SEVENTEENTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

PROFESSOR MICHAEL J. GLENNON[2]

Thank you so much for that very kind and generous introduction. General Black, General Rikhye, Lieutenant Colonel Wollschlaeger, and honored guests, it is a terrific pleasure to be here today to give this famous lecture and to visit this most impressive institution.

I am especially honored to have a chance to talk to those of you who make a difference in the first instance in the life and death of the rule of law. As an academic, I often talk to students about the need for internalizing the theoretical framework of the law. I think all of us who have been in the world of practice know that [the theoretical framework] only really

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1. This is an edited transcript of a lecture delivered on 3 March 2004, by Professor Michael J. Glennon to the members of the staff and faculty, distinguished guests, and officers attending the 52d Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The Judge Advocate General's School, U.S. Army, established the Waldemar A. Solf Chair of International Law on 8 October 1982. The chair is named in honor of Colonel (COL) Waldemar A. Solf (1913-1987). Colonel Solf, commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; the Staff Judge Advocate of the Eighth U.S. Army and United States Forces Korea, the United Nations Command, and the United States Strategic Command. He also served as the Chief Judicial Officer, U.S. Army Judiciary, and as the Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts 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. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

matters where the law is actually applied, where the law lives or dies. So, I'm especially honored to have a chance to be with you here today.

I want to talk to you about an experiment, about the greatest legalist experiment of the 20th century: humanity's effort to subject the use of force to the rule of law. I want specifically to discuss the failure of that experiment. I'm going to do that by addressing, first, the nature of the problem, which can be succinctly stated; second, the solution that humanity settled upon to resolve that problem; third, the failure of that solution; fourth, the reasons for that failure; and finally, where we go from here—specifically, what the United Nations (UN) and the United States can do about it.

First, the problem. For the better part of human history, the fate of states was determined by geopolitics, by geography and economics, by diplomacy and trade, and not least by relative military might. The interplay of those forces produced anarchy and often, massive brutality. War was fought frequently and pitilessly. Cities were burnt. Farmland was laid waste. Populations were exterminated and survivors were enslaved. Finally with the deaths of forty-seven million people in World War I, humanity turned its back, or thought it turned its back, on the reigning geo-

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He served as a consultant to various departments and agencies of the federal government, congressional committees, foreign governments, and the International Atomic Energy Agency. He has testified before the International Court of Justice and various congressional committees. A frequent commentator on public affairs, he has spoken widely within the United States and overseas and appeared on *Nightline*, *The Today Show*, NPR's *All Things Considered*, and other national news programs. His op-ed pieces have appeared in the *New York Times*, *Washington Post*, *Los Angeles Times*, *International Herald-Tribune*, *Financial Times*, and the *Frankfurter Allgemeine Zeitung*. Professor Glennon is the author of numerous articles on constitutional and international law and a number of books on the same subject areas.

political balance of power system, and substituted what it thought was a new legalistic order to constrain the exercise of state power. This new order was embodied, as we all know, in the Covenant of the League of Nations.[3] "The tents have been struck," said South African Prime Minister Jan Christian Smuts, "and the great caravan of humanity is once more on the march."[4] Smuts said that at the framing of the Covenant of the League of Nations treaty at the Versailles Peace Conference in 1919.[5] The Covenant regime was embellished eight years later by the famous, or infamous, Kellogg-Briand Pact by which states promised to forego war as an instrument of national policy.[6] For the first time, the use of force by one state against another was declared by the international community to be unlawful.

Well, as we all know, it didn't work. Millions more people were killed in World War II. In San Francisco in 1945, representatives of the community of nations met once again to ensure that [war] never happened again — "to save succeeding generations from the scourge of war"—in the famous words of the UN Charter.[7] The solution that was arrived at in San Francisco is familiar, but I think it may be worth taking a moment to review. The framework is set out in Chapter VII of the UN Charter.[8] The point of Chapter VII was to give the UN Security Council a monopoly on the use of force. The idea was to set up a system in which the use of force would be permissible in only two circumstances: one, if it was authorized by the UN Security Council in response to a threat to the peace, breach of the peace, or act of aggression; and second, under Article 51 of the Charter, for self-defense, in the event of an armed attack upon a member state.[9]

