The United Nations

States vs International Laws

Donald A. Wells

Algora

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States
vs
International Laws

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Foreword

The United Nations has had either a bad press or no press in the US media. As a result, Americans who read only the mainstream newspapers and the conventional magazines, and who listen only to the major television and radio programs, are misinformed or uninformed as to why the UN does what it is reputed to do, or fails to do what it is expected to do. This volume points out that the United Nations structure was basically US designed at Dumbarton Oaks in 1944. The UN functions the way it does because American leaders planned it that way. The League of Nations was rejected by the Senate Republican leadership in 1919; to avoid a repeat of that rejection and to win the approval of the Senate Republicans in 1945, the United States required that the UN be given only limited powers. Five nations (China, Soviet Union, France, United Kingdom, and the US) gave themselves the right to issue a veto in the Security Council (where votes really matter) so that they would always be able to reject any action that was not in their own interests. Further, the US leaders claimed that resolutions of the General Assembly were "mere recommendations" which could be ignored without the nation being accused of flouting a UN proposal. The UN was created without an army, without the "power of the purse," and with an International Court from which nations could, at their pleasure, claim immunity.

The founders were so determined to create a UN which would never be able to challenge their sovereignty that UN peacekeepers were prevented from coming to the rescue of a population suffering starvation, persecution, disease, illiteracy, and poverty unless the nation where the suffering existed invited them

in. Yet, as we shall see, in spite of all its warts and wrinkles the United Nations has accomplished wonders in bringing justice to the needy and in helping to "save succeeding generations from the scourge of war." This volume is a plea to give the United Nations a chance.

Chapter I: The Establishment of the United Nations: Why the UN Functions the Way It Does

Early Efforts at World Order

The dream of a world where the "wolf shall dwell with the lamb, and the leopard shall lie down with the kid"[1] has been an elusive though persistent one, since ancient times. Many attempts have been undertaken to create some kind of world organization which could, through negotiation, serve as an alternative to war. It was hoped that such an organization could give authenticity to the belief that international laws of war existed and provide the means by which such laws could be implemented. In the Middle Ages the Roman Catholic church attempted to accomplish this by creating a Holy Roman Empire, giving its pope moral authority to at least prevent potential conflicts which were not in his interest, although, at the same time, allowing him to wage wars which were in his interest. These efforts foundered with the fall of the Holy Roman Empire, with the rise of alternative secular empires, and significantly with the rise of sovereign nationalism. Nationalism introduced a fundamental anarchy which to this day creates a stubborn resistance to any effort to persuade nations to engage in constructive discussion.

The Peace of Utrecht (1713), which ended the War of the Spanish Succession, proposed that the old order of Christendom could be restored by a "just balance of power" among signatory states.[2] However, Christendom was no

1. *Isaiah* 11:6

longer the only competitor for leadership in this task. The Abbé de Saint Pierre (1658-1743), who attended the Utrecht meetings, advocated a Constitution for a Federation of Europe, in which he hoped that the contracting sovereigns would form a Diet where all conflicts would be resolved by arbitration and by some judicial decision.[3] Jean Jacques Rousseau (1712-1778) was influenced by the Abbé but considered his proposal flawed because it rested on force. Rousseau proposed a "Project for A Perpetual Peace," in which he outlined a European Federation of Nations where inter-state problems would be resolved by negotiation.[4] Immanuel Kant (1724-1804) stated the necessity of some kind of world order in his *Perpetual Peace* (1795). He observed that "the state of peace must be established."[5] He believed that the failure to establish some kind of over-arching world government has meant that wars remained inevitable, with the consequence that states "find perpetual peace in the wide grave which covers all the abominations of acts of violence."[6]

The primary goal of these proposed world organizations was the prevention of war. Nations have yet to understand that they must give up the claim that war making is a right, if they are to allow such a system work. Problems faced by the United Nations Organization early in the 21st century bear witness to this fact. Unfortunately, in order to get enough signatures in April 1945, the UN Charter included a proviso in Article 51 which assured nations that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." Although Article 39 had affirmed that only "the Security Council shall determine the existence of any threat," nations did not, as a matter of fact, bother to ask the Security Council if their war was, indeed, a matter of "self-defense." The claims of the George W. Bush White House that America has a right to pre-emptive war has put a strain on the relevance of Article 51. US leaders argue "that if it were forced to wait until it had sufficient evidence of wrong doing, or until it could muster up a consensus in the UN Security Council, it might be too late to defend itself."[7] It is obvious, however, that if the

2. Cornelius F. Murphy, Jr., *Theories of World Governance* (Washington, D.C., Catholic University of America Press, 1999), p. 34.
3. *Ibid.*, p. 49.
4. *Ibid.*, p. 50.
5. Immanuel Kant, *Perpetual Peace* (New York: The Liberal Arts Press, 1948) p. 9.
6. *Ibid.*, p. 18.
7. Jeremy Rifkin, *The European Dream* (New York: Tarcher Penguin, 2004) p. 293.

same right was granted to all nations, the basic hope of the UN — to "rid the world of the scourge of war" — will have been thwarted. A Pentagon official admitted that the Defense Department preemptive plans were "conspicuously devoid of references to collective action through the United Nations."[8]

Several attempts to think internationally appeared in the 19th century. The founding of the International Committee of the Red Cross (ICRC) was an early effort to find world agreement, in the absence of a world government, on some conventions set limits to war making.[9] The ICRC was founded in Geneva, Switzerland August 22, 1864 in a meeting prompted by concern over the neglect of the sick and wounded at Solferino in the Franco-Austrian War of 1859. A Swiss citizen, Henri Dunant, was the prime mover and the Swiss government was the convener. The major result was a "Convention for the Amelioration of the Condition of the Wounded Armies of the Field." This document provided for the protection of the ambulance corps, and for doctors, nurses, and hospitals, as long as they functioned solely for medical purposes. A further meeting in 1868 proposed the same provisions for treating the sick and wounded at sea. Although the US was not a participant at either Congress (due to the Civil War), the US Senate approved the conventions of both in 1882.[10] Further ICRC meetings were held in 1906 to take account of events in the Spanish-American war.

The experiences in World War I revealed that the Red Cross rules needed to be expanded again and on July 27, 1929 a new conference was held in Geneva which issued a "Convention on the Treatment of Prisoners of War." The widespread influence of these relatively small conferences was borne out when the judges at the Nuremberg and Tokyo trials, after World War II, claimed to find evidence that laws of war existed by appealing to the judgments of these ICRC conventions. They assumed at the time that the legal concept of "crimes against humanity" had been established by international law. A draft for a new Geneva congress was submitted in 1938 and placed on the agenda for meetings in 1940, although World War II forced the postponement until 1949. The 1949 meetings took account of events during World War II and the war crimes trials which followed them, and the four conventions issued at those meetings became the primary bases for identifying war crimes and crimes against humanity.

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8. John W. Dean, *Worse Than Watergate* (New York: Little Brown, 2004) p. 98.
9. Donald A. Wells, *War Crimes and Laws of War* (Lanham, MD: University Press of America, 1991) pp. 48-53.
10. *Geneva Convention of 1864.* Executive Document No, 177. 47th Congress. 1st session. US Senate, Washington D.C., March 3, 1882.

In 1899 and again in 1907, Congresses were held at the Hague.[11] They were called by Tsar Nicholas II of Russia in an effort to bring about arms reduction and to discover peaceful ways of settling international disputes. The first Congress included twenty-six nations. While no agreement was reached on arms reduction, the participants did issue several Conventions and Declarations intended to outlaw certain war practices and weapons. These included a declaration to "Prohibit the Discharge of Projectiles from Balloons" which was to remain in effect for five years. All participating nations except for Great Britain were signatories. A second, the "Declaration Prohibiting the Employment of Projectiles Containing Asphyxiating or Deleterious Gases," was to be binding only between nations that were signatories. Neither Great Britain nor the United States were signatories. A third, the "Declaration Prohibiting the Employment of Bullets Which Expand and Flatten Easily in the Human Body," was issued, and again neither the United States nor Great Britain signed. In spite of the failure to have the support of these two large nations, the judges at the Nuremberg and Tokyo Trials, in 1945, appealed to the Hague Declarations as further evidence for the existence of international laws of war, on the basis of which war crimes could be identified. The Hague Congresses also declared that it was forbidden to bomb unfortified cities, to attack civilians deliberately, and to wage pre-emptive war.

These facts should be borne in mind when we reflect now on the claim of the US administration that it can rule that declarations of the UN General Assembly, which they do not endorse, may be judged as lacking the status of international laws, and, further, that those declarations from both the Hague and Geneva meetings may, likewise, be dismissed. Unless we believe in a world of Hobbesian anarchy, we cannot afford to grant to leaders of any state the authority to dismiss, unilaterally, the conventions of the Hague or the ICRC. These international efforts played a significant role in providing the legal groundwork for both the League of Nations and the United Nations Organization.

11. *Treaties Governing Land Warfare, 27-1*, Department of the Army (Washington, D.C. December 7, 1958) pp. 5-23.

The League of Nations

The first major twentieth century effort to establish international law with a world alliance of nations was proposed January 8, 1918 at the close of World War I. The collective soldiers had slain 37 million persons, over 1.5 million of whom were civilian men, women, and children. It was not surprising, therefore, that concerned thinkers proposed that this should be the "war to end all war," and that some organization ought to be formed to implement such a goal. The proposal for a League of Nations was the 14th point in President Woodrow Wilson's Fourteen Points.

The proposal for a League was made part of the Treaty of Paris. Wilson had proposed that "a general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[12] In January 1919, the League of Free Nations Association, headed by the English historian, H.G. Wells, promoted this idea of world unification in an article titled, "The Idea of A League of Nations."[13] In a second installment Wells dismissed fears that such a League would have too much power. He argued that such fears stemmed from national aggression and competitiveness, both of which should be abandoned.[14] The Covenant of a League of Nations was adopted at the Paris Conference April 28, 1919 and made part of the larger Treaty of Versailles.

The first 26 Articles of the document produced at Paris established the League of Nations and the last 414 Articles consisted of the Treaty of Versailles. Democrats in the US Senate supported the League and opposed the Versailles Treaty. The Republicans in the Senate supported the Versailles Treaty and opposed the League. Since it was all one package, both Democrats and Republicans opposed the entire Paris Treaty. Nonetheless, the League went into force January 10, 1920 —without the United States.

Eventually, 63 nations joined, although the total at any one time never exceeded 58. Germany became a member in 1926. The Soviet Union joined in 1934 but was expelled in 1939 over its treatment of Finland. By 1939, sixteen nations had withdrawn from the League: Brazil, Chile, Hungary, Italy, Japan, Nicaragua, Costa Rica, El Salvador, Guatemala, Haiti, Honduras, Paraguay, Peru,

12. Louis L. Snyder, *Fifty Major Documents of the Twentieth Century* (New York: Van Nostrand, 1955) p. 28.
13. H.G. Wells, "The Idea of A League of Nations," *The Atlantic Monthly*, January 1919.
14. *Ibid.*, February 1919.

Romania, Spain, and Venezuela.[15] In frustration, some US leaders proposed that a new treaty should be drawn up. However, after all the work that had gone into establishing the League, no support came from any other nation for starting all over. Raymond B. Fosdick, who had served as the special representative of the US War Department in France and was undersecretary general of the League of Nations (1919-1920), deplored the insulting character of the Senate's rejection and pointed out that the US was the last nation whose suggestion for a new conference would ever be acceptable.[16]

How the League Operated

The League provided for a General Assembly where each nation had one vote. Substantive issues required unanimity both in the General Assembly and in the Security Council. The requirement for unanimity made Republican fears pointless, i.e., that the Assembly would trample US interests. Procedural matters passed by a simple majority. The League provided for a Security Council (SC) with five permanent seats (US, Great Britain, France, Italy, and Japan). Germany and the Soviet Union were added later as permanent members and the number of non-permanent members was increased to eleven. The US never took its seat, either on the Security Council or the General Assembly (GA). The GA met once a year between 1920 and 1940. The SC met 106 times during the same period.[17]

The failure of the United States to participate seriously diminished the effectiveness of the League. The experience of the International Labor Organization (ILO) as a subsidiary organization in the League was a typical example of how the lack of American support diminished the League's effectiveness. On February 1, 1919 the ILO was established as part of the League. In spite of the US failure to join, Samuel Gompers (1850-1924), President of the American Federation of Labor and head of the US War Committee on Labor, was asked to lead the drafting of the first ILO constitution.[18] The ILO consisted of 32 members: 16 chosen by government, 8 chosen by management, and 8 chosen by labor. Since the majority of government appointees were from management, it generally followed that the committee consisted of 24 persons with a management point of

15. League of Nations, *Official Journal*, 1939, p. 506.
16. Raymond B. Fosdick, "The League of Nations As An Instrument of Liberalism," *The Atlantic Monthly, October 1920, pp. 553-563.*
17. Mangone, A Short History of International Organization, pp. 132-133.
18. David A. Morse, The Origin and Evolution of the ILO and Its Role in the World Community (New York: Cornell University Press, 1969.

view, and 8 persons with a labor perspective. Between 1919 and 1934 the ILO commission issued 44 conventions and 44 recommendations. The US Senate, whose members were primarily from management, rejected all of the conventions and most of the recommendations. Among the conventions rejected were the following: Convention 29, against forced labor and slavery; Convention 87, in favor of the right to organize unions; Convention 98, on the right to organize unions without management interference; Convention 100, calling for equal pay for equal work for men and women; and Convention 102, calling for workers' insurance, which was further branded as "socialist" in the US Senate.[19] From its inception the ILO was separated from the League proper by pressure from the business community and was never able to play a significant world role. In 1946 the ILO became the first specialized agency formally associated with the UN and, as we shall see, due to pressure from business leaders the ILO was almost immediately isolated from the World Trade Organization (WTO), the North American Free Trade Association (NAFTA), and the General Agreement on Tariffs and Trade (GATT).

The United Nations

Initial Plans

As early as 1939 the US Congress established a Committee on Post War Problems, and in February 1941 it was re-organized into a Division of Special Research headed by Cordell Hull, Secretary of State, and Under Secretary Sumner Welles. On August 14, 1941, President Roosevelt and Prime Minister Winston Churchill issued the 8-point Atlantic Charter in which they affirmed the urgent need for "a peace which will afford all nations the means of dwelling in safety within their own boundaries and which will afford assurance that all men [*sic*] in all lands may live out their lives in freedom from fear and want."[20] On January 1, 1942, twenty-six nations signed a United Nations declaration agreeing to join forces to defeat the Axis.

On October 30, 1943, President Franklin Roosevelt sent Cordell Hull to Moscow for a meeting of the ministers of the UK, the US, and the Soviet Union.

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19. Walter Galenson, *The International Labor Organization* (Madison: University of Wisconsin Press, 1981) pp. 27-28.
20. Snyder, *Ibid.*, p. 92.

Although China did not attend, it gave full support for the plans for a world organization. Roosevelt was assiduous in encouraging Congress to embrace the idea, and his enthusiasm for the UN was further underlined long before the founding meeting in April 1945, when Roosevelt indicated that he would even be willing to resign the presidency when the war was over so he could become the first Secretary-General of the United Nations. The UN idea was reaffirmed at meetings in Cairo, November 22-26, 1943; in Teheran, December 1, 1943; and at Dumbarton Oaks, August 21 and September 28, 1944. These last sessions established the specific structure of the United Nations Organization with a Secretary General, a General Assembly, a Security Council, and an International Court of Justice. Provision was made for additional agencies to be created. Scores of subsidiary agencies and the idea of having peacekeeping forces were added. The basic structure, including the name "United Nations Organization," was firmly established at Dumbarton Oaks.[21] (See Appendices I and II.)

The US Congress passed several resolutions with broad support for a United Nations organization. On March 16, 1943, Republican Senator Joseph Ball of Minnesota introduced a bill supported by Republican Senator Theodore E. Burton of Ohio and Democratic Senators Burton Hatch of New Mexico and Lister Hill of Alabama calling for the formation of an international organization. On September 21, 1943, Democratic Congressman William Fulbright, of the House of Representatives, with the co-support of Republican Hamilton Fish of New York, passed the Fulbright Resolution 25, by a vote of 252 to 23, affirming that the "Congress hereby expresses itself as favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace among the nations of the world, and as favoring participation by the United States."[22] On November 3, 1943 the Connally Senate Resolution 192, with strong bipartisan support, affirmed that "the Senate recognizes the necessity of there being established at the earliest practicable date a general international organization based on the principle of the sovereign equality of all peace-loving states."[23]It passed by a vote of 85 to 5. All three of these resolutions stipulated that the US would not join unless the idea was supported by a two-

21. *Pillars of Peace,* Pamphlet No. 4 (Carlisle Barracks, PA: Book Department of the Army Information School, May 1946.
22. A Decade of American Foreign Policy: Basic Documents 1941-49 (Washington, D.C. : US Government Printing Office, 1950).
23. *Pamphlet No. 4, Pillars of Peace* , Published by the Book Department of the Army Information School, Carlisle Barracks, PA, May 1946.

thirds vote in the Senate. The Senate supplied the necessary votes on December 20, 1945, by a vote of 89 yea, 2 nay and 9 abstentions for a resolution called "The United Nations Participation Act." It is important to remember that the US was a primary power in establishing the United Nations Organization, especially in these days when the UN is the target of so much vilification in America.

President Roosevelt died April 12, 1945, just days before the meeting was held that established the UN. On April 15, 1945, before the surrender of Germany (May 7, 1945) or Japan (September 2, 1945), a founding meeting was held in San Francisco, and by April 26, 1945, the UN Charter was confirmed by acclamation of the fifty nations in attendance. It was understood that, as soon as Poland could establish a government, it would be considered to have been one of the founding nations. The Charter was officially confirmed October 24, 1945, with the vote of Poland included. Early in the planning stages the US, UK, USSR, and China had announced that, since they anticipated they would win the war, they should be able to determine what followed in the peace. As a consequence they gave themselves, plus France (which had been under Vichy control during the planning stages), veto power in the Security Council. The American leadership was so committed to the UN idea that the US assumed all the costs of the meeting, including the travel expenses of many of the delegates.

The League of Nations had been rejected by the Republicans in the Senate, largely because of the fear that the US might be outvoted in either the Security Council or the General Assembly. To avoid this, the five permanent nations (US, UK, France, China, and the Soviet Union) put certain restrictions on the power of the UN. These should be kept in mind in assessing both the perceived successes and failures of subsequent UN actions. The following qualifications represent the major restrictions placed on the functioning of the various key branches of the UN, namely: the General Assembly, the Security Council, and the World Court. All of the following limitations, printed in the UN Charter, are highlighted in italics to identify the significant restrictions.

Limitations on the General Functions of the UN

The formation of the League of Nations was, in part, intended to assure that the 37 million dead would not have died in vain. Sadly, the US Senate was not persuaded that this should be "the war to end all wars," and it voted to maintain the status quo of international anarchy. Over 60 million persons were killed in World War II. It was a total war and was waged so recklessly that an

estimated 27 million of those slain were civilian men, women, and children. Plans were made early to establish a body to serve as the medium for negotiation to avoid giving the impression that first, we go to war, and then we negotiate. Even in 2005 it is clear that not all nations accept this hopeful formula. That the acceptance of the UN in April 25, 1945 was so unanimous was, to a significant degree, a function of the serious limitations put on the power of the UN, essentially by the five permanent nations: US, UK, China, France, and the Soviet Union. Had the UN not been so limited, it would likely have been rejected in Washington at the outset, on the basis of the same fears that motivated the US Senate, after World War I, to steer clear of the League of Nations — namely, that America would somehow lose its sovereignty. The organizers saw to it that no nation, large or small, would ever lose its sovereignty when it joined the United Nations. The following limitations, written into the Charter, circumscribed the power of the UN. These were the price paid to win the cooperation of nations concerned about losing their sovereignty. The first limitation referred to the means by which the United Nations could accomplish its ends.

Article 1. "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about *by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes.*

Article 2. "All members shall settle their international disputes *by peaceful means.*"

Article 4. "All members shall refrain in their international relations *from the threat or use of force* against the territorial integrity or political independence of any state."

The emphasis on the use of peaceful means established, at the outset, that the UN would not be a military body like NATO, that it would have no standing army, and that its peacekeepers were not typical combatant soldiers. Peacekeepers served to keep warring armies apart and to help adjudicate conflict. Unlike typical soldiers, peacekeepers could not be deployed unless invited by both the litigants. It is important to keep in mind that the UN was never intended to be a military organization. As a consequence, those occasions when

the UN apparently was expected to play a military role, for example: the Korean War, the Gulf War, the conflict in the former Yugoslavia, or the Congo, it was never clear whether the UN actually authorized sending armed soldiers to any of these conflicts. Two observations should be made at this point.

