long as there is no binding list, nothing prevents those wishing to curtail the freedom of action of American aviators from striving to develop a tide of legal opinion that may ultimately bar aerial attacks against bridges. Before you know it, the leading air power may find itself bereft of legitimate targets against which it can direct its huge aerial armada.

What I submit is that the best thing for the United States is to proceed to producing a binding list. Let everybody know what is permissible and what is impermissible in air and missile warfare. As for the need to have elasticity in terms of unforeseen future targets, the legal technique is fairly simple. I do not propose the adoption of an exhaustive list. All that is required is an open-ended enumeration of military targets that can be revised and updated in the years ahead. That way there will also be some leeway for a possible trade-off should irresistible pressure mount to delete an item from the list.

The three challenges to the contemporary international law of war are of particular relevance to the United States. The reason is manifest: we live in a unipolar world when much of the burden of peace enforcement is carried by the only remaining superpower. It is true that the European Allies are often urging the United States to joint action, but when the chips are down it turns out that most of the combat action is left to American

39. COMMANDER'S HANDBOOK, *supra* note 33, at 477.

armed forces. There is a famous anecdote about the elephant and the mouse running on an unpaved path in Africa. The mouse turns to the elephant, marveling: "Did you notice how much dust we are making when we run together?" There is perhaps more to this allegorical anecdote than meets the eye. Militarily, when it comes to operations, the mouse's contribution is at best limited. Yet, in terms of politics, public opinion and law, the elephant is not alone. Willy-nilly, it must take into account the views of others. Many Americans still believe that they can afford the luxury of isolationism and ignore the rest of the world. This is a major error. In the era of the intercontinental ballistic missile, the nuclear submarine and an international network of terrorism, the United States cannot maintain the fiction of "Fortress America." There is no alternative to military alliances, and they imply coalition warfare. Unfortunately, the European Allies hold different opinions on a plethora of international legal issues. The United States purports to be aloof to constraint from the outside, but in reality it is susceptible to the sway of world public pressure. A telling example is Protocol I. The United States refuses to ratify it, and yet in all legal publications issued by the armed services there are constant references to the instrument. My point is that there is often erosion in American positions vis-à-vis the laws of war. To my mind, it is time for the United States to take the initiative in the codification of the *jus in bello*. By being more proactive, it can impact on international legal thinking and on the formulation of legally binding rules that might prove more amenable to American needs.

It is only fitting and proper to say all this in a Solf Lecture. In the 1970s, the DOD frequently had to rely on outsourcing when international legal questions were raised. Colonel Solf was one among a very small group of in-house experts. At the turn of the Millennium, the state of affairs has radically changed. Currently, a large number of highly trained international lawyers are working in the DOD and in the armed services. The human assets are in place to meet the challenges of the international law of war. My advice to you is: use them!