These are the only two circumstances in the UN Charter in which use of force is permitted. The idea was that this strict limitation on the right of states to use force for self-help made sense because the Security Council would be, as Winston Churchill put it, a constabulary force before which the forces of atavism and barbarism would stand in awe.[10] It would be a

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3. Covenant of the League of Nations, *reprinted in* BENJAMIN B. FERENCA, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975).
4. Lieutenant-General Jan Christian Smuts, The League of Nations: A Practical Suggestion, *reprinted in* 2 THE DRAFTING OF THE COVENANT 23, 60 (David Hunter Miller ed., 1928).
5. Treaty of Versailles, June 28, 1919.
6. Aug. 27, 1928, 46 Stat. 2343, T.S. No 796, 94 L.N.T.S. 57.
7. U.N. CHARTER pmbl.
8. U.N. CHARTER ch. VII.
9. *Id.* art. 51.

constabulary force because the Security Council would enter into special agreements with member states under Article 43 of the Charter,[11] states that would agree to provide it with naval and sea and land units to serve in a standing or stand-by force, which would respond decisively when states reported to the Security Council (as they were required to do) when they were attacked.

Well, that's the way the system was intended to work. Of course, as we all know, it didn't quite turn out that way. The Security Council, paralyzed by the threat of the Soviet veto during the Cold War, never initiated the negotiation of special agreements with member states. No standing or stand-by force was ever set up under the military staff committee of the Security Council. In the fullness of time, states once more began to use force for purposes of self-help. By the 1990s, well over 200 instances could be cited in which states had used armed force in clear violation of the prohibition in Article 2, paragraph 4 of the UN Charter against any use or threat of force against the territorial integrity or political independence of any state.

Most recently, in the 1990s, we saw nine African states involved in what Madeleine Albright[12] referred to as Africa's "First World War,"[13] a vast interstate conflict that cost tens of thousands of lives. All this was in a sense capped by NATO's use of force against Yugoslavia; a war in which nineteen western democracies representing 780 million people—the founders and charter members of the UN—used force without any authorization of the UN Security Council, and without any plausible claim to act in self-defense. I won't review the controversy about whether the United States acted pursuant to Security Council authorization in the recent con-

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10. *See* WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963 5998 (Robert Rhodes James, ed., 1974). In a speech at Bristol University on 2 July 1938, referring to the League of Nations, Sir Winston Churchill stated, "Civilization will not last, freedom will not survive, peace will not be kept, unless a very large majority of mankind unite together to defend them and show themselves possessed of a constabulary power before which barbaric and atavistic forces will stand in awe." *Id.*

11. U.N. CHARTER art. 43.

12. Ms. Madeleine Albright served as the U.S. Secretary of State for President William Jefferson Clinton from 1997-2001.

13. Mike Crawley, *Kabila and Africa's 'First World War,'* CHRISTIAN SCI. MONITOR, Jan. 18, 2001, at 1 (quoting Secretary Albright describing the Congo as at the heart of Africa's "first world war").

flict in Iraq. Suffice it to say, that is not a view that is shared unanimously by the international community.

The short of it is, therefore, the system that was set up by the UN Charter once again has proved ineffective. Now, as a matter of law, one can parse this failure in different ways; I won't get into the various technical legal doctrines—desuetude, non-liquet, the freedom principle of the *Lotus* case,[14] etc.—that might be pertinent to a situation such as this. Suffice it to recall the fundamental precept of the international legal order, which is that that legal order is volunteerist. States are bound only by those rules to which they consent, and the question is in each case whether the state in question has consented to the rule with which it supposedly is compelled to comply.

The question, to put it slightly differently, is this: viewing all the state's words, all the state's deeds, all the indicia of a state's intent, does that state intend to be bound with the rule in question? Yes, it is useful to start with the language of the UN Charter. It is not, however, useful to stop there. Subsequent practice—those 200-some incidents that I've talked about—have probative effect under a legal methodology that is directed, once again, at assessing all indicia of the state's consent to decide what rules the state in fact accepts.