1) The use of UN soldiers is a sign of UN failure. The efforts of the US administration (2003-2004) to get UN Security Council sanction for the Iraq War appears to signal a misunderstanding of the function of the Council. The Security Council was never intended to be the body to authorize wars. The Council was intended to be the body to determine when a threat to the peace existed and to establish non-military negotiations for the resolution of international disputes. If all else failed, the Security Council could determine if military action was required and what the extent of such action would be. But this last stage was a sign of a UN failure and as we shall see, the SC only actually authorized war in one instance.

2) It should be highlighted that the *concurrent affirmative votes* of the permanent five nations are required before any war will be approved, and importantly, that *this requirement has been met only in the one case of the war in the Congo*.

Limitations on the Functioning of the General Assembly

Article 13: 1.a. "The General Assembly shall initiate studies and make *recommendations*...encouraging the progressive development of international law." At least some of the nations drafting this part of the Charter, as we shall see, were overwhelmingly opposed to conferring on the General Assembly the legislative authority to enact international laws. Its conventions, thus, would have less authority than those of the Hague or of Geneva, even though the UN decisions were based on the judgment of 191 nations

Article 14. "The General Assembly may *recommend* measures for the *peaceful* adjustment of any situation."

By making clear that General Assembly decisions were merely "*recommendations*," nations knew that they would never be compelled to abide by even the most overwhelming votes, nor could any nation be found in violation for "flouting" any such resolution. For example, the General Assembly, by a vote of 189 yea to 2 nay, passed a Convention On the Rights of the Child. One might conclude that such a vote had some significance. But neither the US nor Somalia (both of whom voted nay) was ever punished for being in violation for voting

against the convention or even for acting as if the resolution had no force. By predicating that GA resolutions were merely recommendations, the permanent five had seen to it that they would never be meaningfully outvoted by third world nations in the General Assembly.

Limitations on the Functioning of the Security Council

Chapter 5, Article 24 of the UN Charter dealing with the Security Council states that, "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council *primary responsibility for the maintenance of international peace and security.*"

What may we reasonably infer from this statement? Does this mean that of all the branches of the UN, only the Security Council has the *primary* responsibility? Does this mean that, in matters of international disagreement, the Security Council judgment takes precedence over the judgment of any particular nation? This latter interpretation seems plausible in view of the current widespread belief that going to war requires, or at least gains credibility by, a Security Council resolution of approval.

Article 27 states, further, that "decisions of the Security Council on all [other] matters shall be made by the affirmative vote of nine members *including the concurring votes of the permanent members.*" Anyone familiar with *Robert's Rules of Order* would understand that if a nation with the veto power abstains, this is the same as a veto. Indeed, those who abstain are counted the same as those who do not bother to come to the meeting at all. An abstention does not constitute a concurrent vote of approval. This being understood, it follows that the abstention of Russia from the Security Council vote on the Korean War defeated that resolution, and that the Chinese abstention from Resolution 678 defeated that resolution for the first Gulf War. Thus, neither the Korean War nor the first Gulf War had UN sanction.

In Article 33 of the UN Charter, which deals with the "Pacific Settlement of Disputes," it is affirmed that "Parties to a dispute shall first of all seek a solution by negotiation, inquiry, mediation, conciliation... or other peaceful means." And Article 37 continues, "Should the parties fail to settle it by the means indicated, they shall refer it to the Security Council... It shall decide whether to take action." In the case of the first Gulf War in 1991, for example, the events make clear that no negotiation, mediation or conciliation was ever undertaken. Resolution 660 issued on August 2 called for negotiation, yet on August 5,

President George H. W. Bush authorized sending American troops and rejected any possibility of negotiation. The same held true for the US decision to start bombing Iraq in 2003. No prior negotiation, mediation or conciliation was ever undertaken. These matters are discussed in more detail in Chapter III.

Chapter VII, Article 39 of the UN Charter, titled "Action With Respect to Threats to the Peace," established that "The Security Council shall determine the existence of a threat to the peace, a breach of the peace or act of aggression and shall make recommendations, or decide, what measures shall be taken." The power to make such determinations was given to the Security Council, alone; this pointedly illustrates the questionable legality of the claim of a right to dismiss the reports from UNSCOM (United Nations Special Commission)[24] which concluded that they had no evidence that Iraq possessed weapons of mass destruction. The same illegality was illustrated in the White House dismissal of the 2003 report from UNMOVIC (United Nations Monitoring, Verification and Inspection Committee)[25] which concluded that the committee had found no evidence of weapons of mass destruction. It was clear from these two reports that these UN commissions had found no evidence of any Iraqi "breach of the peace," and that this fact had been reported to the Security Council. Neither the US nor any nation in its "coalition of the willing" had authority to challenge or to ignore these SC decisions.

SinceArticle 46 states that *"Plans for the application of armed force shall be made by the Security Council,"* it follows that the failure of the Bush administrations to gain Security Council approval meant that any American pre-emptive action lacked legality in the same way that the Russian invasion of Chechnya did.

Limitations on the Functioning of the World Court

Article 94.1 of the UN Charter states that "each member *undertakes to comply with the decision of the International Court of Justice*." Unfortunately, no enforcing power exists if member states do not undertake to comply. Furthermore, Article 95 allows states to bypass the Court: "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their dif-

24. John W. Dean, *Worse Than Watergate* (New York: Little Brown, 2004) pp. 198-205. See also Hans Blix, *Disarming Iraq* (New York: Pantheon, 2004) pp. 20-22, 260-264, 270-271.
25. Blix, *Ibid.*, pp. 257-274.

ferences to other tribunals," such as a court in their own nation. This matter will be considered in detail in Chapters II, III, and IV.

The Secretary General (SG)

Chapter XV of the UN Charter, Articles 97-101, established the role of the SG, with a five year renewable term (see Appendix III). The SG is appointed by the joint efforts of the Security Council and the General Assembly. Any of the five permanent members of the Security Council (SC) can veto a nominee, and in the early years most of the use of the veto was on appointees for the position of SG. The nations of the GA have, however, exerted significant pressure in favor of certain candidates. Initial candidates for the first SG included General Dwight Eisenhower and Prime Minister Winston Churchill, but the Soviets insisted that a person from a small nation that had suffered particularly by the Nazi invasion should be elected and that no one from one of the five permanent states should ever be a candidate. At the time, the US supported the candidacy of Lester Pearson, the Canadian ambassador to the US; but the Soviet Union opposed any candidate from North America. The Soviets suggested Trygve Lie, Norwegian foreign minister and former labor leader, and he was successfully elected January 29, 1946. In 1951, when the occasion arose to select again the USSR opposed his re-election because he had approved UN intervention in Korea. The Soviets suggested, instead, candidates from India, Lebanon, Mexico, and the Philippines. Although the US endeavored to appease the opposition by proposing only a three year extension for Lie, the Soviet opposition prompted Lie to resign in 1953.

In 1953 the US initially supported Carlos Romero from the Philippines, a candidate the USSR had supported in 1951; but in 1953 the Soviets opposed Romero and suggested instead Vijaya Lakshmi Pandit from India. She was vetoed by China, which was then represented by Taiwan in the Security Council and the General Assembly. The Soviets also vetoed a European favorite, Lester Pearson of Canada, and helped to establish the principle that no NATO candidate nor anyone from North America need apply. Finally Dag Hammarskjold, a Swedish deputy, received the support of all five permanent members. In 1957 he was unanimously elected for a second five-year term. In 1961, the Soviets objected to renewing his post because of his role in the Congo crisis; Hammarskjold's death in a plane crash ended the controversy. U Thant of Burma was elected to serve out the remaining one year and then he was unanimously re-

elected. The US had initially blocked the re-election of U Thant because he had opposed the US involvement in the Vietnam War. The French were also unhappy with U Thant because he had supported Algerian independence, and Arab states opposed him because he had supported Israel.

For the first time, candidates began to campaign for the position. The two next were Max Jakobsen from Finland and Kurt Waldheim from Austria. Waldheim won election with the support of the USSR, the US, and Great Britain, and he was even promoted for an unprecedented third term re-election. China vetoed the nomination. A decade and a half later it was revealed that a post-World War II UN War Crimes Commission had branded Waldheim a suspected war criminal. The incriminating files on Waldheim had been stored away in UN archives and never consulted. China then supported Salim Salim of Tanzania, whom the US vetoed because he had frustrated US efforts to seat Taipei in the GA a decade earlier. Javier Perez de Cuellar from Peru, a former undersecretary-general, was elected. He was unanimously re-elected for a second five-year term.

A non-aligned movement attracted 102 members of the GA who would refuse to support any candidate who was not from an African State. The Organization of African States proposed six Africans, one from Egypt and five sub-Saharans. Boutros Boutros Ghali from Egypt was elected on the 11th ballot. The US attempted to block his re-election in 1996, while the Arab League endorsed him for a second term. The US did not use its veto, but it did make its opposition known so that other candidates might be proposed. A week later the Group of Seven industrial nations met in France and in their review of UN reform concluded that Ghali had earned an "A" grade. In early July, the Organization of African Unity meeting in Cameroon asked all members of the GA to recommend Ghali for a second term.[26] In the early election process, the candidacy of Kofi Annan (from Ghana) surfaced, and the Organization of African States, although they did not get Ghali, whom they wanted, were satisfied that, at least, the new SG was from Africa.[27]

The SG chairs the meetings of the General Assembly, the Economic and Social Council, and the Trusteeship Council. The latter Council stopped functioning years ago when there ceased to be any nations needing a trustee. The SG may bring to the attention of the Security Council issues which in his/her

26. *The Interdependent*, Vol. 22, no. 2, Summer 1996, pp. 1-6.
27. *Ibid* and The *Interdependent*, Vol. 22, no. 4, Winter 1997.

opinion may threaten international peace and security. Article 100 specifies that the SG "shall not seek instructions from any government or from any other authority external to the Organization (UN)." At the same time, nations shall "not seek to influence them in the discharge of their responsibilities."

The General Assembly (GA)

As of 2005, 191 nations were members of the UN and as such are members of the GA. Each nation, regardless of size, has one vote. Article IV of the UN Charter states, "The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon recommendation of the Security Council." By the same process, in reverse, a nation may be expelled. In the GA, each state may have up to five representatives in order to have representation on the various major committees (see Appendix IV). Whatever else one may say about the resolutions of the GA, they are the best evidence there is of the world's moral judgment.

The GA may make recommendations to the member states on questions relating to the maintenance of peace and security brought by any state, whether a member of the UN or not, and it may call the attention of the Security Council to situations which are likely to endanger international peace and security (Article 11). The GA may also make recommendations promoting international law and international cooperation in the economic, social, cultural, educational, and health fields, and may assist in the realization of human rights (Article 13). The GA receives and rules on reports from the Economic and Social Council and other organs of the UN (Article 15). The GA approves the budget and assigns national dues. Decisions on all substantive matters will be by a two-thirds majority, while decisions on all procedural matters will be by a simple majority of those present and voting.

Any state in arrears by an amount that equals its contribution for the previous two full years, "Shall have no vote in the General Assembly" (Article 19). Actually, states in arrears lose the vote on all UN committees of which they are a member. The US, Japan, Germany, France, UK, Italy, and Russia account for about 70% of the budget. The UN has a category of Least Developed Countries (LDC) and an undersecretary-general, Anwarul Karim Chowdhury (2004), in charge of them. As of 2004 there were 49 LDC nations, of which 33 are in sub-Saharan Africa. The assignment of national dues for these LDC is based on several criteria: 1) a population less than 75 million, 2) a per capita of Gross

Domestic Product less than $800 a year, and 3) life expectancy (Augmented Physical Quality of Life Index) of less than 59. This combines health, wealth, nutrition, and education. The yearly dues for Mali, for example, are $11,800. The total budget for the US is about $630 million. Kofi Annan submitted a preliminary budget for 2004-2005 of about $2.9 billion.[28] The US Senate Helms-Biden bill (June 17, 1997) proposed that the US share for the general operations of the UN should be reduced from 25% to 22% and that the US share for peacekeeping be reduced from 31% to 25%. The Senate also claimed that the US should be reimbursed for their military expenses in the former Yugoslavia and in Iraq. The GA rejected these claims on the basis that neither of these US actions had arisen out of any UN obligation.[29]

In 2002, the UN reported that 52 nations were temporarily delinquent in their dues and had lost their vote.[30] Of these nations 24 were African, 11 were Asian, 11 were Latin American, and 6 were Eastern European. Seven very poor nations, chiefly in Africa, were allowed to keep their voting privileges even though they continued to be in arrears.

The Resolutions of the GA serve two basic functions. They help to establish moral leadership and indicate the consensus of nations as to what ought and ought not be done. They also serve a legal function. As the only universal organization, their resolutions are widely believed to have the force of international law. The following short list of approved Resolutions illustrates a few of the areas of the moral leadership of the General Assembly.

1972 — Ban on Biological and Toxic Weapons.

1979 — Convention on the Elimination of All Forms of Discrimination Against Women.

1989 — Convention on the Rights of the Child.

1989 — Optional Protocol abolishing the death penalty.

1996 — Comprehensive Nuclear test Ban Treaty.

1997 — Kyoto Protocol on global warming.

1997 — Protocol banning manufacture, sale, or use of landmines.

2001 — Agreement to Curb the International Flow of Illicit Small Arms.

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28. *A Global Agenda*, 2004-2005 edition, pp. 263-268.
29. *Ibid.*, pp. 271-278.
30. John Tessitore and Susan Wolfson. (eds) *A Global Agenda: Issues Before the 55th General Assembly of the United Nations* (New York: Rowan and Littlefield, 2000) p. 278.

The GA has worked specifically to determine the kinds of weapons and war strategies which should be banned, a task for which the Hague and Geneva Congresses were initially called (see Appendix V). Consider the following General Assembly resolutions illustrating UN accomplishments.

November 24, 1961 — Nuclear weapons are declared to cause "unnecessary suffering."

November 20, 1969 — A ban of weapons of mass destruction, such as, flame throwers, napalm, gas, chemicals, germ bombs.

December 8, 1971 — A ban on chemical and biological weapons.

December 9, 1971 — A suspension of nuclear testing.

April 10, 1972 — A prohibition against making, using, or stockpiling bacteriological weapons.

November 29, 1972 — Suspension of all nuclear and thermonuclear testing.

November 29, 1972 — A ban on the use of incendiaries.

December 11, 1975 — Work toward a comprehensive nuclear test ban.

December 11, 1975 — A nuclear-free zone is established in the South Pacific.

December 10, 1976 — A prohibition on new types of weapons of mass destruction.

December 19, 1978 — A ban on any further nuclear testing.

December 11, 1979 — The attempt of Israel to acquire nuclear capability is condemned.

November 25, 1981 — Weapons of mass destruction are slated to be banned.

November 25, 1981 — A ban on booby traps, land mines, fragmentation bombs.

December 17, 1989 — A ban on the use of nuclear weapons.

As impressive as these two lists are in their attempts to curb weapons that cause "unnecessary suffering," and, in the case of the former list, to bring justice where persecution exists, the fact that the United States voted against or abstained from voting on every one of these resolutions suggests how easy it is for nations to ignore the UN.

Indeed, it conveys the message that the official contemporary American position appears to be that the UN is irrelevant or at least impotent. In the case of the 1989 Convention on the Rights of the Child, did anyone in these other nations imagine that the "No" vote of only two nations in the world — the US and Somalia — had denied this resolution the status of international law? How

can any national leader pretend that its vote against GA resolutions denies them legal status? In the case of the Convention on the Elimination of All Forms of Discrimination Against Women, only the US, Afghanistan, and Sao Tome and Principe signed but failed to ratify. Can it still be claimed that by not signing or ratifying, these three nations vitiated that Convention? Secretary-General Kofi Annan presciently observed to the GA, "Let's not imagine that, if we fail to make good use of it, we will find any more effective instrument."[31]

The Security Council (SC)

Article 23 of the UN Charter states that the SC shall consist of fifteen member states. Five of these seats are "permanent" (China, France, Russia, the United Kingdom, and the United States); the other ten are elected for two-year terms by the General Assembly and are selected to insure representation of nations of varying size (in terms of gross domestic product), culture, and geography. For purposes of geographical representation, the world is divided into the following groups: African States, Asian States, Latin States, Central and Eastern States, and West European and Other States. This latter group includes the US, Canada, Australia, and New Zealand. The decision to award the veto to the permanent five states was made at the Yalta Conference.[32] Nine votes, including the permanent five, are required to pass any substantive issue. Procedural matters merely require nine affirmative votes. The chair of the SC automatically rotates monthly, based on the alphabetic place of the nation. The members as of 2005, including the permanent five, are Angola, Bulgaria, Cameroon, Chile, China, France, Germany, Guinea, Mexico, Pakistan, Russian Federation, Spain, Syria, the UK, and the US. The October 2004 chair was Syria. In any case involving a member of the SC, that state shall refrain from voting.

Article 25 states that "The Members of the United Nations agree to accept and carry out decisions of the Security Council." Since the primary responsibility of the SC is the maintenance of peace and security, any complaint with regard to a threat to peace should be brought to the SC. Its first action is to urge the parties to try to reach agreement by peaceful means. The SC may do this, additionally, by bringing the matter to the World Court (Article 36.3), and the SC may undertake investigation and may appoint special representatives to assist.

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31. *The Economist*, November 20, 2004, p. 27.
32. Edward R. Stettinius, Jr., *Roosevelt and the Russians: The Yalta Conference* (New York: Doubleday, 1949) p. 296.

On many occasions the SC has ordered "cease fire" directives, which were instrumental in avoiding war.[33]

In a number of instances the SC has been circumvented. In the case of Kosovo, the SC was by-passed.[34] In the cases of Sudan, Afghanistan, and in both Gulf wars, [35] the SC was also bypassed. In two instances where the SC appeared to have given the green light for war, North Korea and the first Gulf War,[36]the vote did not win the approval of all five of the permanent nations. The Korean War resolution did not have the affirmative vote of Russia, which boycotted the meeting, and in the resolution for the first Gulf War China abstained. It should have appeared suspicious in the Korean War (1950-1953) that the UN military staff and the US chief of staff were the same person. These considerations are important in view of the fact that the Charter affirms, in Article 39, that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken." No individual UN member state is given authority to make the decision to go to war unilaterally; and, furthermore, no collection of states, such as NATO, has authority to make war in the absence of UN approval. The US has conducted sixty armed invasions since 1945 (see Appendix IV); none of them was submitted to the SC for approval, nor were any of these interventions declared as wars by the US Senate. Instead, they were approved as "presidential agreements," which only required a majority vote in the Senate rather than a Senate vote to declare war. These "agreements" allowed the President to wage armed combat without having to call it war. These "agreements" were first created by Secretary of State Cordell Hull in 1943, during the Roosevelt administration.

The authority of the Security Council has been seriously tested in the Israel-Palestinian dispute. The SC issued over 60 sanctions against Israel for its treatment of the Palestinians; however, the US vetoed over half of them. In a typical instance, Security Council Resolution 1322 (October 7, 2000) invoked

33. *A Global Agenda,* (2003-2004), pp. 53, 57, 59, 63-65,74-75, 94-95, 100-101, 125-126, 141-143,151-152.
34. Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime," *American Journal of International Law, January 1999.*
35. John Tessitore and Susan Wolfson, *A Global Agenda,* (New York: Rowan and Littlefield, 1999) p. 3.
36. Ramsey Clark and Others, *War Crimes: A Report on United States War Crimes Against Iraq* (Washington: Maisonneuve Press, 1992) p.240.

the 4th Geneva Convention and branded Israel as an "occupying power" in East Jerusalem, Gaza, and the West Bank and condemned Israel's use of "excessive force" against Palestinians. The vote was 14 in favor, with the US abstaining. This abstention effectively vetoed the resolution and the US was put in an embarrassing position with respect to the Muslim countries and in contradiction with many nations in the world community.[37]

The SC may also authorize peacekeeping forces, and has done so on over 60 occasions.[38] These peacekeepers are not conventional soldiers and their weapons are comparable to those of big city police. The traditional role of the UN in peacekeeping requires an invitation from the nations involved before the Blue Berets can be sent. In 1999, the SG, Kofi Annan, called for a re-examination of this policy and proposed the concept of "humanitarian intervention," whereby the UN peacekeepers could enter a sovereign nation without prior permission. This proposal met with objections from China, Egypt, North Korea, Malaysia, Iraq, Libya, and others. After all, these nations argued, the UN was premised on the assumption of national sovereignty where every nation retained the right to accept or reject UN assistance.[39] As of 2005, the SC is conducting peacekeeping forces in Golan Heights, Lebanon, Cyprus, Georgia, Kosovo, East Timor, India-Pakistan, Liberia, Congo, Ivory Coast, Ethiopia/Eritrea, Sierra Leone, and the Western Sahara.[40]

Both the GA and the SC are currently discussing ways in which the Council might be expanded to take account of the importance of nations with both great population and great financial power, which lack permanent status. These include Japan, Brazil, India, and Germany, whom some propose should become "permanent" members. Although these four nations might also want the power of the veto, it appears unlikely that the US, at least, would ever approve it.[41] Indeed, the report from the UN commission (*A More Secure World: Our Shared Responsibility)* recognizes that since it is "politically impossible to take the veto away from the existing permanent members, it recommends against giving it to new members."[42] Some American officials say in private that the only new per-

37. Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN* (New York: Olive Branch Press, 2000) p. 17.
38. *A Global Agenda*, (2003-2004) pp. 271-272.
39. John Tessitore and Susan Wolfson, *Ibid.*, p. 2.
40. *A Global Agenda*, 2004-2005 edition, pp. 108-109.
41. Ian Williams, "Real UN Reform," *The Nation*, December 27, 2004, p. 8.
42. *Ibid.*, p. 8.

manent member who would be acceptable would be Japan.[43] African, Latin American and Muslim countries want to know why none of these countries have permanent status in the SC and they insist that the failure to have them undermines the credibility of the Council as truly representative.