It is sometimes said that states have not explicitly renounced their obligations under the UN Charter. But the question, once again, is whether states have actually posited a rule that says they must explicitly renounce prior obligations before acting in a manner inconsistent with those obligations. Where did the United States ever undertake such an obligation of explicit renunciation? It is said that the United States, by its conduct, in "going back" to the Security Council to seek authorization to attack Iraq, has demonstrated that it accepts the regime of the UN Charter, and that that demonstrates the continuing relevance of the UN.[15] To that I can only say that if this is the test—if the reference point is "justificatory discourse" as some academics like to describe it[16]—if this is the test, then the League of Nations passed with flying colors. In 1936, the debate over the Italian invasion of Abyssinia occurred in the Council of the League of Nations in Geneva.[17] Similarly, if the test is whether reference to the putative regime for justification indicates acceptance of that regime, recall that Adolf Hitler, upon invading Poland in 1939, justified the invasion as permissible under international law because Germany claimed to have been "attacked"

14. S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4.

by Poland. I for one do not take great comfort in these supposed indicia of intent.

The appropriate conclusion, it seems to me, is an unfortunate one. It is a conclusion that I lament. But the conclusion is that the regime governing the use of force, that has been established by the UN Charter, has collapsed. I suggest that anyone who doubts that look at the words of the United States' representatives to the UN, and indeed, our chief executive's words. Yes, it is true. Again, there may have been no explicit renunciation, but who seriously would suggest that the claimed right to use preemptive force made in the national security strategy statement can be squared with the explicit requirement of an armed attack set out as a predicate in Article 51 for the defensive of use of force? Secretary [of State Colin] Powell[18] said on 27 January 2003, "We continue to reserve our sovereign right to take military action against Iraq alone or in a coalition of the willing."[19] Our sovereign right? I thought that right was limited under the UN Charter. Is this statement really consistent with the recognition that that sovereign right is limited by Article 51 of the Charter? President [George W.] Bush said in his 2003 State of the Union address, "The course of this nation does not depend on the decisions of others."[20] But of course, if one accepts the regime of the UN Charter, the course of this nation in a situation such as Iraq depends very much upon the decisions made by the UN

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15. *See, e.g.*, Simon Chesterman, *To Be Irrelevant or to Go Along; Dilemma for Europe*, INT'L HERALD TRIB., Feb. 7, 2003, at 8 (analyzing the best course for "Old Europe" Security Council members regarding the U.S.-proposed ouster of Saddam Hussein's regime); John Donnelly, *Bush, Blair Display Unity on Iraq, Britain Signals Preference for Wider Coalition*, BOSTON GLOBE, Feb. 1, 2003, at A1 (quoting President Bush saying, "[s]hould the [UN] decide to pass a second resolution, it would be welcomed if it is yet another signal that we're intent upon disarming Saddam Hussein"); Philip Stephens, *Learning to Live in a World Governed by American Rules*, FIN. TIMES (London), Feb. 7, 2003, at 17 (questioning whether UN sanctioning of war in Iraq provides more than the mere appearance of UN authority); Editorial, *Irrefutable*, WASH. POST, Feb. 6, 2003, at A36 (describing U.S. Secretary of State Colin Powell's February 5, 2003, presentation to the United Nations as "a worthy last effort to engage the United Nations").

16. Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004).

17. ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918-1935, at 103 (1936).

18. Colin Powell currently serves as the U.S. Secretary of State, appointed in January 2001 by President George W. Bush.

19. Nicholas Kralev, *Powell Ties Saddam Regime to al Qaeda; No 'excuse for inaction,'* WASH. TIMES, Jan. 27, 2003, at A1.

20. President George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* http://www.c-span.org/executive/stateoftheunion.asp (last visited Oct. 27, 2004).

Security Council. In his 2004 State of the Union address, President Bush said, "America will never seek a permission slip to defend the security of our country."[21] Well, again, sometimes, absent an armed attack, it is necessary—under the regime of the United Nations Charter—to seek a "permission slip" because force can be used only with the authorization of the UN Security Council. So, it seems to me that like many other states, the United States does not in reality continue to accept the regime set out in 1945 in the UN Charter.

The failure of the [UN] regime is, I say once again, a tragedy. I lament it. But the United States is not alone in this regard, and my suggestion to you is quite simply that if the international community as a whole intended for the regime of the UN Charter to be binding, it would have set up a system in which the costs of noncompliance exceed the benefits, and it has not done that. So, that's the problem. That's the solution that has been attempted. And that is the fate of the solution. The solution has not worked.