The Use of the Veto

Since 1945, the permanent five nations have used the veto 247 times. Fifty-nine of these vetoes were cast to block admission of member states to the UN and 43 of the vetoes were to block candidates for the position of Secretary General.[44] In the early years of the UN, the Soviet Union did far more vetoing than the United States,[45] and it did so primarily to block the admission of a country to the UN. Since 1965, the record of the use of the veto changed as follows: US — 71; UK — 32; France — 18; Russia — 15; and China — 4.

The Israeli-Palestine question generated a record number of vetoes. The SC proposed 65 resolutions designed to resolve the Palestine/Israel conflict. The US vetoed 35 of the most substantive ones. For example, in 2003 the SC condemned Israel for building walls, but the US vetoed the resolution. Then, SC Resolution 1322 condemned Israeli violence in Jerusalem and other holy places against Palestinians and called on Israel to abide by its obligations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Initially, the US proposed to veto the Resolution but then abstained from voting (but an abstention by a permanent member counts as a veto). The US exercised its veto against 10 resolutions criticizing South Africa, 8 on Namibia, 7 on Nicaragua, and 5 on Vietnam.

The Economic and Social Council (ESC)

The ESC consists of 53 member states (plus the SG, who serves as the chair, making 54) elected for three-year renewable terms by the General Assembly. The voting for membership is by geographical areas. The African states have 16 seats; the Asian states have 11 seats; the Latin and Caribbean states have 11 seats; the Central and Eastern states have 5 seats; and the West European and "other" states have 10 seats. Included in these "other" states are the US,

43. *The Economist*, November 20, 2004, pp. 25-27.
44. Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (Oxford: Clarendon, 1998).
45. Phyllis Bennis, *Calling the Shots,* (New York: Olive Branch Press, 2000) p. 52.

Canada, Australia, and New Zealand. Thus, when the US was not elected to the Commission on Human Rights, the vote was solely by the West European and Other Nations group. No nation in the world voted for US membership except for some Europeans, Canada, New Zealand, and Australia.

Chapter X, Article 62 of the UN Charter established the functions and powers of the ESC as follows:

1) It may make or initiate studies with respect to international economic, social, cultural, education, health, or related matters and may make recommendations to the General Assembly and to specialized agencies which may be concerned.

2) It may make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all.

3) It may draft conventions with respect to matters falling within its competence.

4) It may call international conferences.

5) Article 63 affirms that it may enter into agreements with specialized agencies like the World Health Organization, the International Labor Organization, United Nations Children's Fund, the Office of the High Commissioner for Refugees, and the UN International Drug Control Program. The Council works with more than 1,500 non-governmental organizations[46] which have consultative status. Each member of the ESC has one vote and their reports go to the General Assembly for final approval.

The International Court of Justice (the World Court, or ICJ)

Chapter XIV, Articles 92-96 of the UN Charter established the Court. "All members of the United Nations are *ipso facto* parties of the Statute of the International Court of Justice" (Art. 93). The Court has two primary functions: 1) to settle legal disputes submitted to it by member states; 2) to give advisory opinions on legal questions referred to it. The Court consists of 15 members (always including the US, UK, China, France, and Russia, although they do not exercise a veto in the Court). No two judges may be nationals of the same state (Art. 2). Nine judges constitute a quorum. All judges are elected for nine-year terms and may be re-elected. Only states that are members of the UN can be

46. John King Gamble, Jr., *The International Court of Justice* (Lexington, MA: D.C. Heath, 1976).

parties to a case. Neither international organizations nor private persons are entitled to initiate proceedings before the Court. The Court cannot deal with a case unless the State involved accepts the jurisdiction of the Court. On the other hand, the Court may give advisory opinions on any legal question whether the states involved approve or not. Nominees for the judgeship are secured from a list supplied by national groups appointed by their respective governments for this purpose. The Security Council and the General Assembly vote independently and the final candidates who obtain a majority in both the SC and the GA are considered elected. To assure that the judges are qualified, states are urged to "consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law" (Art. 6 of the *Statute of the International Court of Justice)*.

The Court has not been overused. Between 1946 and 1975, it handled only 26 "contentious" cases which resulted in a merit or non-merit judgment. During that period there were 11 years when the Court issued no merit or non-merit judgments, and 17 years in which no advisory opinions were rendered.[47] Only eight states have appeared more than once before the Court: the UK has appeared 7 times; France 4 times; The Netherlands and the US 3 times; Belgium, West Germany, India, and Norway 2 times.[48] For example, in 1984 Nicaragua brought the US to the Court for mining the harbor of Managua and for aiding the Contras in a US effort to overthrow the established government. The Court found the US guilty and requested a fine of $400 million to be paid by April 7, 1986.[49] Since President Reagan had terminated the agreement by which the US was bound by the decisions of the Court in 1982, the fine was never paid and the mines were never removed.[50] In 1972, the Soviet Union refused to comply with the Court judgment that they pay their delinquent share of peacekeeping operations. Iran refused to obey the Court in the "Hostages" case.[51] Albania refused to obey the Court judgment in the Corfu Channel Case.[52] France refused to appear before the Court to respond to claims of Australia and New Zealand that France's nuclear testing in the South Pacific was unlawful. Ireland refused to

47. *Ibid.*, pp. 31-32.
48. *Ibid.*, pp. 34-37.
49. Lori Fisler Damrosch, *The International Court at the Crossroads* (New York: Transnational Publishers, 1987) pp. 227, 472-476.
50. Thomas M. Franck, *Judging the World Court* (New York: Priority Press, 1986) pp. 29-30.
51. Damrosch, *Ibid.*, pp. 225-226.
52. *Ibid.*, pp.224, 409.

abide by the Court's decision in the "Fisheries Jurisdiction" cases and Turkey (1978) refused to appear in the "Aegean Sea Continental Shelf" case. [53]

In 1997, the Court was asked by the GA to rule on the legality of nuclear weapons. The World Health Organization made a similar request. In spite of appeals not to do so by four of the five nuclear powers at the time, on the grounds that the Court had no jurisdiction, the Court accepted the case. Fourteen of the judges were evenly split, and the deciding vote in favor of illegality was made by President of the Court, Mohammad Bedjaoui of Algeria. The existing eight nuclear weapons states made no move in response nor did they face any sanction for failing to do so, which made it plain that the World Court's authoritative jurisdiction was in doubt.

Summary

Clearly, the UN is not a world government and US Republican fears that the UN might undermine US national sovereignty have little foundation in fact.

1) Even the UN efforts to create international law through GA resolutions have had mixed success since these resolutions, no matter how overwhelming the support, do not impose enforceable or legally binding obligations. Nations are able to reject or accept resolutions at will. For example, the many resolutions against "weapons of mass destruction," even when overwhelmingly supported, have not resulted in a general ban on the manufacture, sale, or use of any of these weapons nor in a general move to implement the votes unilaterally let alone multilaterally.

2) The efforts of the UN to authorize the sending of peacekeepers are still at the mercy of the veto in the Security Council of any of the permanent five nations and of the unwillingness of nations to allow such peacekeepers to come in. Even where peacekeepers are approved, the UN cannot send them without the consent of the nations in conflict nor can the UN require any particular nation to send troops.

3) The UN has no power, other than moral persuasion, to enforce its recommendations. We have seen this in World Court decisions as well as in General Assembly and Security Council resolutions. This is not to say that the UN has had no influence. In over 80 instances where nations have been willing

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53. Franck, *Ibid.*, pp. 48-51.

to arbitrate, wars have been averted. The current fourteen peacekeeping operations indicate a significant moral and legal accomplishment in a world that would otherwise be in complete anarchy. The UN has no army, and proposals that it should acquire one suggest a misunderstanding of the UN *raison d'etre* to "rid the world of the scourge of war"; furthermore, having an army would give the UN a power which, in its present state, it would be unable to manage. In its present form the UN is not a competitor of NATO or the European Union.

4) The UN does not have the "power of the purse." Assessed dues are based on the wealth of the member states. The UN has no IRS, although it can deny the vote to states which are more than two years delinquent. As we shall see later, this has happened scores of times.

5) The original World Court could not prosecute persons. It could only prosecute states. The Nuremberg and Tokyo trials after World War II made a strong case that this lack needed to be corrected. The first effort to fill this need came when the Security Council approved the establishment of two special courts for prosecuting personal crimes: one to deal with offenses committed in Rwanda and another for offenses committed in the former Yugoslavia. In addition, the General Assembly established a worldwide International Criminal Court (ICC) which is empowered to prosecute individual persons anywhere in the world. Since this new ICC was approved in the General Assembly, it avoided the certain veto by the United States. Again, concerns for national sovereignty were over-riding, as witnessed by the inclusion of an escape clause whereby nations could, if they chose, refuse the jurisdiction of the court.

In effect, largely through efforts of certain of the "permanent five" nations, most of the crucial powers of the UN were "deregulated." Consider, for example, that although the UN was established to "rid the world of the scourge of war," and in spite of the insistence in Article 24 that only the Security Council had power to determine when a threat to the peace existed, and in spite of the affirmation in Article 37 that only the Security Council had the authority to determine that war was called for — in spite of all these assurances, Article 51 allowed (contradicting Articles 24 and 37) that nations still had permission to declare war unilaterally. Russia did this in attacking Chechnya and the US did this in attacking Afghanistan and Iraq.

Similarly, when it comes to allowing the UN to aid starving and displaced refugees (as for example in Darfur), sovereign Sudan can refuse to allow "humanitarian intervention." In the case of the AIDS epidemic in Africa, sovereign nations are still permitted to deny medical assistance. This is deregulation with a

vengeance. This absurd situation is caused by the shibboleth of national sovereignty which has the consequence that the issues of war and justice are left to be resolved by "voluntary" action. In 2000, at the Millennium Summit, Kofi Annan asked, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, or to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?" On one point the report was clear; namely, if a case can be made to intervene, it cannot be based on a unilateral claim of one nation. It must be a Security Council decision.

In spite of all these limitations, the General Assembly is the only organization where 191 sovereign nations can share their common dreams, hopes, and fears and where, through committees like the World Health Organization, the Commission on Refugees, and the International Labor Organization. Successful efforts have been made to deal with the world's most pressing problems: war, poverty, disease. hunger, illiteracy, and the destruction of our environment. For example, a thirteen-year effort by the World Health Organization succeeded in eradicating small pox and helped wipe out polio from the Western hemisphere. In 1974 only 5% of the children in developing countries were immunized against polio, measles, whooping cough, diphtheria, and tuberculosis. By 1995, as a result of the World Health Organization and UNICEF, the immunization rate is now 80%, saving the lives of over 3 million children a year.[54]

In its short history, the UN has provided famine relief to over 230 million people in nearly 100 developing countries and currently provides about one-third of the food to the world's hungry. Since its founding the UN has conducted 49 peacekeeping operations, thus avoiding war between nations.[55] The Security Council has negotiated 172 peaceful settlements between nations, thus avoiding war. The General Assembly and the Security Council have worked to control weapons of mass destruction.[56] In 1980, there were 58 democratic nations worldwide. Due largely to UN action there are now 115 democratic nations. None of these countries became democratic as a result of military action.

The General Assembly has issued conventions promoting women's rights, against the maltreatment of children, improving education in developing

54. A Global Agenda, 1994-1995, pp.229-235.
55. A Global Agenda, 2003-2004, pp.52-110.
56. A Global Agenda, 2003-2004, pp.2-31.

nations, clearing antipersonnel landmines, cleaning up pollution, urging steps to curb global warming, preventing over fishing, and providing sanitation and good drinking water, resulting in over one billion people receiving safe drinking water and 760 million receiving sanitation for the first time. This short list of UN accomplishments makes evident that the UN is more relevant than ever. In his address to the General Assembly on September 21, 2004, Secretary-General Kofi Annan stated, "Indeed today, more than ever, the world needs an effective mechanism through which to seek common solutions to common problems. That is what this Organization was created for. Let's not imagine that if we fail to make good use of it, we will find any more effective instrument."

CHAPTER II. THE SEARCH FOR RULES OR LAWS OF WAR: FORBIDDEN STRATEGIES AND WEAPONS

If we are ever to achieve the United Nations goal to "rid the world of the scourge of war," we must believe in the existence of crimes of war, crimes against humanity, and crimes against the peace. Furthermore, such beliefs require that we first recognize rules or laws of war, the breaking of which will confirm the crimes. The Nuremberg and Tokyo trials, after World War II, were based on the conviction that such laws existed and that, as a consequence, certain acts of war could be legally forbidden. Unfortunately, many international jurists at the time, though favoring the trials, doubted that such international laws existed. On the other hand, many argued that the judgments of medieval Church Councils, and international conferences like those at the Hague and in Geneva (by the International Red Cross), provided strong evidence that crimes of war could be identified.

Among the reasons for the general failure to adopt rules or resolutions to curb the indiscriminate havoc of war were three military doctrines: 1) military necessity, which claimed that no weapon or strategy of war which was necessary for winning a war could ever be forbidden; 2) the right of reprisal, which claimed that any "forbidden act" against one's own army could legally be reprised; and 3) that soldiers were always obligated to obey the orders of their superiors. These ancient doctrines confirmed an equally ancient premise that sovereign nations had the right to wage war in their perceived national interest. The dilemma was that, while national leaders did not wish to appear to be callous brutes, neither did they wish to lose their national interest over mere

humanitarian concerns. As a consequence, as we shall see, military manuals have permitted what international congresses forbade. Let us turn to a study of how our forebears wrestled with this problem.

Aristotle (384-322 bce) claimed that: "The art of war is a natural acquisition...against men who, though intended by nature to be governed, will not submit; for war of such kind is naturally just."[57] Cicero (106-43 bce) urged states to obey the "laws of war" so that their soldiers would be better than brutes. He believed that wars for property or glory were just wars, although they should be carried out with a minimum of hatred.[58] Augustine (354-430) made one of the first serious Western efforts to apply criteria to the practices of war. When Constantine (280-337) made Christianity the official religion of the Roman Empire, Christians who had traditionally ignored the role of soldiers, as they had also ignored the role of politicians, business leaders and lawyers, now were pressed to think about the role of Christian soldiers who could be drafted to protect and expand the empire. Augustine's general thesis was that the advent of Christianity had introduced a humanizing effect to relations, and he presumed that Christian soldiers, although participating in the killing and plundering normal in war, would do so with more grace, less malice, less needless destruction and for a worthier cause.[59] There is nothing in the bible, nor in the history of how Christians waged war throughout the ages, that gives any credibility to such a presumption. Indeed, in the biblical account of how the Jews won the Promised Land, nothing seems to have been excessive. The faithful, in *Psalm 137*, were urged by Jehovah to dash the heads of Edomite children against the city walls even though the Edomites were their cousins through Esau. Later, in *Isaiah 13:1-19*, the prophet pleaded for the abandonment of war and urged the beating of swords into plowshares. Yet, that same prophet predicted that if the people did not follow the commands of their religious leaders, Jehovah would wreak his vengeance in ways similar to what he had served upon Sodom and Gomorrah (which included killing babies, ravishing women, and disemboweling pregnant mothers).

Augustine distinguished the justification for going to war from the justice of the means used to gain that end. We will spell this out in a later section and merely note at this time that, according to Augustine, wars had to have worthy

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57. Aristotle, *Politics* (New York: Random House, 1943) Chapter VIII, l. 1256.
58. Cicero, *Offices* (London: Lackington, 1820) pp. 25-27.
59. Augustine, *The City of God*, Book I, Para. 7.

causes and that the means to support those ends had to be proportional and not excessive. He asserted further that certain persons should be protected in times of war. The problem then, as now, has been the apparent absence of any authority to evaluate that the ends were "just" and to measure when the means were excessive. These questions received some attention from Roman Catholic Church councils. At one such council, the Synod of Charroux in AD 989, it was affirmed that the killing or wounding of priests, who were not bearing arms, would lead to excommunication.[60] The Second Lateran Council of 1139 listed penalties for slaying non-combatants and declared that slings and incendiary devices should be forbidden.[61] These early church efforts to set limits to what was permissible in war were stoutly opposed by military writers, who had ample support from the clergy — who traditionally urged their followers, "Thou shalt make war against the infidel without cessation and without mercy."[62]

Thomas Aquinas (1225-1275) revived the Augustinian criteria in the context of four questions about war.[63] **First,** "Whether some kind of war is lawful?" His answer was that just wars were lawful and that, to be just, three conditions needed to be met:

1. The war must be declared by the duly constituted authority.
2. A just cause must exist.
3. The belligerents must have just intentions.

This third requirement might have prompted Aquinas to comment on avoiding excesses in waging the war; however, he made no mention of this advice, and instead cited Augustine's remark that if the war was just it did not matter what means were used. Moreover, his comments about violence were in the context of jousting, rather than war, and he pointed out that such manly exercises were not forbidden provided that they were not "inordinate and perilous."[64]He remarked that soldiers ought not to have a "passion for inflicting harm," but this referred to intentions, not to the amount of violence. While

60. Oliver Thatcher and Edgar H. McNeal, *A Sourcebook for Medieval History* (New York: Charles Scribner's, 1907) p. 412.
61. *Ibid.*, p. 403.
62. Leon Gautier, *Chivalry* (New York: Routledge and Sons, 1891) p. 9.
63. Thomas Aquinas, Summa Theologica, Question XL.
64. *Ibid.*, Reply to Question IV.

Christians were supposed to slay their enemies with charity, this did not appear to entail any moderation.[65]

Aquinas' **second** question was, "Is it legitimate for clerics to take up arms and fight like soldiers?" He concluded that war-making hindered the mind from divine contemplation, and should, thus, be avoided by clerics.

His **third** question was whether it was lawful to lay ambushes. He paraphrased Augustine in his answer when he remarked that in just wars one did not need to worry about the methods of war.[66]

His **fourth** question was whether it was lawful to fight on holy days. Aquinas concluded that if it is lawful for medical doctors to heal on any day, then it should be lawful for soldiers to do their work on any day as well.[67] Aquinas added little to the search for rules or laws of war.

Military advice on these matters reached a low level in the *Policraticus* of John of Salisbury. In 1159, he described the duties of the Christian soldiers (who were not expected to raise moral questions). Obedience to higher military orders was not to be questioned. John claimed that, "It makes no difference whether a soldier serves one of the faithful or an infidel, so long as he serves without impairing or violating his faith."[68] In current times we see this same military expectation that soldiers will follow superior orders and that soldiers ought not to be punished for so doing.

The earliest serious secular effort in the West to find "laws of war" came in the sixteenth and seventeenth centuries from a number of European jurists. It is interesting that these first serious efforts to find international laws were laws with respect to the waging of war. These scholars raised the following kinds of questions:

— Who may properly declare a war?

Their answers covered a gamut. Pierino Belli (1502-1575) remarked that "it is my view that any people or nation living under its own laws and its own charges, and any king or ruler who is fully independent, may declare war at will."[69] At the other end of the spectrum Francisco Suarez (1548-1584) affirmed

65. *Ibid*., Reply to Question II.
66. Questions Concerning the Heptateuch, Question 1.
67. *Summa Theologica*, Question XL, Fourth Article.
68. John Dickenson (tr), The Statesman's Book of John if Salisbury (New York: Russell and Russell, 1963) p. 201.
69. Pierino Belli, *A Treatise on Military Matters* (Oxford: Clarendon, 1936) Chapter V, 3.

that any war "declared without legitimate authority is contrary not only to charity, but also to justice, even if a legitimate cause for it exists."[70]Hugo Grotius, a Dutch jurist and statesman, asserted that, since some wars were unjust, provisions must be made for conscientious objection by concerned Christians.[71]

— Can justice be on both sides of a war?