Now, why has the attempted solution not worked? What are the causes of the failure of this solution? Why have rules that were once, in the words of the famous American legal realist Karl Llewellyn, working rules—why have those working rules changed gradually into paper rules?

There are, I believe, three reasons for the collapse of the international legal regime governing the use of force. First, and most important, is an absence of consensus on fundamental, underlying values. The reason that the term "aggression" is used but not defined in the Rome statute establishing the International Criminal Court is plain.[22] Notwithstanding numerous efforts over the last five decades by the international community to define the term, aggression remains a concept that has no settled definition. The extent of the divisions became evident with NATO's use of force against Yugoslavia in 1999. Russia and China were not the only states to take vigorous issue with the claim that NATO's action was permitted by international law. In April of the year 2000, 114 member states of the nonaligned movement condemned humanitarian intervention. It has no legal basis

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21. *State of the Union Address*, WASH. POST, Jan. 21, 2004, at A18.

22. Rome Statute of the International Criminal Court. President Clinton signed the treaty on Dec. 31, 2000. As of 31 Aug. 2001, 139 states have signed the treaty, including every member of the European Union and most other major allies, such as Canada and Australia, and thirty-seven states have ratified the treaty. Status of ratification of the International Criminal Court Rome Treaty is *available at* http://www.un.org/law/icc/statute/status.htm (last visited Nov. 3, 2004).

under the Charter, they said. This gulf between nations of the North and the West, on the one hand, and those of the South and the East on the other, was reflected in states' reaction to Secretary General Kofi Annan's,[23] 20 September 1999 address to the General Assembly. He spoke of the need to "forge unity behind the principle that massive and systematic violations of human rights wherever they take place should never be allowed to stand."[24] This speech led to weeks of debate among UN members. Of the nations that spoke out in public, roughly a third appeared to favor humanitarian intervention under some circumstances. Another third opposed it across the board. And the remaining third were equivocal or non-committal.

The divisions, however, did not end with Kosovo. Before its attack on Iraq, the United States, as I mentioned a moment ago, claimed broad power to use preemptive force[25]—a claim contested by many other states including American allies. The attack on Iraq generated heated denunciations by many states.

A recent poll by the German Marshall Fund asked respondents in six European states and the United States whether the use of force is appropriate to advance justice.[26] In Europe, forty-eight percent of the respondents said yes. In the United States, eighty-four percent said yes.[27] The evidence, it seems to me, is incontrovertible on the most important of international values. On the question of when the use of force is appropriate, the international community is split down the middle. Working rules have become paper rules largely for that reason.

The consequence of this failure and fracture is to undermine severely the effectiveness of legal regulation of the use of force. To function prop-

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23. Kofi Annan currently serves as the Secretary General of the United Nations, taking office on 29 June 2001.

24. Richard Reeves, *A Tale of Two Speeches*, DENVER POST, Sept. 26, 1999, at K3.

25. *See, e.g.*, Craig Gilbert, *The Best Defense? Pre-emptive Attacks Are a New Option*, SEATTLE TIMES, Apr. 20, 2002, at A3 (questioning the United States' authority to use pre-emptive force against Iraq); Ann Scott Tyson, *Where Antiterror Doctrine Leads*, CHRISTIAN SCI. MONITOR, Feb. 7, 2002, at 1 (contending that Pres. Bush's preemptive strike policy was greater in scope than Israel's bombing of Iraq's Osirack reactor in 1981); Richard Wolffe, *The Bush Doctrine*, FIN. TIMES (London), June 21, 2002, at 18 (commenting on the international consequences of a change in United States foreign policy that includes preemptive strikes).

26. *See* Christopher Caldwell, *'Murky Pacificism' Is a Parody of the Old Virtue*, FIN. TIMES (London), Oct. 25, 2003, at 15.

27. *See id.*

erly, law requires a consensus on basic values concerning the subject matter of the regulation. When that consensus evaporates, working rules, as I say, become paper rules. As British Foreign Secretary Jack Straw put it, "If you have a set of rules which conflict with reality, then reality normally wins."[28] That, unfortunately, is precisely what has happened to the use of force rules embodied in the UN Charter. Those rules have fought a losing battle with geopolitical reality. I might say, to use a perhaps simplistic analogy, that the situation is rather similar to one in which a community is divided over the propriety of using fireworks. One half of the community wishes to permit fireworks at night but prohibit them during the day. The other half wants to permit them during the day but prohibit them at night. How is it possible for that community to come up with a working rule governing when fireworks can be used? Yes, it is possible to paper over the difference. The community can enact an ordinance saying, in effect, that it's impermissible to use fireworks when it's inappropriate—which is, in effect, what the UN Charter does in purporting to regulate the use of force—but is that really a triumph of the rule of law?