Virtually all of the jurists believed that "all wars must be regarded as equally lawful."[72] Alberico Gentili (1552-1608) said that the answer is obviously in the affirmative.[73] Richard Zouche (1590-1661) affirmed that "two persons may go to war justly, that is in good faith on each side."[74] Emmerich Vattel (1714-1767) concluded that all wars "must be regarded as equally lawful."[75] Was this conclusion reached because no rightful body existed to determine whose war was most worthy, or did it imply that the right to go to war was possessed equally by all nations, and that, thus, the fact of war cannot be questioned? Franciscus de Victoria (1480-1546), a professor of theology at the University of Salamanca, concluded that wars for religion were never just, and that justice could be on both sides of any given war.[76]

— Are there limits to what can be done to win a war?

Francisco de Victoria gave a qualified answer: "If some one city cannot be captured without greater evils befalling a State, such as the devastation of many cities, great slaughter of human beings… it is indubitable that the Prince is bound rather to give up his own rights and abstain from war."[77] Francisco Suarez believed that it would be unreasonable to inflict grave harm when the injustice

70. Francisco Suarez, *The Three Theological Virtues* (Oxford: Clarendon, 1944) Disputation XIII, Sec. 2, para. 1. (Geneva, 1949).
71. Hugo Grotius, *On the Law of War and Peace* (Oxford: Clarendon Press, 1944) Book III, Chapter 3, Section 4.
72. Emmerich Vattel, *The Law of Nations* (Washington: Carnegie Foundation, 1916) Chapter III, para. 39.
73. Alberico Gentili, *On The Law of War* (Oxford: Clarendon, 1933) para. 61 and 62.
74. Richard Zouche, An Exposition of Fecial law and Procedure or the Law Between Nations and Questions Concerning the Same (Washington: Carnegie Foundation, 1911) Section VI, 2.
75. Emmerich Vattel, *The Law of Nations* (Washington: Carnegie Foundation, 1916) Chap. III, para. 39.
76. Franciscus de Victoria, *On the Indians* (Washington, D.C., Carnegie Foundation, 1917) Paragraphs 13 and 32.

was slight.[78] Little evidence can be mustered to show that leaders of state ever struggled very hard with this Solomon-like question. Most jurists believed, however, that civilian men and women, and all children, should be spared. At the same time, most agreed with Hugo Grotius (1583-1645) who observed that, in the heat of battle, it was common practice to kill everyone and that the laws of war even sanctioned this.[79] Grotius stated that civilians ought not to be slain and that women and children especially should be spared, except that "for reasons that were weighty, they too might be slain."[80] Since he did not explain what such "weighty" reasons might be, it was common practice for nations to answer this question for themselves. The doctrine of "military necessity" (whatever is militarily required to win a war should not be forbidden) tended to undermine most efforts to ban either strategies or weapons, although a general aversion to the use of poison has remained through the ages. These writers, however, were "ministers without portfolio" and, thus, were in no position to persuade those who waged wars that there were laws of war.

Following the demise of the Holy Roman Empire and the rise of secular nationalism, there appeared to be no international moral authority. Let us consider some of the secular efforts to provide that universal moral authority.

General Orders 100: Instructions for the Government of Armies in the Field (1863)

The United States has the unique distinction of having produced the first military manual in the West prescribing the "laws of war" for its soldiers. The need for such a manual was prompted by confusion about certain common military practices during the Civil War. Municipal law was silent on how soldiers should treat each other and how they should treat civilians. Individual officers differed markedly in their views. Some Northern officers confiscated Confederate private property and shipped it home for resale, while others forbade such practices.[81] Confederate army practices posed problems, also. Some Confederate

77. Franciscus de Victoria, *On the Indians* (Washington: Carnegie Foundation, 1917) Section III, paras. 15-18.
78. Francisco Suarez, *The Three Theological Virtues*, Oxford: Clarendon, 1944) Disputation XIII, Sect, IV, 804.
79. Hugo Grotius, *The Law of War and Peace* (Oxford: Clarendon, 1925) Book III, Chap. IV. Sect. Ix.
80. *Ibid.*, Book III, Chapter 4, section 1x.
81. Frank Freidel, "General Orders and Military Government," The Mississippi Valley Historical Review. Volume XXXII, No. 4, March 1946. p. 542.

authorities claimed the right to send their troops dressed in civilian clothes inside the Union lines where they omitted acts of sabotage and killed unwary Union troops. The Confederate government not only demanded that these troops be treated as ordinary prisoners but threatened that if, when captured, they were treated as spies and summarily executed, then, in reprisal, Union troops who were prisoners of war likewise would be summarily shot.[82]

General Orders 100 spoke to the matter of what soldiers were permitted to do and what they were forbidden to do. Paragraph 15 of the manual stated, "Men who take up arms against one another in public war do not cease on this account to be moral beings." Paragraph 70 stated that the use of poison in any form "is wholly excluded." Paragraph 60 forbade waging a war of "no quarter," (i.e. troops must be permitted to surrender). Paragraph 22 stated that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." Paragraph 148 forbade assassination, as follows: "The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, to be an outlaw who may be slain without trial." We will note how far the American position has changed in this matter when we consider the planned assassinations in the American war against Iraq as well as in the "war" against terrorism. (See Appendix on assassinations.) Paragraphs 49, 56, 75, 76, and 79 obligated armies to treat prisoners with respect and to subject them to no punishment "for being a public enemy."

General Orders 100 was so successful that the United States army used it as the basis for war crimes trials following the Civil War in the trial of Captain Wirz, which is discussed in Chapter IV. It was also used in the Spanish American War, in which the Army prosecuted some of its own soldiers for offenses against the "laws of war." These will be considered in some detail in Chapter IV.

Congress at St. Petersburg

In 1868, seventeen nations, at the invitation of the Imperial Cabinet of Russia, met in St. Petersburg to consider banning certain weapons. The conference issued a "Declaration Renouncing the Use in War of Certain Explosive Projectiles." The plausibility of the Declaration rested on the brief thirty-eight

82. Major Willard B. Cowles, "Recent Practical Aspects of the Laws of War," *Tulane Law Review*, Vol. XVIII (1943) pp. 123-124.

line claim that since the aim of war should be to weaken but not to annihilate the enemy forces, no weapon should be used which would uselessly aggravate the suffering of the wounded. The Declaration proposed that all explosive projectiles weighing less than 400 grams or charged with flammable substances should be banned. The US was not a signatory, and, in any case, the ban did not apply in wars with non-signatories.[83]

Congress at Brussels

In 1874, fifteen nations met in Brussels in an effort to establish laws against the use of some especially "excessive" weapons. The conference issued six bans:

1. Against the use of poisons in war.

2. Against murder by treachery of individuals belonging to the hostile nation or army.

3. Against killing soldiers who have surrendered or are otherwise *hors de combat.*

4. Against waging a war of no quarter (i.e. denying soldiers the right to surrender).

5. Against the use of weapons which may cause unnecessary suffering, like those banned at St. Petersburg in 1868.

6. Against wearing the uniform or carrying the flag of the enemy.

These old bans were considered so important that as recently as November 10, 1969, U Thant, Secretary General of the UN, urged all nations that had not already done so to ratify the decisions of the Brussels Congress.[84] At what point may we conclude that enough nations have ratified such conventions that it is proper to consider them to be international laws?

The Geneva International Red Cross Conferences

The International Committee of the Red Cross (ICRC) was established at a first Conference in 1864. It was prompted by concern over the lack of treatment of the sick and wounded soldiers at the battle of Solferino in the Franco-Austrian War of 1859. Henri Dunant, a Swiss philanthropist, was the prime mover and the Swiss government was the convener. Dunant had personally witnessed

83. Donald A. Wells, *War Crimes and Laws of War* (Lanham: University Press of America, 1991) pp. 53-54.

84. Leon Friedman (ed) *Laws of War* (New York: Random House, 1972) p.196.

the plight of soldiers on the battlefield and he had reported his reflections in 1862 in a book, *Un Souvenir de Solferino.* A major result of this conference was a "Convention for the Amelioration of the Condition of Wounded Armies in the Field." The document provided for the establishment and protection of a medical corps of doctors, nurses, and hospitals. Twelve nations participated in this first ICRC Conference (the US was not present, due to the Civil War). The conference issued the following "rules of war."

1. It is forbidden to wage a war of "no quarter" (i.e. soldiers must be allowed to surrender).

2. It is forbidden to kill or wound soldiers who are *hors de combat* or who have surrendered.

3. Prisoners have the right to receive adequate shelter, food, medicine, and privacy.

4. When the war is over, all prisoners are to be sent home.

Those at that Conference would have been surprised and pleased if they had known that when the Nuremberg judges in 1945 were seeking prior "laws of war," the breaking of which would constitute "crimes against humanity," they referred to the 1864 and subsequent ICRC conferences for evidence. It is remarkable that a conference attended by only twelve nations in 1864 was believed to have set such a precedent in 1945. In 1868, a second Geneva Conference made the same provisions for sailors at sea, and a third conference was held in 1906 taking account of the Spanish-American War.

The Geneva Protocol of 1925

On June 17, 1925 the ICRC called representatives from forty-four nations to Geneva. These meetings produced a Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare. The Protocol reaffirmed similar prohibitions from the Brussels Congress as well as from the Congresses at the Hague and extended these prohibitions to bacteriological methods of warfare.[85] The delegates from both Great Britain and the US were signatories at the time, but neither country ratified those signatures until later. Great Britain ratified the Protocol in 1930, but the US Senate did not ratify it until 1976, and even then both nations did so "with reservations".[86] These reservations included: 1) the US

85. Philip John Baker, The Geneva Protocol for the Pacific Settlement of International Disputes (London: P. S. King and Sons 1925).

agreed not to use these banned chemicals in a "first use" while retaining the power to use them in reprisal against a nation which had previously used them; and 2) the US reserved the right to determine which chemicals, gases, etc. were included on the list of banned substances.[87] Both of these reservations violated the letter and spirit of the original protocol.

Geneva Conferences of 1929 and 1938

In 1929, a fourth ICRC Conference met in Geneva and revised the Convention in light of the Hague Congress of 1907 and of events in World War I. This conference was attended by 47 nations and they reframed conventions requiring the humane care of prisoners and reaffirmed that all prisoners should be returned to their homes at the end of the war. A fifth Conference was held in 1938. Special mention was made that care be given to prisoners regardless of race, sex, nationality, religion, or political persuasion. It stated further that prisoners were not to be tortured nor used as guinea pigs in medical experiments. These "laws" were of particular relevance to many of the actions committed during World War II, and it was not surprising that the Nuremberg and Tokyo judges appealed to them as "international laws." The basic thrust of this Convention was expressed in Article III.

> Persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.[88]

Geneva Conference of 1949

A sixth meeting was held in 1949 to take account of the mass deportations and abuse of civilians in concentration camps, the maltreatment of enemy aliens in belligerent territory, and the inadequate protection of sick and wounded civilians. Four Conventions were issued. The first Convention obligated the captors to take special care of prisoners and it banned torture of prisoners and forbade using prisoners in medical experiments (a reference to what had happened in Nazi concentration camps). The second Convention expanded the list of both requirements and prohibitions for the treatment of sailors at sea. The

86. The Law of Land Warfare(Washington: Department of the Army, July 1956 includes 1976 revision). Article 38.
87. *Ibid.*, Article 38.
88. *Ibid.*, p. 50.

third Convention expanded the scope of who was entitled to prisoner of war status (this and subsequent Geneva conventions have a special bearing on the preposterous claim of the George W. Bush administration that some combatants may be denied prisoner-of-war status). The fourth Convention forbade forced labor, labor without compensation, and displacement of civilian populations.[89] Of special significance in the light of the US war against Iraq, these conventions affirm that an occupying power has the obligation of ensuring the food, medical supplies, and the restoration of water, sewage, hospitals, medical supplies, and police of the occupied population. Quite simply, this means that the "food for oil" program in Iraq is a violation of a Geneva Convention and a shirking on the part of America of its responsibility. Iraq should not be expected to provide the primary support to correct the damage caused by the US invasion. America, as the invader, bears primary responsibility.

Geneva Protocols of 1977

In 1977-78 the ICRC met again and produced two protocols. Protocol I extended the range of those entitled to be considered prisoners of war. In many wars of the late 20th and early 21st centuries, the combatants do not have uniforms and do not have superior officers. In the past, such persons were not entitled to prisoner-of-war status. The new Protocol stated more clearly that as long as a person carries arms openly, he/she is entitled to prisoner-of-war status. This is especially important to remember in the cases of the imprisonment of combatants in Guantanamo or Abu Ghraib. These Geneva Conventions affirmed that all combatants, without distinction, were entitled to all the privileges of prisoners of war. The current name of "terrorist," applied to some enemy combatants, should not, therefore, deny them the rights of being prisoners of war with all the privileges appertaining thereto. Protocol II stated that non-international wars should be treated the same as international wars. President Reagan urged the Senate to ratify Protocol II and to reject Protocol I.[90] But did this decision on the part of one country to reject the Protocol mean that the Protocol was, thereby, nullified? Did this mean that the US did not have to treat prisoners in accordance with the Protocol? Surely, the US Senate rejection of this Protocol did not mean that it thereby lost its status as international law. If nations can

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89. International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949.*
90. Donald A. Wells, *An Encyclopedia of War and Ethics* (Westport: Greenwood Press, 1996) pp. 163-165.

accept or reject "laws" to suit their national wants, then there are no international laws. But more importantly, if these conferences in the past were interpreted as "law" by the Nuremberg judges, why is there so much current American opposition to giving these Geneva conventions the status of international law?

The Hague Congresses of 1899 and 1907

These two congresses served as models for both the League of Nations and the United Nations. Both congresses were called by Tsar Nicholas II in the hope to reduce armaments and to find more peaceful ways of settling international disputes. The first congress was attended by twenty-six nations and it issued three major conventions: 1) "Convention for the Pacific Settlement of International Disputes"; 2) "Convention with Respect to Laws and Customs of War on Land," which urged compliance with the Geneva conventions of 1864 with respect to the treatment of the sick and wounded; and 3) "Convention for the Adoption to Maritime Warfare the Principles of the Geneva Convention of 1864." In addition, the Hague Congress issued three relevant declarations: 1) "Declaration Prohibiting the Discharge of Projectiles from Balloons or by other Methods of a Similar Nature"; 2) Declaration Prohibiting the Employment of Projectiles Containing Asphyxiating or Deleterious Gases"; and, 3) Declaration Prohibiting the Employment of Bullets Which Expand or Flatten Easily in the Human Body." Of the nations attending, only Great Britain refused to sign Convention 1; both Great Britain and the US failed to sign Conventions 2 and 3.[91]

Tsar Nicholas II of Russia called a second Hague Congress in 1907. Forty-four nations attended. Once again no agreement was reached on disarmament even though that had been the stated goal of the meetings. Article XXIII included a Convention banning weapons that caused "unnecessary suffering" (the 1899 Congress forbade weapons that caused "superfluous injury"). In neither case, however, was it made clear what weapons were singled out for this judgment.[92]Among the specific "rules" set by these Hague congresses were the following:

1. Prisoners are not criminals, but simply soldiers doing their job.
2. It is forbidden to drop bombs from balloons.

91. *Ibid.*, pp. 51-53.
92. *Ibid*.

3. It is forbidden to use noxious gases or other poisonous substances.
4. It is forbidden to attack unfortified cities.
5. It is forbidden to target civilians deliberately.
6. It is forbidden to use explosive or expanding bullets.
7. A pre-emptive war is a war of aggression.

Today's United Nations consists of 191 nations, while the two Hague Congresses contained only 26 and 44 nations respectively. With that in mind, it is surprising that some American judges at the Nuremberg Trials appealed to these Hague judgments as evidence that rules existed, the breaking of which constituted war crimes, yet in the present day there are some American scholars who deny that these far more widely-endorsed UN resolutions have the force of international laws.

In efforts to amplify and reinforce these declarations and conventions the UN General Assembly has passed a number of comparable resolutions. One may well ask why these should not have the same status as international laws that the Geneva and Hague conventions have enjoyed. Consider the following General Assembly resolutions.

- December 17, 1989, the General Assembly passed a resolution prohibiting the use of nuclear weapons, with a vote of 134 yea, 17 nay (including the US), and 4 abstentions.
- On December 9, 1974, the GA passed a resolution banning napalm and other incendiary devices. The vote was 108 yea, 0 nay, and 13 (US) abstentions.
- On December 11, 1975, the GA passed a resolution on the urgent need to cease nuclear testing and to work for a comprehensive test ban. The vote was 106 yea, 2 nay, and 24 (US) abstentions. On that same date the GA passed a resolution establishing a nuclear-weapons-free zone in the South Pacific. The vote was 110 yea, 0 nay, and 20 (US) abstentions.
- On December 10, 1976, the GA passed a resolution banning the development of new types of lethal weapons, including ray weapons which affect blood and intercellular plasma, infrasound weapons designed to damage internal organs and genetic weapons to affect heredity. It passed with a vote of 120 yea, 1 nay, and 15 (US) abstentions.
- On December 14, 1978, the GA passed a resolution prohibiting the development of new weapons of mass destruction. The vote was 118 yea, 0 nay, and 24 (US) abstentions.

- In 1981, the GA passed a resolution banning weapons of mass destruction. The vote was: 116 yea; 0 nay, and 27 (US) abstentions.
- In December 12, 1980, the GA passed a Resolution for a Comprehensive Test Ban. The vote was: 129 yea, 0 nay, and 35 (US) abstentions.
- In 1999, the Landmine Treaty banned the use, stockpiling, production and transfer of antipersonnel landmines. To date, 142 nations have signed in approval and 122 nations have ratified it. All nations in NATO with the exception of Turkey and the US have signed. Can America's leaders still insist that no international law against the use of landmines exists? It seems difficult to reject the importance and validity of an international law against the use of landmines when, according to a 2001 Landmine Monitor Report, landmines continue to maim or kill approximately 15,000 to 20,000 people (primarily civilians) each year.[93]

Here, then, is a short list of proposed "banned weapons" supported by various Hague, Geneva, and UN conventions. The fact is that the Nuremberg and Tokyo trials appealed to both Hague and Geneva rules as justification for those trials. While the US Senate has remained irresolute in its commitment to both Hague and Geneva rules, the fact remains that US Supreme Court Justice Robert H. Jackson introduced the trials and served as Chief Counsel for the Prosecution, and US General Telford Taylor served as Chief Prosecutor.[94] The tacit understanding was that Hague and Geneva resolutions were the bases for the legitimacy of the trials. This fact alone shows that these rules have been accepted by representatives of the US as international laws. It is also a fact that the current criminal courts of the UN (the International Criminal Court, the special Criminal Court for Crimes Committed in the Former Yugoslavia, and the special Criminal Court for Crimes Committed in Rwanda) all appeal to the Nuremberg and Tokyo Trials, as well as to Hague and Geneva conventions. Why then, don't these prohibitions have the status of international law?

The section on "banned weapons" in the current US military manual suggests that, for the US, at least, none of the Hague or Geneva prohibitions have any status at all. The relevant sections in the manual are as follows:

> Article 34. "The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades."[95]

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93. *The Defense Monitor*, Volume XXX!, No. 2.
94. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Random House, 1970) pp, 22-23, 30.
95. *The Law of Land Warfare, FM27-10* (Washington, D.C., 1956) p. 18.

> Article 35. "The use of explosive 'atomic weapons'...cannot as such be regarded as violative of international law."[96]
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> Article 36. "The use of weapons which employ fire such as tracer ammunition, flamethrowers, napalm, and other incendiary agents...is not violative of international law."[97]
>
> Article 38. "The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, of smoke or incendiary materials, or of bacteriological warfare."

Any doubts about the existence of laws proscribing certain weapons and strategies of war must confront the fact that the long and specific list of such UN "banned" weapons and strategies is contradicted be the military practices and weapons permitted in the military manuals of the United States. It is evident that efforts to establish rules or laws of war are consistently undermined by actual American military practice. Is this why conventions issued by the United Nations are not viewed as establishing international laws?

Article 13, section 1 of the UN Charter states that "the General Assembly shall initiate studies and make recommendations encouraging the development of international law." Yet the nations drafting this part of the Charter seemed to be overwhelmingly opposed to giving the General Assembly the power to enact such international laws. This opposition did not prevent the UN from establishing an International Law Commission in 1947, which has for its object "the promotion of the progressive development of international law and its codification.[98] Chapter II, Article 15 of the Statute of the International Law Commission identifies its role as follows:

> In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematizations of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

Is the UN the body to distinguish legitimate from illegitimate weapons and strategies?

96. Ibid.
97. The Law of Land Warfare, p. 18.
98. Statute of the International Law Commission, Article 1, para. 1.

The UN General Assembly has a long and distinguished record of efforts to identify forbidden weapons and forbidden strategies, and the UN has assumed that their conclusions are consistent with the Geneva and Hague conventions. The following partial list of General Assembly resolutions illustrates how exhaustively that body has undertaken the task. The problem is, however, that the US has failed to support any of the following proposals.