The second reason why the Charter has failed relates to disparities of power. Any legal system must be grounded on incentives that enhance the likelihood of compliance. One principal source of those incentives must be the underlying power structure. Yet, a configuration of power has emerged in the international community since the end of the Cold War—unipolarity—that provides a disincentive on the part of the hegemonic power to subject itself to legalist constraints governing the use of force. Because the United States is often capable of getting what it wants through the use of force rather than through support for restraints on the use of force, the United States has little incentive to subject itself to such restraints. To do so would, after all, largely eliminate the advantage of hegemony. So long as huge disparities of power separate the United States from other states, this dynamic will likely prevail.

Moreover, this dynamic is not one-sided. Second–tier power competitors, such as France, Russia, and China, have every incentive to try to reestablish a multipolar system. In doing so, such states have every incentive to use institutional tools at their command to advance their national interest and enhance their own power, as France and Germany have recently done in the European Union. They have objected to proposed changes to the European Constitution that have been suggested by third–tier powers such

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28. George Parker, *EU Pact Dispute Blights Foreign Minister Meeting*, FIN. TIMES (London), Nov. 29, 2003, at 6.

as Poland and Spain, which have been directed at enhancing their own power.[29]

Hence the train wreck in the Security Council in 2002 when the veto threat was deployed to that same end. States use international institutions for the same reason that they join them: to enhance their own power, not that of power competitors. Of course, these sorts of disincentives are not necessarily determinative. Many other factors bear upon a state's decision to reject or accept given policies. But these incentives are extremely powerful, and under current conditions they do tend to undermine the proper functioning of the legalist order governing the use of force. The same incentives, as I'll mention in a moment, will inevitably limit the potential of any reform aimed at strengthening the legal order governing the use of force.

The third factor that is responsible for the collapse of this regime is a free rider phenomenon. The more a given state acts unilaterally to provide a public good such as collective security, the less incentive is provided for other states to do so. In practical terms, this means that the percentage of GDP [Gross Domestic Product] spent by the United States and European states on defense is not likely to change. It is unlikely that European states will give up their TGV's ,[30] early retirement systems, universal health care, and the like to provide the expenditures needed to participate meaningfully in the provision of collective security—provided the United States remains committed and willing to doing it itself.

The upshot is that the United States will continue to be caught in a dilemma: it will be locked in the situation in which it must act alone as the world's policeman or see no action, with no other nation or nations willing and able to do so. Either alternative bodes ill for the possibility of breathing life into Chapter VII of the UN Charter.

So, finally, where do we go from here?

First, let me begin with the UN and then turn to the United States. The three conditions that I have outlined severely limit the potential of a legalist regime to regulate the use of force. Because these conditions were not

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29. *See* John O'Doherty, *European Constitutional Fight Echoes America's*, BALT. SUN, Jan. 13, 2004, at 13A.

30. Train à Grande Vitesse, *at* http://www.brainyencyclopedia/encyclopedia/t/tg/tgv.html (last visited November 9, 2004) (defining the term TGV as Train à Grande Vitesse, the French high-speed rail network).

created by the UN, the UN probably can do little to alleviate them. Reform efforts must originate primarily with individual member states. Innovative reform efforts by the UN will likely be ineffective for the simple reason that such efforts do not and cannot address these three root causes, which lie beyond the UN's reach. Tinkering with the composition of the Security Council, for example, will have no effect on these underlying conditions and may indeed exacerbate power disparities by engendering greater paralysis in the Security Council, and thus encouraging the United States to bypass the Council with even greater frequency in future contentious circumstances.

The best that the UN can therefore do is to help lay the groundwork for the creation—by member states—of conditions in which the use of force can realistically be regulated by law. The most important contribution the UN can make would thus be to encourage member states to recognize the seriousness of the problem and to drop the pretense that use of force rules are working as they should. They do not. In the meantime, the UN can continue to test the waters to see whether the international community is coming any closer to a genuine consensus. The General Assembly is the perfect laboratory in which to do this, and a trial balloon of the sort floated by the Secretary General in the 1999 address that I referred to a moment ago, is the perfect medium for doing so. If and when the results are more promising than they were in 1999, a conference might than be convened to consider possible amendments to the UN Charter. Given the deep-seatedness of the three conditions that I outlined above, however, it is highly unlikely that any meaningful amendments can occur any time in the future.

Let me turn, finally, to the United States. How should the United States respond to the collapse of the legal regime governing the use of force? First of all, we need to recognize this is not the end of the world. The UN, as the Secretary General of the UN Kofi Annan so wisely observed recently, is not an end in itself. It is a means to an end. It is possible to pursue the ends of the UN—a more peaceful and just world—through other means.

In the 19th century, for example, a coalition of the willing was extremely successful in establishing peace on the continent of Europe for the better part of that century. It was called the Concert of Europe.[31] It originated in the Congress of Vienna following the Napoleonic wars in

31. *See* HENRY KISSINGER, DIPLOMACY 78-102 (1994).

1815, and it worked.[32] The number of casualties on the European continent during the 19th century was reduced to one-seventh the number that had occurred there during the 18th century—largely, historians tell us, as a result of the effectiveness of this consortium of European powers that kept the peace.

So it's possible to achieve some of the ends of the UN in the face of the collapse of the legalist order—perhaps even more effectively than might be possible under the UN Charter. Consider NATO's action in Kosovo. Let's be frank about this: if the UN Charter had been complied with, tens of thousands of people alive today would not be alive because NATO would not have used force against Yugoslavia absent Security Council approval. Those people are alive because NATO was willing to take the bull by the horns and "just do it"—to use force to achieve the end of justice. There is no reason why that cannot be done again.

Second, the United States needs to deal with the world as it is, not the world as it should be, not the world as it might have been, not the world as we would prefer it to be, but the world as it is. Henry Cabot Lodge said there is "grave danger in unshared idealism."[33] It's fine to be idealistic, but the first task is to recognize when that idealism is unshared, lest we be a victim of our own ideals.

All this suggests to me the need for new clarity in the ends and the means of American foreign policy. Let me talk about each of those in turn.

First, the ends or objectives. The objective of American foreign policy is to set out quite clearly in the national security strategy statement. It is to preserve American preeminence. Contrary to what some critics suggest, this is not a new objective. Madeline Albright was famous for going around the world—infamous some might say—declaring the United States to be the world's one "indispensable nation."[34] Some people didn't much like hearing that, but it turned out in retrospect to be quite true. Indeed, when the Reagan administration decided to seek the dissolution of the

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32. *See id.*

33. Henry Cabot Lodge, Address in Washington D.C. on 12 August 1919, *at* http://www.firstworldwar.com/source/lodge_leagueofnations.htm (last visited Nov. 4, 2004).

34. President Clinton used the term "the indispensable nation" in a speech on December 5, 1996, later echoed by Secretary of State Madeleine Albright at that time. *See* White House Press Release, Remarks by the President in Announcement of New Cabinet Offices (Dec. 5, 1996), *at* http://www.hri.org/news/usa/usia/1996/96-12-05.usia.html (last visited Nov. 4, 2004).

Soviet Union, it became clear that absent the "evil empire," as he called it, the United States would emerge as the world's sole superpower.[35] Now, whether it was useful diplomatically to articulate this objective as boldly as Secretary Albright did, or as plainly as the national security strategy statement did, is another question. But was it useful, is it useful, does it make sense for American policymakers to pursue the objective of maintaining American hegemony? In my view, absolutely; and it seems to me that the propriety of that objective for American policymakers ought indeed be seen as beyond dispute—for the simple reason that we live in a world in which other states in the international system also seek to enhance their security by enhancing their power.

As I suggested a moment ago, that is how the international system works. It is not correct, as some suggest, that the individual interest of actors within that system always, necessarily, corresponds with the collective interest. All states sometimes find themselves in a situation in which their own national security interests conflict with the collective interest, and when they do, they opt for their own national interest. That is what I believe the United States should continue to do.