Resolutions banning the manufacture or use of nuclear weapons included:

November 24, 1961 — The specification that nuclear weapons cause "unnecessary suffering."

November 28, 1966 — A call for a plan for a "Ban the Bomb" conference.

November 29, 1972 — A call for a world disarmament conference.

December 11, 1979 — Opposing the stationing of nuclear weapons in non-nuclear weapons nations.

November 25, 1981 — Banning weapons of mass destruction.

November 25, 1981 — Calling for a cessation of the nuclear arms race.

December 15, 1989 — Advocating a "nuclear freeze."

December 17, 1989 — Prohibiting the use of nuclear weapons.

1990 — A resolution on preventing nuclear war.

1991 — A resolution for nuclear disarmament.

Resolutions banning nuclear weapons testing included:

December 9, 1971 —A resolution to suspend nuclear and thermonuclear testing.

November 29, 1972 —Suspension of nuclear and thermonuclear tests in the atmosphere as well as in all other environments.

November 29, 1972 — A call for all nations to cease testing independently of any verification scheme agreement.

December 11, 1975 —Work for a comprehensive test ban.

December 11, 1975 — Establishment of a nuclear-weapons- free zone in the South Pacific.

December 10, 1976 — A comprehensive nuclear test ban.

December 10, 1976 — Establishment of a nuclear free zone in South Africa.

December 14. 1976 — A complete prohibition of nuclear tests.

December 11, 1979 — A condemnation of any attempt on the part of Israel to acquire nuclear weapons.

December 12, 1980 — A comprehensive test ban.

November 23, 1981 — A comprehensive test ban.

1990 — A comprehensive test ban.

Resolutions banning chemical and biological weapons

December 4, 1967 — A ban on non-nuclear weapons of mass destruction.

December 16, 1969 — A ban on chemical and biological weapons.

November 20, 1969 — Reaffirming a ban on weapons of mass destruction.

December 8, 1971 — A ban on chemical and biological weapons.

April 10, 1972 — A prohibition on the development, production, and stockpiling of bacteriological and toxin weapons.

December 10, 1976 — A ban on the development of new types of lethal weapons including ray weapons which affect blood and intercellular , infra-plasma, infrasound weapons designed to damage internal organs and genetic weapons to alter heredity.

December 11, 1976 — A prohibition of the manufacture and stockpiling of radiological weapons.

November 1981 — A ban on chemical weapons.

December 15, 1989 — A ban on chemical and biological weapons.

January 13, 1993 — Establishment of an organization for the prevention of chemical weapons.

Resolutions banning incendiaries

November 19, 1972 — A ban on napalm and other incendiary devices.

December 9, 1974 — A ban on napalm and other incendiaries.

December 19, 1977 — A ban on all incendiaries.

December 14, 1978 — A prohibition on development of new types of weapons of mass destruction.

November 21, 1980 — A ban on development of new weapons of mass destruction.

1981 — A ban on "particularly inhumane weapons" including booby traps, mines, fragmentation bombs, and incendiaries.

It is unclear whether the United States will ever allow the UN General Assembly to play a significant role in curbing weapons of mass destruction. Some American leaders have even questioned the authority of the International Atomic Energy Agency (IAEA), chosen by the Security Council to determine officially whether Iraq has weapons of mass destruction. The reader is advised to refer to helpful current books reporting the history of IAEA work.[99] We may take some hope from the resistance of France, Russia, China (of the permanent five), and other nations to current American go-it-alone policies in violation of the United Nations, that these policies will not survive unchallenged.

Forbidden strategies: the crime of aggressive war (crimes against the peace)

An early general effort to identify aggression as such was made in 1928 at the Paris Peace Conference (Kellogg-Briand Peace Pact) which stated that "the time has come when a frank renunciation of war as an instrument of national policy should be made." It was noted that the immense number of casualties in World War I "led to a severe reaction against the concept that nations could resort to war for any reason."[100] The aim of the meeting was to get some agreement among nations to renounce the use of war as an instrument of national policy. The Paris Pact was finally passed July 24, 1929. Among the fifteen signatories were Germany, US, France, UK, Italy, and Japan. Thirty-one states were "adhering" states. By 1938 a total of 49 states had become adhering.[101] Among the reservations and qualifications expressed by the adhering states, the most significant was one offered by the US on June 20, 1928 — that it "believes that the right of self-defense is inherent in every sovereign state and implicit in every treaty." In other words, the right of a sovereign state to make war usurps the Paris Pact.

All efforts to distinguish between a war of aggression and a war in response to aggression have failed. The UN General Assembly Resolution on the definition of aggression was not resolved. This distinction has become even more confused due to the George W. Bush administration's claim of the right to wage

99. Hans Blix, *Disarming Iraq* (New York: Pantheon, 2004); Ron Suskind, *The Price of Loyalty* (New York: Simon and Schuster, 2004); Richard A. Clarke, *Against All Enemies* (New York: Free Press, 2004); Amy Goodman, *The Exception to the Rulers* (New York: Hyperion, 2004); John W. Dean, *Worse Than Watergate* (New York: Little Brown, 2004).

100. *International Law*, (Washington, D.C. Department of the Army, October 23, 1962) Vol. II, Pamphlet No. 27-161-2, p. 235. *Humanitatrian.*

101. *Ibid.*, p. 236.

war pre-emptively. Pre-emptive war violates the traditional assumption that the aggressor was the one who fired the first shot. On October 10, 1933 an Anti-War Treaty (Non-Aggression and Conciliation) that was signed in Rio de Janeiro and by Argentina, Brazil, Chile, Mexico, Paraguay, and Uruguay affirmed in Article 1 that "The High Contracting Parties solemnly declare that they condemn wars of aggression."[102] Justice Robert H. Jackson, who played a major role in the Nuremberg trials, conceded that the judges had no clear definition of aggression. Indeed, between June 26 and August 8, 1945 at a meeting in London between the US, UK, USSR and France, the US was virtually alone in its wish to include "aggression" as a crime in the war crimes trials.[103] At the time of the Litvinov Agreement, whereby Russia agreed not to aggress against Estonia, Latvia, Turkey, and Afghanistan, Jackson commented in his opening statement, "An aggressor is generally held to be that state which is the first to commit any of the following actions: invasion by its armed forces, with or without a declaration of war of the territory of another state."[104] Jackson's remarks were verbatim from the Convention for Definition of Aggression between the Soviet Union and its Neighbors (1933).[105] In view of the fact that the US supported the Nuremberg and Tokyo trials, in which Germans and Japanese were prosecuted for waging aggressive war, it is inconsistent to claim now that America, or any other nation, should be excused for similar actions.

Any assurance that the Nuremberg and Tokyo trials had made the definition of aggression any clearer was undermined when in 1954 the General Assembly failed to ratify a proposal from the UN Commission on the Codification of International Law to the effect that the trials had set a precedent and that the nature of aggressive war had been explained. [106] It is no surprise that the US Senate has opposed the establishment of the International Criminal Court, since it fears that some American might be prosecuted for "aggressive" actions. Telford Taylor observed that the traditional meanings of "aggressive war" had

102. Quincy Wright, *The Rule of International Law in the Elimination of War* (Manchester: University Press, 1961) p.47.

103. Donald A. Wells, *War Crimes and Law of War* (Lanham, MD, University Press of America. 1991) p. 99.

104. Justice Robert H. Jackson, "The Significance of the Nuremberg Trials to the Armed Forces,": *Military Affairs*, Winter, 1946) p 14.

105. Quincy Wright, *Ibid* p. 101.

106. Wells, War Crimes and Laws of War, p. 109.

been obstacles to military success, and that "rules of war that interfere significantly with military success do not remain enforceable."[107]

Forbidden Strategies: A war of no quarter.

"No quarter" informs the enemy that surrender will not be accepted and that the battle will continue until either no enemy are left alive or the attacker is willing to stop. In the Middle Ages, rules were proclaimed such that if a town refused to surrender, it might be attacked; and every citizen of that town was then fair game for slaughter. This included rape and pillage as well. On the other hand, if the town in question was willing to surrender, then neither rape, pillage, nor slaughter were permitted. Franciscus de Victoria (1485-1546) asked whether it was lawful to kill everyone who was guilty. His answer was that in the heat of battle everyone who resists may be slain. But it is right to continue to kill soldiers after they have surrendered? Victoria thought that in a war against "unbelievers" it would be expedient to kill them all.[108] In the case of war against Christians, however, he concluded, "I think that they may not be killed, not only not all of them, but not even one of them, if the presumption is that they entered the strife in good faith."[109]

One of the current consequences of wars, where ideology is paramount, has been that moderation tends to be absent. Enough ambiguity exists on the meaning of "no quarter" that armies fail to see, for example, that the use of mega weapons, especially those dropped from airplanes, really constitutes waging a war of no quarter. Indeed, in the US military manual, *General Orders 100*, 1863 (Paragraphs 60-66), wars of no quarter are forbidden, although they may be waged in reprisal. In the current US military manual, *The Law of Land Warfare* 1976 (Paragraph 85), commanders are forbidden to refuse to take prisoners on the grounds that to do so would be militarily inconvenient. The difficulty in all of this is that the magnitude of today's weapons causes damage far in excess of the "no quarter" rule that these provisions are supposed to avoid.[110]

Forbidden strategies: siege warfare.

In medieval times it was common practice to lay siege to a fortified city, which was where all the inhabitants normally fled in the event of an attack.

107. *Ibid.*, p. 110-112.
108. *On the Indians*, Sections 44-48
109. Loc cit.
110. Wells, *Encyclopedia*, pp. 404-405.

Rules existed whereby a city might avoid the siege by surrendering, and thus protecting the inhabitants from total destruction. Should the city refuse to surrender, then a siege that cut off all supplies was warranted and civilians and soldiers alike were legitimate targets. Indeed, the citizens of any city that had refused to surrender in the first place were fair game to rape and plunder.[111] The 1899 Hague Congress "Convention With Respect to the Laws and Conventions of War" article XXV forbade any attacks on unfortified cities, since they were a form of siege warfare.[112]

In modern warfare the embargo plays a role similar to that of the medieval siege and similarly targets the civilian population. Take, for example, the first Gulf War of 1990-91. The UN Security Council issued Resolution 661 on August 6, 1990, which called for an end to all trade with Iraq including both goods and currency. Resolution 665, on August 25, 1990, called for a halt to all outward and inward shipping, blockading everything except medical supplies. Resolution 670 on October 24, 1990 urged the freezing of all Iraq assets abroad. At the time, a Harvard University study predicted that the embargo would result in at least 170,000 civilian deaths in Iraq (chiefly children under five years of age). This same dire prediction was asserted by UNESCO and a Tufts University team. On April 30, 1998 in a summary report by UNICEF, "Situation Analysis of Children and Women in Iraq," it was noted that there had been an "increase of approximately 90,000 deaths yearly due to the sanctions."[113] The report stated, "The total cost in lives directly resulting from UN sanctions is now 1,500, 000 deaths over the normal death rate."[114] Given the record of UN Security Council resolutions supporting the embargo on Iraq, and the (mistaken) Iraqi perception that the Security Council supported the US war against Iraq, it is not surprising that UN workers have been targeted by Iraq dissidents. The January 2004 request from the Bush administration to invite the UN to come into the situation was complicated by the US insistence that the UN work under the US and, hence, become an accomplice in the war. This was not a position the UN can afford to

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111. Donald A. Wells (ed), *An Encyclopedia of War and Ethics* (Westport, CT: Greenwood Press, 1996) pp. 428-431.
112. Donald A. Wells, *War Crimes and Laws of War*, (Lanham, MD: University Press of America, 1991) pp. 51-53. See also "Siege Warfare," in Wells, *An Encyclopedia*.
113. Ramsey Clark, *Challenge to Genocide: Let Iraq Live*, (New York: International Action Center, 1998) p. 237.
114. *Ibid.*, p. 25.

take. The preamble to the UN Charter states that the goal of the UN is "to rid the world of the scourge of war," and not to aid national war efforts.

Medieval moralists objected to siege warfare on the grounds that it deliberately targeted civilians. The embargo is an extension of this same practice. On October 18, 1907, the Annex "Regulations Respecting the Laws and Customs of War on Land" of the Hague Convention IV, Article 25 stated, "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[115] At that time one could drop bombs on cities from balloons or by long distance cannon, and these were what Article 25 forbade. The current US Army Manual, *The Law of Land Warfare (1976)*, Section IV, Article 39, cites this 1907 prohibition. The same requirement to protect civilians in war was affirmed in the August 12, 1949 Geneva Convention "Relative to the Protection of Civilian Persons in Time of War."[116] The advent of modern aircraft and modern mega bombs make such rules functionless. If aerial warfare is permitted, then concern for distinguishing civilians from combatants is, in fact, abandoned. We can see that this has been the case when we compare the increase in civilian casualties since World War I — where civilian casualties were 5% of the total — with the civilian casualties in World War II (48%), in Korea (84%), and in the Vietnam War (90%).[117]

Terrorism

The expression "war on terrorism" highlights a fundamental ambiguity in the use of the term "terrorist." While it is generally agreed that violence against civilians should be forbidden, we distinguish acts of violence against civilians done by the armies of nations from the same acts committed in a *levee en masse*, by local tribes as in Afghanistan, by individual Palestinians against Israel civilians, and by jungaweed against Darfur citizens. The term "terrorist" most often is used to mean no more than a designation of violence we disapprove of. When President Bush classified entire nations as "terrorists," he used the term to mean "all our enemies are terrorists," while claiming that all our soldiers are good guys. Soldiers inevitably commit terrible acts of violence, most of which are praised by those whose interests they are defending. Americans praise American soldiers. When the soldiers of other nations commit deeds of which we disapprove, then

115. *Treaties Governing Land Warfare*, Department of the Army Pamphlet 27-1 (Washington: US Government Printing Office, December 1956) p. 13.
116. *Ibid.*, pp. 135-146.
117. Bulletin of the Atomic Scientists, April 1964.

we have the categories "war crimes" or "crimes against humanity" to identify them.

In a 1992 report to the UN Crime Branch, the scholar A.P. Schmid suggested that an act of terror was simply the peacetime equivalent of a war crime. Thus the bombing of civilians by Israeli soldiers was a war crime, while the Palestinian civilian using himself as a bomb to kill Israeli citizens was a terrorist. If we accept that, then shouldn't America wage the "war on terrorism" against the actions of the soldiers of every army in the world as well as against every civilian when they deliberately kill civilians? In 1937, a League of Nations Convention defined terrorist acts as "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public." This definition is useless, since most of what we permit soldiers to do "creates a state of terror," quite apart from the grammatical rule that the word "terror" cannot be part of the definition of "terrorism."

Forbidden Strategies: the maltreatment of prisoners of war

A primary reason for the establishment of the first American Army Manual, *General Orders 100*, was to affirm that laws of war existed that described the proper treatment of prisoners of war. Wars of "no quarter" were thereby banned, and whenever an enemy became *hors de combat* he/she was entitled to become a prisoner of war.[118] This manual declared further that "no belligerent has the right to declare that he will treat every captured man in the army of a *levee en masse* as a brigand or bandit" (Article 52). This position was maintained in further revisions of the manual in 1914, 1934, and 1940. The 1956 version cited the Geneva III convention of 1949, which expanded the range of persons entitled to prisoner of war status, provided that they carried arms openly, had some distinctive clothes, and were part of an organized army. Geneva Protocol I of June 8, 1977, recognizing that many modern combatants had no uniforms, reduced the requirement to the sole provision that the person carried arms openly.[119] If a combatant failed to meet even this requirement, he/she was entitled to "protections equivalent to those accorded prisoners of war" (Article 44.4). While the US Senate complied with President Reagan's request that they reject Protocol I,

118. Article 49.
119. Section II, Article 44.3.

and accept Protocol II, the fact remains that Protocol I was passed handily by the international community.

It follows that the claim of President Bush that he had the power to act as if Protocol I did not exist was simply unsupportable. No leader of state has the legal power to rewrite international law. Furthermore, Article 45 of Protocol I states that if any doubt does exist as to whether any detainee was entitled to prisoner of war status, "he shall continue to have such status and, therefore, to be protected by the Third Convention and the Protocol until such time as his status has been determined by a competent tribunal." It is unclear where such a tribunal would originate. Would the Senate create such a body or would the UN create the tribunal? Suffice it to say, neither President Bush nor any other head of state should be granted the authority to determine arbitrarily that a detainee does not have prisoner of war status.

Some members of the White House staff were aware that the administration was on shaky legal ground. A draft memorandum of January 9, 2002 written by John Yoo and Robert Delahunty of the Justice Department's Office of Legal Counsel advised the Pentagon that US soldiers could not be tried for violations of Geneva III in Afghanistan because "such international laws have no binding legal effect on either the President or the military." But such a claim flies in the face of the War Crimes Act of 1996 (HR 3680), passed by the Senate, which certified that the US is obligated to comply with Geneva III on the matter of prisoners of war.[120] A further internal memo of January 25, 2002 by White House counsel Alberto Gonzalez urged the President to declare that the Geneva rules were simply outdated on the grounds that we now faced a "new kind of war" against terrorism.

The claim that the events of 9-11 constituted a new kind of war showed an abysmal ignorance of the experiences of British and European citizens who had faced 9-11 type experiences daily through six years of World War II. No one in those countries recommended the scrapping of Geneva or Hague conventions because modern war had made these conventions obsolete. Due in part to objections of Secretary of State Colin Powell, the White House announced, by fiat, that while they would adhere to Geneva III, the captured Taliban and Al Qaeda fighters would not be given prisoner of war status. America cannot afford to allow the leaders of any nation to presume the right to dismiss past achieve-

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120. *War Crimes Act of 1996*, 104th Congress, 2nd session, Report 104-698 committed to the Committee of the Whole House on the State of the Union, July 24, 1996.

ments with such *hubris.* It was a great achievement when the world community established both Geneva III and Protocol I, which asserted that all combatants should be protected. The United Nations International Covenant on Civil and Political Rights, Part III, Article 9 confirmed that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be informed at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." None of these provisions were followed in the case of the prisoners at Guantanamo. When Americans consider how much these Hague and Geneva conventions protect their own soldiers who may become prisoners, it is shameful to allow the US leaders to announce that such protection is now being taken away.

Geneva III and Protocol I also established rules for the interrogation of prisoners of war. Geneva III, article 13 states that "prisoners must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." Article 17 states that prisoners need give only name, rank, serial number and date of birth, and that "no physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind." The United Nations stands as the primary bulwark to enhance and enforce these efforts to set moral or humane limits to what is permissible in war.

Forbidden weapons: chemical and biological

In 1868, a Conference at St. Petersburg issued a Declaration urging the contracting parties to renounce in war the use of any projectile weighing less than 400 grams which was "explosive or charged with fulminating or inflammable substances."[121] The Declaration stated that since such weapons "uselessly aggravate the sufferings of disabled men, or renders their death inevitable," their use would be "contrary to the laws of humanity." This Declaration was reaffirmed at a conference at Brussels on August 27, 1874, which in addition banned poison or poisoned weapons, no quarter, the killing of soldiers who had surrendered, as well the use of "arms, projectiles, or substances which may cause unnecessary suffering."[122] The same prohibition appeared in the Hague Congress

121. *International Law* , Department of the Army, Pamphlet 27-161-2, October 1962, pp.277-278.

of 1899 in a "Declaration Prohibiting the Employment of Projectiles Containing Asphyxiating or Deleterious Gases."[123] The American delegate to the Hague, Naval Captain Alfred T. Mahan, cast the sole dissenting vote. The US interpreted the prohibition to apply only to projectiles whose "sole" object was to diffuse gases. As long as the projectile had other functions, it did not count as forbidden. Like similar preceding rules, it was binding only among signatories. Neither the US nor the UK were signatories. Did we imagine that we were thus not bound to comply?

On June 17, 1925, at Geneva, representatives from forty-four nations issued a "Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare." Although the US and the UK signed at the time, the UK did not ratify the Protocol until 1930, while the US did so in 1976, with the proviso that the US reserved the right to use such weapons in reprisal although not in first strike.[124] A further US reservation stated that the US was not obligated to comply with the Protocol when dealing with a nation that was not a signatory[125] This reservation violates the letter and spirit of the Protocol and puts America on the side of anarchy. Perhaps such a stance is not surprising, since the US is the leading producer of germ weapons seed stock. At the 2001 meeting of the Biological Weapons Convention, the US delegate announced that the US would not allow UN inspection of its own biological weapons programs and then walked out of the meeting.[126] This behavior is not consistent with the values that America claims to promote and should make Americans proud.

The following partial list of resolutions of the General Assembly (GA) were attempts to ban both chemical and biological weapons, and the list shows how assiduously the UN has undertaken its task.