France, I might just mention again, is a perfect example of what I'm talking about. French decision makers are very forthright about this—Hubert Védrine even wrote a book about it a few years back,[36] and his successor, Dominique de Villepin was very forthright about this. The aim of French foreign policy is to return the world to a multipolar configuration of power, to end American hegemony. The aim, in other words, is to narrow the gap of power that exists between the United States, France, Russia, and China. Note that the aim of French decision makers is not to narrow the gap in power that exists between France and third-tier power competitors, such as Spain and Poland. No, when they have the "uppityness" to sign a letter supporting the United States at the time of the recent conflict in Iraq, they are told that they are "not well brought up." So it's not simply the United States that acts to enhance its security by enhancing its power.

I do not fault the French, the Russians, or the Chinese for seeking greater power at the expense of the United States. If American decision-makers were sitting in Berlin, Moscow, or Beijing, they would probably be

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35. *See* Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983).

36. HUBERT VÉDRINE, FRANCE IN AN AGE OF GLOBALIZATION (2001).

acting very much as French, Chinese, and Russian decision-makers are acting. By the same token, however, it seems to me inappropriate for them to point the finger at the United States, and to suggest that they would be acting any differently if they were sitting in Washington and determining whether the United States should seek to preserve its hegemony.

I might say, just as a Bostonian, it always has struck me that the counter-hegemonists seem inexplicably silent when it comes to what seems to me to be the greatest, most brutal abuse of hegemonic power in the 21st century. I'm referring, of course, to the New York Yankees signing A-Rod. I mean [laughter], where were the counter-hegemonists? Why didn't they explain to George Steinbrenner[37] that the Yankees would be better off if baseball were more competitive, if the Yankees only lost a few more games, and Boston won a few more games? I mean, let the poor Red Sox win, along with Russia, China, and the other power competitors, right? That seems to be the upshot of their theory. So, by rights the United States need make no apology for attempting to preserve its preeminence. Every other state sitting in our position would be doing exactly the same thing.

Let me talk for a minute about means. Some have suggested that the debate about means is a debate, really, about unilateralism versus multilateralism, and that the pursuit of American power counsels unilateral means. I disagree with that. Indeed, I would suggest to you that the whole debate over unilateralism versus multilateralism is misdirected. I believe that these are not in fact oppositional categories. Multilateralism can, in fact, promote the United States' capacity to act unilaterally and can indeed tend to preserve the unipolar configuration of power by enhancing American soft power. Multilateral means soften the jagged edges of hegemony. It's much more effective to win friends by persuading them that they want to do what you want to do rather than by making them do [what you want to do]. It's in our long-term strategic interest, therefore, to cultivate institutions that will redound to our net benefit even if that may involve some short-term sacrifice, as all international institutions do. I do not foreclose the possibility that American power, like the power of other hegemonic states in the past, will not last forever. Prudent decision-makers in Washington, recognizing that possibility, need to invest in international institutions by seeking to ensure that American interests are protected by law,

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37. George Steinbrenner bought the New York Yankees on 3 January 1973. *See* Michael Aubrecht, Baseball Almanac, *George Steinbrenner Biography*, *at* http://www.baseball-almanac.com/articles/george_steinbrenner_biography.shtml (last visited Nov. 4, 2004).

should the day ever come when relative military superiority cannot be relied upon to do that. So the real question is not whether to act unilaterally or multilaterally; the real question is the extent to which the United States should subject itself to international legal institutions and regimes.

I want to underscore in this regard the point that I just made. These international institutions can, if dealt with properly, *enhance* American power. They can *advance* our interest in maintaining American hegemony. We are now, for example, dealing with a UN team in Iraq that has helped persuade the Iraqis that a certain schedule be adhered to in holding elections. That, it turns out, has been recommended by the United States, and it makes sense. It's useful to have a neutral, impartial international arbiter or jury, say to interested parties, like the Iraqis, "Hey, guess what? The Americans happen to be right." I would think that it would be useful to have UN weapons inspectors at our sides in Iraq in the event that weapons of mass destruction are discovered—for the simple reason that we have a national interest in being believed. We are more likely to be believed if weapons inspectors from UN say, again, "Guess what? The Americans are right."

So I do not believe that it would be in our long-term interest for the United States to seek to, as George Will has recommended, "deligitimate" the UN.[38] Why would we want to destroy a tool that can be used to advance American power? The trick is to decide—the test of statesmanship is to determine—when these institutions in fact advance American power and when they undercut American power. This requires a very careful long-term calculus, looking at the costs and benefits of adherence to each institution, institution by institution, one institution after the other.

We need, in this process, to be aware of the danger of getting locked into a situation in which we are dependent upon the legitimacy that that institution can confer. Our aim ultimately has to be to maintain the ability to act unilaterally when it is in our national security interests to do that. It's possible to get too habituated to the legitimacy that these international institutions can provide; we need to recognize that recourse to those insti-

38. *See* Press Release, George F. Will, *The UN Is a Bad Idea* (Mar. 13, 2003), *available at* http://www.townhall.com/columnists/georgewill/gw20030313.shtml (last visited Nov. 4, 2004). Pulitzer Prize recipient for Newspaper Commentary, George F. Will, has been a *Washington Post* Syndicated Columnist since 1974. His column appears today in more than 460 newspapers. He is an author and *ABC-TV* network-television broadcaster commentator. *See id.*

tutions is not always automatically appropriate even though they can provide additional legitimacy.

The final example that I'll give you in this regard is Afghanistan. After 9/11, the United States could have gone to the UN Security Council and sought authorization to use force against Afghanistan. Now, you might say, why would we have done that? It was permissible under Article 51 of the [UN Charter]. We were the subject of an armed attack. To use force against Afghanistan without Security Council approval would have been permissible under the Charter. You are, of course, correct. But you are also correct in thinking that could have been done at the time of the first Gulf War. Remember, after all, Kuwait was attacked by Iraq, and the United States stood in the stead of Kuwait, for purposes of use of force under Article 51. The use of force by the United States would have been permissible against Iraq without Security Council authorization. I believe that this was a wise decision made by this administration in not going to the Security Council to get its permission to use force against Afghanistan—for precisely the reasons that I have outlined. We need to avoid getting locked into a situation in which we have become reliant on the boost that UN legitimacy can provide in controversial circumstances where our national security is on the line.

I want to close with you today on a personal note. Last fall, I had the pleasure of speaking at the George Marshall Center in Garmisch, and meeting the director of the international program there, Mike Schmitt, a fine scholar whom I understand gave this same lecture here last year.[39] It's a tremendous place. As some of you know, you're not going to get "imminent danger" pay for service there. It's not exactly a hardship assignment. It's a place that one notes in one's notebook to return to when one has a few days of spare time. On one of the afternoons that I had free, I took the train into Munich, and took a streetcar outside of Munich, and spent the afternoon walking around the concentration camp at Dachau. As you can imagine—I'm sure a number of you have done that—it is a horrific experience. The place is, in many respects, perfectly preserved from how it was left at the end of the war, right down to the showerheads. The vent where they poured in the poison gas pellets, into the shower room, still works. The handles still turn. It is absolutely stomach wrenching. Anyway, as you walk around Dachau, you see lots of memorials to the memory of people

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39. *See* Michael N. Schmitt, Lecture, The Judge Advocate General's Legal Center and School, U.S. Army (28 Feb. 2003), *The Sixteenth Waldemar A. Solf Lecture in International Law*, *in* 176 MIL. L. REV. 364 (2003).

who died there, but the curious thing is that you find, among all these memorials, only one memorial that actually thanks anybody. That one memorial doesn't thank the League of Nations, Kellogg or Briand, or the World Council of Churches, or Immanuel Kant for his "categorical imperative."[40] It thanks the United States Seventh Army—for liberating the place. Sometimes, the use of force, regrettable though it may be, is the only way to bring barbarism to an end. John Stewart Mill, I think, got it right. He said, "War is an ugly thing, but it is not the ugliest of things."[41] I saw the ugliest of things that afternoon, and I never want to see it again, and if we are not to see it again, we need always to remember that sometimes, not always, but sometimes, the U.S. military—not the community of nations, not the UN, not international law, but the U.S. military—is all that stands between humanity and the ugliest of things. Thank you.

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40. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 25-27 (Mary J. Gregor, et al, eds., Cambridge Univ. Press 1998).

41. John Stuart Mill, "The Contest in America," *Dissertations and Discussions*, 26 (1868). First published in *Fraser's Magazine,* Feb. 1862, *available at* http://www.bartleby.com/73/1934.html (last visited Nov. 3, 2004).