December 16, 1969 — Resolution to ban Chemical and biological weapons: passed with 89 yes, 3 (USA) no, and 36 abstentions.

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122. *Ibid.*, p. 196.
123. Donald A. Wells, *War Crimes and Laws of War* (Lanham, MD: University Press of America,1991) p. 54.
124. *Ibid.*, pp. 54-55.
125. *The Law of Land Warfare-FM 27-10*, Department of the Army Field Manual, July 1956, revised as of 15 July 1976 as FM 27-10, C 1, pp. 1-4.
126. Phyllis Bennis, Before and After: US Foreign Policy and the September 11th Crisis (New York: Olive Branch Press, 2003) p. 13.

December 8, 1971 — Resolution commending the ban of chemical and bacteriological weapons: passed with 110 (USA) yes, 0 no, and 1 (France) abstention.

December 10, 1976 — Resolution banning development of new types of weapons of mass destruction: passed with 120 yes, 1 no, and 15 (USA) abstentions.

In 1982 — a resolution banning chemical/biological weapons. The US was the only nation to abstain.

December 15, 1989 — Resolution banning radiological weapons: passed 124 yes, 2 (USA) no, and 21 abstentions.

Nineteen nations are known to possess biological weapons: Bulgaria, China, Cuba, Egypt, India, Israel, Laos, Libya, North Korea, Pakistan, Romania, Russia, South Africa, South Korea, Syria, Taiwan, Vietnam, and the US. Twenty-six nations are known to possess chemical weapons: Chile, China, Ethiopia, Egypt, France, India, Indonesia, Iran, Israel, Laos, Libya, Myanmar, North Korea, Pakistan, Russia, Serbia, South Africa, South Korea, Sudan, Syria, Taiwan, Thailand, Vietnam, the UK, and the US. When we consider how many nations support the production, sale, and use of these weapons of mass destruction, it is remarkable and a sign of progress that the General Assembly has been able to issue such resolutions.

Forbidden weapons: Incendiaries

As early as the Second Lateran Council in 1139, incendiaries were declared to be forbidden.[127] Although the Hague Congresses had banned weapons that caused "unnecessary suffering" or "superfluous injury," the current (1976) US Army Manual claims that "the use of weapons that use fire, such as tracer ammunition, flamethrowers, napalm and other incendiary agents, against targets requiring their use is not violative of international law. They should not, however, be employed in such a way as to cause unnecessary suffering to individuals."[128] The suggestion that napalm and flamethrowers might ever be used in a way that would not cause unnecessary suffering is difficult to reconcile with the *United Nations Study on Incendiary Weapons and All Aspects of Their Use* (UN Document No. A-8803, 1972) that explains the nature of napalm wounds. Attempts were made during World War I by both the Axis and the Allies to use petrol

127. Thatcher, *Ibid.*, p. 403.
128. The Law of Land Warfare, Paragraph 36.

flame throwers but the results were as risky to the user as to the victim; it was not out of humanitarian concerns for the "enemy" that they were not used. Treaties at St.-Germaine-en-Laye in 1919 and Trianon in 1920 prohibited the manufacture and use of flame throwers. The Trianon Treaty, Article 119, banned "flame throwers, asphyxiating, poisonous or other gases and all similar liquids."

At the beginning of World War II the US Army Chemical Warfare Service enlisted the assistance of private companies and universities to develop a useful incendiary. Harvard professor Louis Fieser, a noted organic chemist, invented napalm. It was used extensively in World War II, Korea, Vietnam, and in the first Gulf War. It was praised by the military as "the best all-around weapon." In 1969 the Secretary General of the UN, U Thant, encouraged the International Red Cross to study the effects of incendiaries in general and napalm in particular at its 19th International Conference. The results of this special study were published in 1972 in *The United Nations Study on Incendiary Weapons and All Aspects of Their Use.* This resulted in a UN resolution in 1972 which proposed a ban on napalm and other incendiaries. While it passed by a vote of 99 yea and 0 nay, there were 15 abstentions including the United States. That is why the current US Army Manual, *The Law of Land Warfare,* can state in Paragraph 36 that the use of weapons that employ fire, such as napalm and flame throwers, does not violate international law. In addition, the *US Army Field Manual 3-8, Chemical Reference Handbook* has over 30 pages of descriptions of incendiaries and chemicals in the official arsenal. This state of affairs cannot be blamed on the United Nations.

A partial list of General Assembly Resolutions banning incendiaries includes:

November 29, 1972 — a resolution banning napalm and other incendiaries, passed 87 yes, 0 no, and 27 (USA) abstentions.

December 9, 1974 — a resolution banning napalm and other incendiaries, passed 108 yes, 0 no, and 13 (USA) abstentions.

December 14, 1978 — a resolution urging the prohibition of the development of new types of weapons of mass destruction, passed 118 yes, 0 no, and 24 (USA) abstentions.

November 21, 1980 — a resolution prohibiting development of new types of weapons of mass destruction, passed 103 yes, 18 (USA) no, and 24 abstentions.

Forbidden weapons: fragmentation bombs (landmines)

The St. Petersburg Congress of 1868, consisting of 17 nations, met to consider the desirability of forbidding certain projectiles of war. The conference produced a "Declaration Renouncing the Use In War Of Certain Explosive Projectiles." This included a ban on the use of all projectiles weighing less than 400 grams which were explosive or charged with flammable substances (explosive bullets). The US was not a signatory, but in any case the rules did not apply in wars with non signatories.[129] The same prohibition was included in a declaration of the 1874 Brussels conference.

Sophisticated fragmentation bombs have, in the meantime, been invented. Many are classified as "cluster bombs," which are of two types: those delivered by airplanes and those by rockets in artillery projectiles. Each bomb contains bomblets which in turn explode, scattering flying shards of steel. These bomblets vary in design and shape but have in common the fact of remaining lethal long after the initial "mother" bomb explodes. Depending on the type, these bomblets can scatter in an area larger than a football field. Some have a delayed mode and lie inert until stepped on by an unwary civilian or soldier. In the first Gulf War 85,000 tons of rocket bombs with bomblets were dropped during the 42-day war.[130] These included launches of the Tomahawk and Patriot missiles which contained penetration bombs, scatterable landmines, and bomblets; Multiple Launch Rocket Systems (MLRS) where each bomblet contained 7,700 sub-munition fragments; Army Tactile Missile Systems (ATACMS), where each missile carried 950 bomblets; and CBU cluster bombs (the weapon of choice in B-52 raids). The Pentagon reported that 210,000 of these missiles were of the "dumb" variety and 9,342 were of the "smart" variety. Later research by the Defense Department revealed that not much difference existed between the accuracy of the smart and dumb varieties.[131] The estimates of Iraqi deaths ranged from 20,000 (US Defense Department) and 200,000 (Amnesty International, the International Red Cross, and UNICEF).[132] All of these weapons are indiscriminate, and thus qualify as WMD, standing as stark evidence of the

129. International Law, p. 40.

130. Cynthia Peters (ed), *The New World Order at Home and Abroad* (Boston: South End Press, 1992)

131. *Operation Desert Storm: Date Does not Exist to Conclusively Say How Well Patriot Performed* US General Accounting Office Report to Congressional Requesters, National Security and Internal Affairs Division. GAO?NSIAD-92-340 (Washington , D.C.: US Government Printing Office, September, 1992)

degree to which the nations of the world have ignored the valiant efforts of the Hague, Geneva, and United Nations to minimize the horrors of conventional war.

Physicians for Human Rights Watch reported that landmines, because of their delayed action, are indiscriminate weapons; obviously, they will blow the leg or arm off of anyone who steps on them.[133] Such unexploded bombs are highly unstable and capable of exploding at the slightest contact. A further complication arises from the fact that the cluster bomblets were the same color as the food packages the US was dropping at the same time. In the early 1960s the US developed a new class of remotely deliverable landmines (called "scatterables") and used them in Vietnam. These were the BLU-43 and BLU-44, nicknamed "dragon tooth," and American pilots dropped so many that they were referred to as "garbage." Antipersonnel landmines are a form of fragmentation bomb. Today, more than 340 models of landmines are produced in at least 48 countries. In the US alone, at least 16 firms manufacture over 50 kinds of landmines.[134] The number of unexploded landmines currently lying scattered about the earth is staggering. According to the US State Department, Africa is the most mined continent in the world with 18-20 million mines in 18 nations; the Middle East has 17-24 million mines in at least 8 nations; East Asia has 15-23 million mines in 8 nations; South Asia has 13-15 million mines (mostly in Afghanistan, Pakistan, India, and China); Europe has 3-7 million mines in 13 nations; and Latin America has 300,000 to 1 million mines in 8 countries. "By all accounts Afghanistan may be the most heavily mined nation in the world," with estimates as high as 40 million.[135]

In 1981 the General Assembly issued a Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps, and Other Devices, which has been in force since December 2, 1983. In Article 3, Section 2 this Protocol prohibits directing mines either in offense, defense, or reprisals against the civilian population. Since such weapons are spread indiscriminately, and at least 100 million are estimated to be lying lethal on the ground long after the war for which they

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132. *Who Goes There: Friend or Foe?* Office of Technology Assessment (Washington. D.C.: Printing Office, 1993) and *Humanitarian Dilemma in Iraq* Hearing Before the International Task Force of the Select Committee on Hunger, House of Representatives 102nd Congress, 1st Session, August 1, 1991. (US Government Printing Office, 1992).

133. Landmines: *Landmines: A Deadly Legacy* (New York: Human Rights Watch, 1993) p. 5.

134. *Landmines*, pp. 14-15; 461-482.

135. *Ibid.*, pp. 143-145.

were placed is over, it is not surprising that virtually all of the subsequent millions of casualties have been civilians.[136]

Senator Patrick Leahy (D-NY) was the author of the Landmine Moratorium Act of 1992[137] which proposed a ban on the export of anti-personnel landmines. It was a step forward, but had several limitations. 1) It did not ban the sale of anti-tank landmines which obviously functioned as antipersonnel mines as well; 2) it did not speak to the indiscriminate way landmines were being spread from airplanes as well as from artillery; 3) it did not mention fragmentation bombs whose bomblets were anti-personnel landmines; 4) it did not recognize and condemn the American practice of making bombs in the shape of children's toys: white or green butterflies, orange striped soda pop cans, and green baseballs.

The US Congress did not ratify the Act. In 1991 Robert Muller, a disabled veteran and head of the Vietnam Veterans of America Foundation, asked Jody Williams if she wanted to help build a coalition to ban land mines. After six years of grassroots work which she inspired, Canada's foreign minister, Lloyd Axworthy, announced Canada's unilateral decision to ban the manufacture and use of land mines and he led the initiative to negotiate a meeting in Oslo 1997 to create a treaty. In December 1997, in Ottawa, 122 states signed the "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction." Missing from the meeting were the US, Russia, China and a number of Middle East and South Asia nations.[138] On March 1, 1999 the Convention entered into force, and by May 3, 1999, 133 countries had signed the Convention and 81 had ratified it.[139] A review conference of the participants in the 1997 Ottawa Conference was held in Geneva September 16-20, 2002. They reported that over 34 million landmines had been cleared and destroyed by 61 states, the export of landmines had "nearly ceased," and the number of countries manufacturing them had decreased from 55 to 14.[140] It was also reported that new casualties from land mines were running between 15,000 and 20,000 a year in 69 countries. It is still the case that the biggest military powers are not signatories: the US, Russia, China, India, and Pakistan. Sadly, in a

136. *Ibid.*, pp. 141-233.
137. *Ibid.*, p. 385.
138. John Tessitore and Susan Woolfson, *A Global Agenda: Issues Before the 53rd General Assembly of the United Nations* (New York: Rowan and Littlefield, 1998) pp. 81-84.
139. A Global Agenda: Issues Before the 54th General Assembly, p. 91.
140. A Global Agenda: Issues Before the 58th General Assembly, p. 24.

typical year (1993) while 100,000 mines were cleared, 2 million more were laid down. This sad report does not signal a UN failure, but rather a failure of sovereign nations.

The Arms Project of Human Rights Watch was founded in 1992 with a grant from the Rockefeller Foundation to check on arms production and sales. The Project identified at least 100 companies and government agencies in 48 countries which have manufactured more than 340 types of anti-personnel land mines in recent times.[141]In Operation Desert Storm, because the dud rates were so high, estimates ran as high as 2 million unexploded American bomblets in Iraq. The US used 74,790 Claymore mines in that war. Each contains 700 steel balls packed in front of a powerful explosive which are propelled at a 60 degree arc. US troops also used 46,902 M14 antipersonnel mines and 227,376 M162A anti-personnel mines. US troops also dropped 61,000 CBU-87 fragmentation bombs totaling 29 million bomblets. Even the manufacturer estimated a dud rate of 5-20%. If we accept the middle number, this could mean that about 2 million unexploded American bomblets are scattered in Iraq.

On February 27, 2004, the US Administration announced that it would not join the Ottawa Treaty banning anti-personnel landmines. It stated further that it planned to close out its stock of anti-vehicle and anti-personnel mines that lack a built-in mechanism which automatically turns off within a stated period after it has been deployed.[142] The Administration said that it would not use these mines anywhere except Korea, and that by 2010 all these mines would be replaced by self-destructing mines. In July 2003, representatives of both government and civil groups met in the UN to assess the progress of the Programme of Action on Small Arms and Light Weapons. It was reported that at least 90 countries had domestic laws governing the illicit manufacture or possession of small arms and that 2 million of an estimated 4 million small arms collected over the past decade had been destroyed.[143] The US was the top producer of arms of all kinds in the world in 2002 followed by Russia.

Forbidden Weapons: nuclear.

The following as a partial list of UN General Assembly resolutions banning nuclear weapons:

141. *Ibid.*, Landmines, p. 36.
142. Angela Drakulich (ed), *Global Agenda: Issues Before the 59th General Assembly* (New York: United Nations Association, 2004) p. 181.
143. *Ibid.*, p. 182.

November 24, 1961 — A resolution classifying nuclear weapons as causing "unnecessary suffering" passed. The US voted against.

November 28, 1966 — A resolution to plan for a "ban the bomb conference" passed (80 yes, 0 no, and 23 [USA] abstentions).

December 9, 1971 — A resolution to Suspend Nuclear and Thermonuclear Tests, passed (74 yes, 2 no, 36 [USA] abstentions).

November 29, 1972 — A resolution to Suspend Nuclear and Thermonuclear Tests in the Atmosphere as Well As In All Environments, passed (105 [USA] yes).

December 11, 1979 — A resolution against stationing nuclear weapons in non-nuclear countries, passed (99 yes, 18 [USA] no, and 19 abstentions).

November 25, 1981 — A resolution banning weapons of mass destruction passed (116 yes, 0 no, 27 [USA] abstentions).

December 11, 1975 — A resolution for the Cessation of Nuclear Tests, and to Work for A Comprehensive Test Ban, passed (106 yes, 2 no, 24 [USA] abstentions).

December 10, 1976 — A resolution Urging the Cessation of Nuclear and Thermonuclear Tests, passed 105 yes, 2 no, 27 (USA) abstentions.

December 14, 1978 — Resolution to ban further nuclear testing, passed 130 yes, 2 no, 8 (USA) abstentions.

December 11, 1979 — Resolution condemning any effort on the part of Israel to manufacture, store, acquire, or test nuclear weapons, passed. 97 yes, 10 (US) no, and 38 abstentions.

December 11, 1975 — Resolution for the Cessation of Nuclear Tests, and to Work for A Comprehensive Test Ban, passed 106 yes, 2 no, 24 (USA) abstentions.

December 10, 1976 — ResolutionUrging the Cessation of Nuclear and Thermonuclear Tests, passed 105 yes, 2 no, 27 (USA) abstentions.

December 14, 1978 — Resolution to ban further nuclear testing, passed 130 yes, 2 no, 8 (USA) abstentions.

November 25, 1981 — Yugoslavia Resolution on the cessation of the nuclear arms race, passed (136 yes, 0 no, 9 [USA] abstentions).

December 15, 1989 — Resolution for a Nuclear Freeze, passed (136 yes, 13 [USA] no, 5 abstentions).

December 17, 1989 — Resolution Prohibiting the Use of Nuclear Weapons, passed (134 yes, 17 [USA] no, 4 abstentions).

1990 — Resolution on Preventing Nuclear War, passed (132 yes, 12 [USA] no, 9 abstentions).

1990 — Resolution to Freeze the production of nuclear weapons, passed (125 yes, 17 (USA) no, 10 abstentions).

1991 — Resolution for Comprehensive Disarmament, passed (123 yes, 6 [USA] no, 32 abstentions).

1991 — Resolution to Prohibit the Use of Nuclear Weapons, passed (122 yes, 16 [USA] no, 22 abstentions).

1991 — Resolution on the Prohibition of the Production of Fissionable Materials for Weapons Purposes, passed (152 yes, 2 [USA] No, 3 abstentions).

Two treaties deserve special mention:

1) The Non-Proliferation Treaty (NPT) of July 1, 1968, was signed by 62 of the 123 nations (including the US, UK, and the USSR). Its original intention was to limit the nuclear weapons possessing nations to the US, UK China, France, and Russia.[144] These five nations, for their part, pledged to reduce the number of their nuclear weapons. This has not been accomplished. On the other hand, nations that have come to possess nuclear weapons now include Israel, Pakistan, and India. The nuclear powers have in fact increased their nuclear weapons rather than decreasing them. In 1970 the five nations possessed an estimated 39,700 nuclear weapons. In 1995 they possessed 43,200 nuclear weapons.[145] In March 1969, President Nixon urged the Senate to ratify the Treaty, which it did March 5, 1970. Provision was made at the time to review the Treaty every five years. In May 1995, 185 nations signed and agreed to extend the Treaty indefinitely. The principal current non-signers are Israel, India, and Pakistan.[146]

Unfortunately, proliferation of nuclear weapons has continued.[147] Currently eight nations admit possessing nuclear weapons and 44 nations with nuclear reactors are capable of producing nuclear weapons. At the present the NPT has not stopped the proliferation of nuclear weapons, either horizontally or vertically, and so that the Treaty seems to be inoperative. (See Appendix.)

The US possesses the largest nuclear arsenal in the world. Horizontal proliferation to new nations is a problem, and nuclear states like the U.S are guilty of "vertical proliferation,"[148] (i.e. increasing their number of weapons). The

144. *Ibid.*, p. 307.
145. *The Defense Monitor*, Volume XXIX, Number 3, 2000, p. 1.
146. *1999 CDI Military Almanac*, Center for Defense Information, 1999, p.51. .
147. *The Defense Monitor*, Volume XXIX, no. 3 (2000)

United States and Russia possess 96% of the total world inventory of nuclear weapons (about 28,000); Britain, France, and Israel have about 3% (800), and Pakistan and India have about 1% (280).[149] China possesses only 20 long range missiles that could hit the US, while the US has 6,000 long range missiles that could hit China.[150]

2) The Comprehensive Nuclear Test Ban Treaty (CNTBT) was overwhelmingly approved by the General Assembly in 1996 by a vote of 158 yea, 3 nay, and 5 abstentions. By September 2000, 155 nations had signed and 51 had ratified the Treaty, which was not to go into effect until all 44 of the nuclear capable nations had ratified it. Under a common reading of international law, all signatory nations are legally bound not to conduct any nuclear tests even though the required number of ratifications has not been submitted.[151] The treaty contains 17 articles, 2 annexes, and a verification procedure. The basic obligations are as follows:

> 1. Not to carry out any nuclear weapons test explosions, nor any other nuclear explosions.
>
> 2. To prohibit and prevent any such explosions from taking place in territories under its jurisdiction.
>
> 3. To refrain from causing, encouraging, or in any way participating in carrying out such nuclear explosions anywhere else.

The Treaty had early support from President Eisenhower (1960), President Kennedy (1963) and more recently President Clinton (1997). When the matter finally came to a vote for Senate ratification in October 1999, it failed on Party lines by a vote of 48 aye to 51 nay. Every Democrat with the exception of Byrd (D-WV), who abstained, voted aye. Four Republicans joined the Democrats in supporting the Treaty: Chaffee (RI), Jeffords (VT), Smith (OR), and Specter (PA). As of January 1999, 152 nations had signed the Treaty, but only 26 nations had ratified it. The US, India, Pakistan, and North Korea[152] are among the non-signers. A coalition of 17 national nuclear non-proliferation organizations issued a press release November 19, 1999 stating:

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148. Drakulich, *Global Agenda*, p. 176.
149. The Defense Monitor, Vol. 33, No. 1 (January-February 2004) p. 1..
150. *Ibid.*, p. 2.
151. The Defense Monitor, Vol. XXVII, No. 7.
152. *Ibid.*, p. 53.

> Governor Bush's opposition to the test ban treaty puts him on the wrong side of public, expert, and international opinion on the CTBT. In dismissing the value of the CTBT, he fails to offer a strategy for stopping nuclear weapons testing and the modernization of nuclear arsenals by countries such as China, India, Pakistan, Russia and others. His statement ignores the harsh reality that India and Pakistan are pursuing a nuclear arms buildup, made possible by their recent nuclear tests."[153]

By 2004, 171 states had signed and 111 had ratified; but the conditions of the treaty required that the 44 nations with nuclear power be included as ratifying. As of 2005, only 32 of them have done so. Another nine have signed but not ratified, and three (India, North Korea, and Pakistan) have not even signed.[154] The US still claims that it does not intend to ratify the treaty. In spite of this, considerable work has already been done in establishing a functioning verification system as is required by the treaty. Thus, the treaty seems already to be functioning even though it has not been formally confirmed.

Nuclear testing is a hazardous enterprise. Since 1945 the known numbers of nuclear tests were:

USA	1,054
Russia	715
France	210
UK	45
China	45
India	3
Pakistan	2

The list is obviously not complete. On December 7, 1993, Hazel O'Leary, US Energy Secretary, divulged that between 1963 and 1990 the US had conducted 204 secret explosive tests.[155] The US military claimed that such testing was to determine whether the existing bombs were still functional. This claim was belied by Stephen I. Schwartz, Director of the US Nuclear Weapons Cost Study, who confirmed that 83.5% of the tests were related to the development of new weapons, and an additional 9.5% were concerned with the effects of the bombs on military hardware; 3% were to minimize the risk of accidental

153. Coalition to Reduce Nuclear Dangers, Daryl Kimball, "Nuclear Experts Fault Bush Beliefs on Test Ban Treaty," November 19, 1999.

154. Ben Mines, "The Comprehensive Nuclear Test Ban Treaty: Virtually Verifiable Now," *Vertig Brief*, April 2004.

155. Edward A. Martell, February 9, 1994 letter to Hazel O'Leary.

explosion; while only 1% were to determine that the existing weapons were still functional.[156]

Between 1971 and 1995 the General Assembly passed 17 resolutions to ban nuclear testing. The US abstained on 13 of these resolutions, voted nay on 3 resolutions, and voted yea on 1 resolution. The US Senate failed to ratify any of the 17.

In addition, a Resolution of the General Assembly requested that the World Court render an advisory opinion on the question, "is the use of nuclear weapons permitted under international law?" Furthermore, the World Health Assembly of the World Health Organization (WHO) also requested the Court to give an advisory opinion on their question, "In view of the health risks, would the use of nuclear weapons be a breach of its obligations under international law?" By the deadline, September 20, 1994, thirty-four nations had submitted statements to the World Court. The US, Russia, Germany, Italy, and Finland opposed sending the matter to the Court. The following nations believed that the use of nuclear weapons would be illegal: Colombia, Costa Rica, India, Iran, Kazakhstan, Lithuania, Malaysia, Mexico, Moldavia, North Korea, Philippines, Samoa, Solomon Islands, Sri Lanka, Sweden, Ukraine, and Papua. While the Court ruled that it was not qualified to answer the first question (by a vote of 11 to 3), it claimed that it was qualified to answer the WHO question. By a vote of 7 to 7 the Court ruled that no prohibition existed under international law. The President of the Court, Mohammed Bedjaoui, however, cast the deciding vote and confirmed that the use or threat to use nuclear weapons would be contrary to international law. The judges voting in favor of the use of such weapons were from France, Japan, the UK, the US, Sri Lanka, Guyana, and Sierra Leone.

In spite of this Court ruling, the US argued that the WHO was not qualified to request the Court's opinion, and that the Court should have declined. The US also argued that while the Security Council and the General Assembly were entitled to ask for an opinion, the Court should have declined since the matter was outside its jurisdiction. On December 5, 1996, generals and admirals (all retired) from seventeen nations issued a statement urging the abolition of all nuclear weapons. The list included five US generals and six US admirals as well as seventeen Russian generals and one Russian admiral. Their hope to dismantle nuclear bombs faced the obstacle (among others) that neither Russia nor the US has a technically feasible method to dismantle the bombs and dispose of the radioactive elements. In addition, the storage of nuclear waste at Yucca

156. The Defense Monitor, Vol. XX, No. 3.

Mountain is a project estimated to take until the year 2014 to complete and its safety is admittedly scientifically uncertain.[157]

Humankind has come a long way toward establishing international agreement that some weapons and strategies should be forbidden. The first meeting in 1864 that established the International Red Cross created "laws" requiring the protection of soldiers who had surrendered, were wounded, or otherwise *hors de combat*. These soldiers were to be fed, housed, cared for medically and treated with the respect we all hope our own soldiers will receive, if they were captured. The requirement that soldiers who were prisoners should be treated humanely and with respect was reinforced by further conventions issued at the meetings at the Hague in 1899 and 1907. This obligation was additionally elaborated in declarations of the International Red Cross (called Geneva conventions) in 1864, 1906, 1929, 1949, and in 1977. Ample public knowledge exists as to both the successes and failures in this area. The prisoner of war camps during the Civil War, the Spanish-American war, World War II, the death camps under Nazi rule up to Guantanamo and Abu Ghraib all revealed the frequency and extent of maltreatment and failure to abide by well-established conventions.

The situations in Guantanamo and Abu Ghraib are particularly troubling because the treatment of the prisoners there violates the most basic of the rights most people thought had been established. Monitoring of these failures has been a task largely assumed by non-governmental organizations like the International Red Cross, Red Crescent, Amnesty International, Human Rights Watch, and a host of religious and medical agencies. The UN has established international criminal courts for offenders in Rwanda, the former Yugoslavia, and currently there is an International Criminal Court (ICC) to prosecute offenses worldwide. This latter court is the proper venue for trying all those interned in Abu Ghraib as well as Guantanamo. The failure of the US either to ratify or to recognize the ICC has put this country in the position of a rogue state which holds prisoners without charging them with any crime and without granting them due process, in violation of established international law.

Hague and Geneva conventions have already identified "forbidden" weapons and strategies, and a number of General Assembly conventions have concurred by agreeing that biological, chemical, and nuclear weapons should be

157. *Nuclear Waste: Yucca Mountain Project Behind Schedule and Facing Major Scientific Uncertainties*, General Accounting Office report to the Chairman of the Subcommittee on Environment and Public Works (May 1993).

forbidden. Furthermore, napalm and other incendiaries are likewise banned. Antipersonnel landmines and booby traps are on their forbidden list. Unfortunately, it is still possible for nations to ignore all these efforts without fear of being prosecuted. The day still awaits when the same voluntary motives which prompted nations to join the United Nations Organization in the first place will also prompt them to accede to the general will in the second place. In his address to the General Assembly Secretary-General Kofi Annan affirmed that "at the international level, all states — strong and weak, big and small — need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. This is one of our Organization's proudest achievements."

Chapter III. The Role of the Security Council in War and Peace

What Does the UN Charter Say about War?

In spite of the brave words in the preamble to the UN Charter, asserting that it hopes to "rid the world of the scourge war," over 200 wars have been waged since the UN was established in 1945.[158] In at least 60 of these wars the United States was the aggressor in what might be called "pre-emptive" wars (sometimes called "armed conflicts" [see the appendix]). In most of these wars/conflicts the UN Security Council was not consulted in advance to determine whether the SC saw a "threat to the peace," and if the SC did see a threat, what non-violent options the SC recommended. Furthermore, in none of these 60 conflicts was war ever declared by the US Senate.

Indeed, the practice of declaring war had fallen into desuetude as far back as the 17th century.[159] In 1943 Secretary of State, Cordell Hull, invented an "executive agreement" whereby the President could, at his discretion, advocate armed conflict without a declaration of war. Unlike a war declaration, which would require a two-thirds vote in the Senate, this "agreement" needed only a bare majority vote. Yet, for most of the 60 US armed conflicts since then, the Senate

158. James F. Dunnigan and Austin Bay, *A Quick and Dirty Guide to War* (New York: William Morrow 1991) pp. 579-585.

159. Donald A. Wells, *War Crimes and Laws of War* (Lanham, MD: University Press of America, 1991) pp. 21-23, 40-42.

was not consulted even to consider this agreement. Such Presidential failures to consult the Council are flagrant rejections of America's commitment to the UN.

The responsibilities of the SC in matters of war are explained in Articles of the UN Charter. Let us review the relevant ones.

The Unique Role of the Security Council

The Charter identifies four functions over which the SC has primary authority:

1) The SC identifies the existence of a threat.

2) The SC advocates peaceful resolutions to the threat.

3) The SC may advocate embargoes, economic sanctions and other non-military strategies.

4) The SC may, in the last analysis, recommend or not recommend military action.

The Charter affirms in Chapter V, Article 24 that the United Nations confers "on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on its behalf." Article 24 makes clear that no member nation in the UN is authorized in advance to use armed force against any other member nation. Every instance of international disagreement must first be presented to the Security Council. The importance of this requirement is rooted in the consequences of the scourge of war. We must not forget the consequences of the major wars in the 20th century.

1. World War I produced 37 million deaths (about 100,000 were Americans and about 1.8 million of the total were civilian men, women and children.

2. World War II produced 60 million deaths, and about 27 million of these were civilian men, women, and children. Over 400,000 American soldiers died in that war. Far more uncounted wounded were both physically and psychologically damaged. The damage to the environment was beyond measure.

3. Korean War deaths were estimated at 700,000 plus 1,400,000 wounded. American soldier deaths were about 53,000.

4. The Vietnam War resulted in about 1,250,000 Vietnam deaths, with 57,000 American soldiers killed and over 150,000 Americans wounded, plus immeasurable havoc to the environment of Vietnam.

5. Hundreds of other armed conflicts have ravaged the planet.

6. The war over the partition of Pakistan and India killed an estimated two million lives, as did the Nigerian civil war and the Mexican revolution.

We might also bear in mind that the problems that purportedly prompted these wars were not solved by the wars. The negotiations, which should have taken place through the good offices of the UN before the wars, were addressed belatedly, if at all, after the human slaughter and environmental destruction had occurred.

It is essential, at the outset, to understand the voting procedure in the SC by which such negotiations are carried out. The process is explained in Article 27 as follows: decisions on procedural matters shall be determined by nine votes, while "decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." (This means that an abstention by one of the permanent five is like a veto.)

A. Step one.

Article 39 establishes that the Security Council, and only the Security Council, "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken." It is for this reason that nations must seek SC advice before going to war and this is as close as the UN Charter gets to challenging the traditional presumption that all sovereign nations have the inherent right to go to war.

The Charter requires that nations "shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means to resolve the dispute. Going to war is not an option at this juncture. This is explained in Article 33. Article 36 states that "The Security Council may, at any stage of the dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment." Article 37 requires that "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council."

B. Step two.

Articles 39-43 explain that, should the parties be unable to settle their differences by negotiation, the Council is authorized to decide "what measures not involving the use of force" (Article 41) should be taken. These measures include "partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations" (Article 41).

C. Step three

The SC determines that if the suggestions proposed in Article 41 are inadequate, the Council may, as specified under Article 46, plan for the use of armed force. At this point the Charter becomes ambiguous. Article 42 states that the SC "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." It is unspecified what these "other operations" may consist of as well as what kinds of weapons, if any, would be permissible. Article 46 states that any "plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee" (consisting of the Chiefs of Staff of the permanent members). The nature of the weapons to be used and the degree of force are not specified in the Charter.

It should be noted that the use of missiles and bombs by the US "coalition" in Iraq was a US, not a UN, decision, and that none of the three phases of the Gulf War was UN sanctioned. Since the United Nations was established to "rid the world of the scourge of war," any final permission to go to war by the SC signals a failure, not a success. It would be a contradiction for the UN to wage war.

In any event the ambiguity as to what is to be done is compounded by Article 51, which affirms that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at

any time such action as it deems necessary in order to maintain or restore international peace and security."

We can understand that the shibboleth of "sovereignty" would have been sorely challenged if the UN had banned outright the unilateral "right to go to war." Indeed, such a restriction would probably have led to the failure of the UN to pass in the US Senate. If Article 51 had been either omitted or replaced with the requirement that SC approval for any war would be a pre-condition, the role of the SC would have been significantly strengthened, and at least all proposals to go to war would have to be at least discussed in the Council. It would not be surprising if the Council were to reject most of the arguments for wars that nations use as failing the "self-defense" requirement. After all, the permanent five nations could always use their veto if they were sufficiently displeased. Requiring that war be in "self-defense" has never posed much of a problem to leaders of state, who have always claimed that their armed attacks on other nations were for "self-defense."

Peacekeeping versus Peace Enforcement

UN peacekeeping missions are a different matter, since they require the consent of the parties involved and are normally deployed only after a ceasefire has been issued. The aim of the peacekeepers is to create a buffer zone between the contestants. The UN troops are ordered not to use armed force except in self-defense.[160] UN peacekeepers do not use napalm, antipersonnel landmines, smart bombs dropped from airplanes, or indeed any of the so-called "weapons of mass destruction." The UN learned in the Congo that war making was not something the UN did very well, and a general aversion to the use of UN force has prevailed ever since the Congo fiasco.[161] Between 1948 and 2004, the SC authorized 65 peacekeeping missions, to which some 90 nations have sent troops.[162] In 2004 fourteen missions were underway, and, in addition, thirteen political missions were functioning. Peacekeeping troops currently number 13,305 and the US troop share is 643.[163]

It may be noted that the current emphasis on military action, even though directed to peacekeeping, has tended to militarize the UN out of proportion to its other tasks. One of the UN's principal aims is to "rid the world of the scourge

160. A Global Agenda: 58th General Assembly, p. 53.
161. Loc cit.
162. *Ibid.*, p. 57.
163. *Ibid.*, p. 55.

of war," and as such it should emphasize negotiation and conciliation, rather than act as a NATO-like organization which takes sides in wars.

The UN was also created to be the organization to serve as the means to banish poverty, discrimination, illiteracy, disease, and slavery. The UN Declaration of Human Rights outlines what should be the major tasks. Yet, as Bennis notes, "in the 1980s and 90s military spending was the only budget category going up, and all programs involved in education, health, development, culture, and democracy suffered massive cutbacks. In 1988, for example, the UN deployed 1,516 international civil servants in its missions around the world; that same year it deployed 9,570 military personnel."[164]

The first peacekeeping mission was authorized on May 29, 1947: the UN Truce Supervision Organization (UNTSO) between Israel and four neighbors (Syria, Egypt, Lebanon, and Jordan). The meeting at which this decision was made was poorly attended. A UN official noted that the Department of Peacekeeping was too controversial.[165] The "controversial" aspect, in part, grew out of the strangeness of this new task. Peacekeepers were not conventional soldiers and they were expected to play a role for which boot camp gave no preparation. There was a similar situation back in the 1980s when the US Senate established an Institute for Peace. The Reagan administration, at the time, was so uneasy about the notion that they required the new Institute to have on its board members from the military.

In June 1992, UN Secretary-General Boutros Boutros-Ghali issued a report titled *An Agenda for Peace*, in which he proposed that the UN be allowed to "pre-empt aggression, facilitate cease-fires, and strengthen existing peace settlements."[166] Traditional peacekeeping missions derive their authority and nature from Chapter VI of the UN Charter and require the consent of the countries to which they may be sent. The *Agenda*, however, proposed that peace enforcement operations under Chapter VII would not require the consent of the countries involved. As we shall see, this proposal failed to gain sufficient support. The UN discovered in Somalia, for example, that the authority of the chain of command confronted a situation where "each member state that had contributed forces felt it needed to check with its home government before accepting orders from UN commanders on the ground."[167] The response was so weak that Boutros-Ghali

164. Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN* (New York: Olive Branch Press, 2000) p. 86.
165. A Global Agenda, 1998-1999, p. 1.
166. A Global Agenda, 1994-1995, p. 2.

issued an addendum which attempted to explain how this worked. Then Secretary of State Madeleine Albright, however, denounced the document even before it was officially released.[168] In 1999, Secretary-General Kofi Annan observed that, almost without exception, "the new conflicts which have erupted since 1991 have been civil ones. Although, often, there is outside interference, the main battle is between people who are, or were, citizens of the same state."[169] How do peacekeepers function in such a situation?

In his annual report to the 54th General Assembly, Secretary-General Kofi Annan called for a re-examination of the relationship between national sovereignty, human security, and military intervention. And he challenged the "strictly traditional notions of sovereignty."[170] He even suggested that the Security Council consider removing the veto power of the permanent five in such matters so that the Council could engage in a "humanitarian war."

It is clear from the UN Charter that the Security Council is the only body designated to determine when a threat to the peace exists. It is also the only body entitled to determine what non-violent solutions are called for. Finally, it is the only body empowered to determine whether war is an option, and if war is an option, then the SC, and only the SC, is empowered to determine the extent of the violence permitted. On this last matter, the SC determines how much force is authorized and which weapons will be declared "forbidden." This is explained in Articles 37, 39, 42, 44, 46, and 51 of the UN Charter. In most of the cases of US armed invasions, the US administrations never consulted the Security Council for their judgment as to whether a threat to the peace existed, nor did the US follow SC recommendations for negotiation as the first required option. Since, with the exception of the war in the Congo, the SC never authorized any war, it followed that it made no sense, except in the Congo, for the Military Staff Committee to be consulted as required in Article 46. This did not prevent the Truman administrations from acting as if the war against North Korea had SC authorization and from putting on a pretense that the Military Staff was functioning in that war. Finally, in no case did a US president ask the US Senate to approve a declaration of war let alone to determine what weapons were not on the "forbidden" list. Let us consider some of these American "armed interventions."

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167. *Ibid.*, p. 5.
168. A Global Agenda, 1995-1996, p. 2.
169. A Global Agenda, 1999-2000, p. 1.
170. A Global Agenda, 2000-2001, p. 1.

The US Invasion of Panama

Americans have generally been unaware of the degree of military intervention practiced by their government. For example, the claim was made that the US invasion of Panama on December 20, 1989, was "the first American use of force since 1945 that was unrelated to the cold war. It was also the first large-scale use of American troops abroad since Vietnam, and the most violent in Panamanian history."[171] Be that as it may, it was not the first American armed intervention since 1945. Have scholars forgotten the US "armed invasions" beginning in 1947 against Greece and again against Turkey under President Truman, all the way through almost sixty more armed invasions, including the invasion of Chile (1973) under President Nixon, under President Ford in Cambodia (1975), El Salvador (1975), and Angola (1975), under President Carter in Zaire (1978), Iran (1980), and Iraq (1980), with the record number of armed invasions under President Reagan in Jordan (1981), Syria (1981), Lebanon (1981), El Salvador (1981-82), Puerto Rico (1981), Libya (1981), Nicaragua (1981), Afghanistan and Grenada (1983), Libya (1986), and Iran (1988) (see Appendix V).

On June 21, 1989, the Justice Department proposed "an extraordinary opinion"[172] claiming that the US president had the right to order the capture of non-American fugitives from US laws, no matter where they were living, even though such action was a violation of international law with respect to national sovereignty. Manuel Noriega, then President of Panama, was charged by a federal grand jury in Florida with drug-trafficking. It was less than clear why a major American military invasion should be undertaken to capture so minor a figure, but the invasion took place with no prior effort on the part of the US to obtain SC approval or to negotiate a nonviolent resolution with help from the Security Council. On December 23, 1989, the Security Council proposed a resolution condemning the US invasion of Panama and demanding the immediate withdrawal of US troops. The US, however, vetoed the resolution.

It was not until January 1990 that the US press discussed the matter of the number of civilians who might have been killed by American troops in that action. Allegations had been made that thousands of Panamanian civilians were killed. The US military estimated Panamanian casualties at 314 soldiers and 202 civilians. Physicians for Human Rights estimated 300 Panamanian deaths and

171. Eytan Gilboa, "The Panamanian Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era.," *Political Science Quarterly* (volume 110, #4, p. 539).

172. Robert Parry and Norman Solomon, "Behind Colin Powell's Legend-Panama War," *The Consortium* (11-8-01).

3,000 Panamanians wounded. The Red Cross estimated 2,000 Panamanian deaths. The Catholic Church in Panama estimated 655 deaths. Former US Attorney General Ramsey Clark estimated 3,000-4,000 Panamanians killed, and the Noriega government estimated at least 8,000 deaths.[173] Some claimed that the ratio of civilian to military deaths may have been up to ten civilians killed for every American soldier.[174] American soldier casualties were estimated by the Southern Command to be a mere 23.[175]

In addition, as reported by Rear Admiral David Chandler, Chief of Staff of the Southern Command, no warning was given to the civilians of El Chorrilo about the imminent attack nor was any effort made to allow them to evacuate as is required by Geneva III.[176] On December 29, 1989, the General Assembly issued R 44/240 which affirmed the sovereign rights of Panama, and "strongly deplored" the US invasion which "constituted a flagrant violation of international law." The GA demanded US withdrawal and called on all States to "uphold and respect the sovereignty, independence and territorial integrity of Panama."[177] The Organization of American States (OAS) called this US action a "violation of the rights of the Panamanian people to self-determination."[178]

The failure of the US to bring the matter to the Security Council for its determination that a threat existed, the failure of the US to pursue negotiation through the Council, and the failure of the US to recognize the sovereignty of Panama meant that the invasion of Panama was "pre-emptive," in violation of international law, and without UN support. Both the strategies and weapons used were unquestionably excessive. For example, the US used stealth bombers on civilian centers. It used "forbidden" incendiary bombs without warning on civilian targets, resulting in unwarranted collateral damage. "The shelling of urban areas during the few hours of fighting caused the destruction of many private homes, almost entirely in poor neighborhoods."[179] The attack constituted a serious breach of humanitarian law. Hundreds of Panamanian civilians and soldiers were detained in camps which functioned as military jails for cap-

173. Donald A. Wells (ed), *An Encyclopedia of War and Ethics* (Westport, CT: Greenwood Press, 1996) pp. 379-380.
174. America Watch Report, The Laws of War and the Conduct of the Panama Invasion, May 1990, pp. 5-6.
175. *Ibid.*, p. 5.
176. *Ibid.*, p. 7.
177. *The Panama Intervention*, The Jean Monnet Seminar, Spring Semester 2004.
178. An Encyclopedia of War and Ethics, p. 379.
179. America Watch Report, *The Laws of War*, p. 20.

tives awaiting trial; the camps were staffed by military police from Fort Bragg. None of this was in accordance with the Geneva Conventions of 1949.

The UN War in the Congo

In at least one instance, however, all of the required pre-conditions with respect to Security Council involvement seemed to have been met, namely in the case of the war in the Congo in 1960-1964.[180] This venture was the first time that the Security Council actually gave permission to send military forces (as distinguished from peacekeepers). Thirty-four nations participated with about 20,000 military and 6,000 civilian forces over a four year period. It was the "UN's baptism by fire."[181] The mission was, by and large, unsuccessful and the experience increased the conviction among many people that the UN ought to stick to peacekeeping and not to make any more attempts to intervene militarily. After all, it was opined, the goal of the UN "is not military victory but the amelioration of the cessation of armed conflict."[182]

The Korean War

The case of the Korean War is instructive. At the end of World War II, the US persuaded the Soviet Union to participate in disarming the Japanese troops stationed in Korea; and to implement this, the US "temporarily" divided Korea along the 38th parallel, giving the Soviets responsibility for the territory north of the parallel and giving the US responsibility for the land to the south. The USSR-US joint commission to work out the details broke down. Consequentially, the Soviet delegate boycotted the Security Council meetings from January 13, 1950 until the end of July 1950. On June 25, during the Soviet absence, the Security Council issued Resolution 82 declaring that the North had committed a "breach of the peace." On June 27, the SC adopted Resolution 83, which recommended that the UN members take immediate military action. On July 7 the SC adopted Resolution 84, placing the UN forces under the command of the United States military. Resolution 85 (July 31, 1950) requested other nations to supply such support as the Unified Command might request. The Soviet Union dele-

180. John Tessitore, A Global Agenda: Issues Before the 58th General Assembly of the United Nations (UNA of USA, 2003) pp. 52-53
181. Walter Dom, "United Nations Peacekeeping in Africa Since 1960" *Political Science Review*, 2003.
182. Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: University Press, for Stockholm International Peace Institute, December, 2002)

gation did not attend any of these SC meetings. The absence of the Soviets meant that none of these resolutions had the necessary "concurring vote" of all permanent members, as required under the UN Charter, Article 27. This fact was ignored by the US, which pursued the war for four years and acted and spoke as if the war had UN support. While an armistice was signed July 27, 1953, American troops have remained in South Korea ever since, and the US has continued to give South Korea military and economic aid.[183] None of this had UN blessing.

Based on estimates from the April 1964 issue of the *Bulletin of the Atomic Scientists*, 700,000 Koreans were killed, almost 600 thousand of them civilians. US deaths were 53,000. No serious effort was undertaken in the Security Council to resolve, by negotiation, the issues used as the excuse for the war. While under the Clinton administration efforts were made to conduct negotiations, the current administration shows little interest in continuing them. No serious case has been made that establishes that the Korean conflict was irresolvable by negotiations.

The Vietnam War[184]

The Vietnam War was a prime example of the failure to utilize the Security Council. That war was not preceded by efforts to negotiate and it had no sanction from the SC. The casualty consequences of that war were at least 1,250,000 Vietnamese slain, and over one million of these were civilians. In addition, 57,000 American soldiers lost their lives. The arguments explaining the American justification for the war (to contain Communism and to avoid a domino effect) would have been rejected had they been presented either to the World Court or to the Security Council. The My Lai massacre and the subsequent war crimes trials have since stood as moral judgments against the way the US waged that war.[185] The guerrilla setting and the absence of clear military fronts meant that soldiers would inevitably be shooting at a largely invisible enemy. Under the circumstances it was highly likely that soldiers would commit crimes against the peace, war crimes, and crimes against humanity. Professor

183. Donald A. Wells (ed), *An Encyclopedia of War and Ethics* (Westport, CT: Greenwood Press, 1996), pp. 264-267.
184. H. Bruce Franklin, *Vietnam and other American Fantasies* (Amherst: University of Massachusetts Press, 2000)
185. The Peers Commission report, The My Lai Massacre and Its Cover-Up: Beyond the Reach of the Law? (New York: The Free Press, 1976.

Richard Falk commented at the time that counter-guerrilla strategy "resulted in a degree of destruction and disruption disproportionate to the value of the political objectives."[186]

A worldwide protest against the US role in Vietnam prompted an ad hoc "International War Crimes Tribunal" organized by philosophers Bertrand Russell and Jean-Paul Sartre to prosecute Americans for war crimes.[187] General Telford Taylor, who had represented America in the Nuremberg trials after World War II, stated in his book, *Nuremberg and Vietnam: An American Tragedy* that the Vietnam War encapsulated the modern difficulties in identifying when soldiers were breaking laws of war or committing crimes against humanity. It illustrated the gulf between what Nuremberg had forbidden and what modern armies permitted. Vietnam demonstrated the kind of moral crisis which can occur when a war is undertaken based on an ideology, i.e. to "save the world from communism".[188]

The Gulf Wars

The Gulf War was paradigmatic of what happens when an event, in this case the invasion of Kuwait by Iraq, is treated as a solely military matter. As Resolution 660 made clear, a combination of negotiation and containment could have resolved the issues quite simply and the Iraq army would have removed itself. Phyllis Bennis wisely observed, "A military outcome was virtually inevitable from the moment the US decided to turn what might have remained a containable regional crisis into a global conflagration."[189] Three phases of the Gulf War can be distinguished between 1991-2004. These phases exhibit the most current instances of the flouting of UN Charter procedure with respect to war. These Gulf wars were not preceded by negotiation through the UN, even though many resolutions were passed. For example, the Security Council was not asked to determine whether a threat to the peace existed in 1990. The SC never authorized the armed attacks on Iraq in January 1991 in the first phase. In the second phase the armed fly-overs, unilateral acts by the US and France, the SC was not

186. Richard A, Falk, *The Status of Law in International Society* (Princeton: University Press, 1996) pp. 584-585.
187. John Duffett (ed), *Against the Crime of Silence* (New York: Simon and Schuster, 1970).
188. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Time Books, 1970) p. 19
189. Phyllis Bennis, *Calling the Shots: How Washington Dominates Today's UN* (New York: Olive Branch, 2000) p. 26.

consulted. In the Iraq War begun in 2003, neither the US nor anyone in its "coalition of the willing" was ever able to get SC blessing. Let us look at these Gulf wars in some detail.

The purported reasons for the US to enter the initial Gulf War

In an address, "Against Aggression in the Persian Gulf," reported in the September 3, 1990 issue of the State Department official journal, *Dispatch*, President George Herbert Walker Bush announced that, "Our jobs, our way of life, our own freedom...would all suffer if control of the world's greatest oil reserves fall into the hands of Saddam Hussein."[190] It was not noted that Saddam already controlled the Iraqi oil supply. The same reasoning was reaffirmed by Secretary of State, James Baker, in his address, "America's Stake in the Persian Gulf," where he remarked, "third, and most obviously, what is at stake economically is the dependence of the world on access to the energy resources of the Persian Gulf."[191] Later these remarks were underlined by Deputy Assistant Secretary of Near Eastern Affairs, Toni G. Verstandig, in his address, "Principal Elements of US Policy."[192] He stated that "the basic strategic principle for the US in the Gulf is in the free flow of oil at stable prices." No mention was made at this time of getting Saddam out of office, or of "rescuing" the Iraqi people from his control, nor was there any mention of Iraq's putative weapons of mass destruction as reasons for invading the country. From the beginning, the stated reason for invading Iraq was oil. Let us consider the development of this first phase of the war and the ways in which the reasons for the war changed.

Antecedents to the war

Iraq had waged a long and bloody war against Iran, 1980-1988 (with US support). National Security Advisor Zbigniew Brezinski encouraged Iraq to invade Iran. Henry Kissinger was quoted widely as stating, "I hope they kill each other"[193]. In 1984, Vice President George H. W. Bush, together with the CIA, began lobbying the Export-Import Bank to "begin large scale financing of US exports to Iraq," while at the same time encouraging Europe and Japan to increase their purchases of Iraqi oil.[194] While the Iran-Iraq war was going on, the

190. *Dispatch*, (September 3, 1990), p. 54.
191. *Dispatch*, (September 10, 1990), p. 69.
192. *Dispatch*, (April 4, 1994) p. 198.
193. Ramsey Clark, *Challenge to Genocide: Let Iraq Live* (New York: International Action Center, 1998) pp. 4-5.

Reagan administration removed Iraq from their list of countries promoting terrorism. The result was that the US and other world arms industries saw themselves as free to sell war material to Iraq. A 1994 Senate report found that the United States had licensed dozens of companies to export war materials to Iraq. In addition it seemed likely that the other four of the permanent nations in the Security Council were suppliers as well.[195] The war against Iran was one of the consequences of the US role in overthrowing the democratic Mossadegh regime in Iran. With the fall of the subsequent Shah, the end of the Iran-Iraq War, and the economic collapse of the Soviet Union, it was argued, "it now became possible for the US to intervene militarily in the region with little risk of Soviet opposition."[196]

At the end of the war with Iran the economy of Iraq was in a shambles. Iraq had borrowed heavily from Kuwait to wage that war and now Kuwait was demanding repayment. Meanwhile, Kuwait had glutted the market with oil, thereby causing the value of oil to drop and making it impossible for Iraq to repay the $30 billion loan by selling oil. At the same time Iraq accused Kuwait of using horizontal drilling technology to steal Iraq oil, and blamed Kuwait for continuing to block Iraq's access to the sea, preventing the shipment of its oil.[197] On July 25 the US announced joint military exercises in the Gulf with the United Arab Emirates, while Iraq troops were gathering on the Kuwait border, and as General Schwarzkopf readied CENTCOM (for war against Iraq), Saddam Hussein summoned US ambassador April Glaspie to his office in what seems to have been a final attempt to "clarify Washington's position."[198] When she assured Saddam that "we [US] have no opinion on Arab-Arab conflicts like your border disagreement with Kuwait,"[199] Saddam felt free to invade. This was precisely the kind of situation which the Security Council was created to resolve.

The invasion of Kuwait, although referred to by the State Department as the primary reason for US involvement, was never a significant reason. The avowed US policy in similar US invasions since the end of World War II was to do so only when US national security was at risk. Concern with the fate of

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194. *Ibid.*, p. 5.
195. Susan Wright, *Biological Warfare and Disarmament* (War and Peace Library, 2002)
196. *Ibid.*, pp. 6-7.
197. William Blum, *Killing Hope: US Military and CIA Intervention Since World War II* (Monroe, Maine: Common Courage Press, 1995) p. 321.
198. Clark, *Ibid.*, p. 8.
199. Blum, *Ibid.*, p. 322.

Kuwait was not consistent with the US policy position of coming to the rescue when the "survival of a legitimately elected democratic government is threatened."[200] Kuwait scarcely qualified as such a government.

On August 2, 1990, Iraq invaded Kuwait and that same day, with record speed, the Security Council issued Resolution 660 which stated:

a) The Iraq invasion is condemned.

b) The SC demands that Iraq withdraw immediately and unconditionally all its forces to the positions where they were on August 1, 1990.

c) The SC calls upon Iraq and Kuwait to begin immediate intensive negotiations for the resolution of their differences and supports all efforts in this regard especially the offer of the League of Arab States to mediate.

d) The SC decides to meet again to take further steps to ensure compliance.

The Vote was 14 yea, 0 nay, and 1 abstention (Yemen).

President Bush, however, insisted that negotiations should not be allowed to begin, in part on the grounds that he believed that Saddam Hussein should be removed from office and that his military should first be disbanded, and in part because he feared that the problem would be resolved peacefully leaving American oil interests unresolved. The US administration added two new conditions which were not part of any Security Council resolution: 1) that Saddam should be thrown out of office as president and, 2) that the Iraqi military should be disbanded. Neither of these was part of the requirements in Resolution 660. President Bush argued, further, that negotiations would give credence to Saddam's leadership. Thus Bush rejected negotiations altogether. To make it clear that negotiations were not part of the American plan, on August 7, 1990, President Bush authorized the sending of up to 150,000 American soldiers to the Gulf area. The five days between August 2 and August 7 did not satisfy the requirement of having exhausted negotiations. The President's action ignored, from the start, the crucial function of the SC as the primary locus of non violent resolutions to such "threats to the peace."

On August 6, 1990 the SC issued Resolution 661, which stated:

a) Iraq has so far failed to comply with 660 and has usurped the legitimate authority of the government of Kuwait.

200. *The Defense Monitor*, Vol. XXIII, No. 3, 1994, p. 4.

b) As a consequence the SC will take the following measures.

1) All States shall prevent the import of all commodities and products originating in Iraq or Kuwait.

2) States shall not aid in any trans-shipment of such materials.

3) States shall not transfer any funds to Iraq or Kuwait.

4) States shall not sell any commodities, including weapons and all military equipment, but they shall allow foodstuffs and medicines for humanitarian purposes.

The vote was 13 yea, 0 nay, and two abstentions (Cuba and Yemen).

On August 12, 1990, Iraq formally accepted the conditions of Resolution 660 and announced that it was ready to begin negotiations. On August 13 the Secretary General, Javier Perez de Cuellar, emphasized his intention to conduct the negotiations when he disassociated himself from approval of any use of force by the UN or by any of its member states. Additional offers to assist in the negotiations came from France, the Soviet Union, and the League of Arab States. In the absence of the negotiations required by Resolution 660, further SC resolutions still continued to be issued. On August 9, 1990 Resolution 662 demanded that Iraq "rescind its actions." On August 19, 1990, Resolution 664 demanded that "Iraq take no further actions to jeopardize the safety, security, or health" of Kuwaiti nationals. On August 25, SC Resolution 665 called on all states to cooperate in assuring that the requirements of Resolution 661 were fulfilled. On September 13, 1990, Resolution 666 established a committee to "review all requests for humanitarian aid to supply foodstuffs" to Iraqi citizens in cooperation with the International Red Cross, and that "special attention to the needs of children under the age of 15, expectant mothers, and the sick and elderly" be duly considered. All of this was still in the absence of the negotiations required by Resolution 660 as well as by article 24 of the UN Charter which obligates states to bring potential conflicts to the Security Council for resolution. The vote was 13 yea, 0 nay, 2 abstentions (Cuba and Yemen).

On September 16, 1990 SC Resolution 667 "strongly condemns aggressive acts perpetrated by Iraq" and "demands the immediate release of all foreign nationals being detained." But there were still no negotiations as required in Resolution 660.

The vote was unanimous.

On September 24, 1990, Resolution 669 urged the committee to "make recommendations" to the President of the Security Council on how humanitarian aid would be sent. The vote was unanimous.

On the same date, Resolution 670 reaffirmed all prior resolutions and allowed "all necessary means" to get compliance. Furthermore, it urged freezing all Iraqi assets abroad. The vote was 14 yea and 1 nay (Cuba).

On October 29, 1990, Resolution 674 proposed that Iraq may be liable to pay for the damages caused by the war. The vote was unanimous.

All of these resolutions operated in a void because on August 7, 1990, President George H.W. Bush had refused to allow negotiations to begin and, to confirm this unwillingness, he had authorized sending up to 150,000 American troops to the Gulf. This was in violation of Resolution 660 which called for immediate negotiations, and it was in violation of Article 33 of the UN Charter which required "first of all, to seek a solution by negotiation." President Bush ignored the fact that Iraq had, from the beginning, expressed its willingness to accept the various offers from France, the Soviet Union, and the League of Arab States to assist in the negotiations. The early intention of President Bush to go to war against Iraq was confirmed by former Air Force Chief of Staff General Michael J. Dugan, who revealed that Bush had already announced his plans to concentrate an air war on civilian centers.[201] Within days of his comments, Dugan was fired.[202]

On November 19, 1990, the debate on Resolution 678 revealed disagreement within the Security Council over the insistence of the US that negotiations should be dismissed and that war was the only option. The initial U.S version of Resolution 678 was that:

> "[the SC] Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January, 1991 fully implements, as set forth in paragraph 1 above to use *all necessary force* to uphold and implement Security Council Resolution 660" (emphasis added).

China advised the US that it would veto such a Resolution should it be proposed in its suggested form. The US, then, rewrote the offending part using the expression *all necessary means* to replace *all necessary force.* This change did not satisfy China and the vote was 12 yea, 2 nay (Cuba and Yemen) and 1 abstention (China). Since Article 27 of the UN Charter requires the "concurring votes of the

201. The Washington Post, September 6, 1990.
202. Clarke, *Ibid.*, p.9.

permanent members," an abstention on the part of China functioned like a veto. If any of the other members of the Council pointed this out to President Bush and his Cabinet, we have no record, but President Bush at the time seemed to assume that his resolution had passed, and this seemed to go unchallenged. Whatever may have been his initial intent, President George H. W. Bush planned on going it alone. If "all necessary force" was unacceptable to China in the first instance, then one would reasonably assume that "all necessary means" did not include "force" as one of the "means." China must have seen the ambiguity here and found the new formulation equally unacceptable. The fact remains that China's abstention functioned as a veto so that Resolution 678 on November 29, 1990 failed. Thus, the pre-emptive war that the US began on January 15, 1991 did not have Security Council approval and was not, therefore, a war with UN sanction.

In order to get the required nine votes (not to forget the China abstention) on Resolution 678, President Bush "bribed" most of the members of the Council to vote in favor of the Resolution. Egypt's $7.1 billion debt to the US was "forgiven"; China was assured a $140 million loan; the Soviet Union was promised $7 billion in aid; Colombia was promised military assistance; Zaire was promised partial "forgiveness" of its debt plus military assistance; Saudi Arabia was promised $1.2 billion in armaments; Israel was "forgiven" $4.5 billion of its debt to the US; and Yemen was threatened with the termination of US aid if it failed to support the resolution. Two of the threatened nations refused to yield: Yemen voted against the resolution and lost all US aid, while China simply abstained and officially defeated the resolution.[203]

Thus, based on a deliberate misreading of Resolution 678, American forces began their air war on Iraq on January 15, 1991. Instead of targeting the Iraqi troops in and around Kuwait, the bombing was concentrated on Iraqi cities (i.e. civilian targets) in violation of Geneva III Declarations, UN resolutions, and conventional "laws of war," all of which forbade the deliberate bombing of civilian centers and especially against those items like water and sewage on which the civilian life depend. In addition, "forbidden" weapons were used: napalm, air-fuel explosives, the Rockeye Cluster bomb (Mark 20) — each containing 24 anti-personnel grenades containing 2,000 high velocity needle sharp fragments —

203. Phyllis Bennis and Michael Moushabeck (eds), *Altered States: A Reader on the New World Order* (New York: Olive Branch Press, 1993) p. 41.also Phyllis Bennis and Michael Moushabeck (eds), *Beyond the Storm* (New York: Olive Branch Press, 1991) p.64.

and the Tomahawk Cruise Missile, each of which contained three packages of grenade sub-ammunitions containing tens of thousands of shrapnel fragments. Only 4.5% of the bombs (9,342) were "smart" and even they missed their designated targets about 30% of the time.[204] The remaining 95.5% of the missiles (210,000) were of the "dumb" variety which missed their targets about 70% of the time.[205] An estimated 85,000 tons of "conventional" bombs were dropped in the 42-day air war. Air sorties (126,581) were carried out chiefly by the US (109,390), with Saudi Arabia accounting for 6,852; UK 5,417; France 2,258; and Canada 1,302.[206]

On February 19, 1991 Iraq accepted Resolution 678 and began withdrawing its troops as required by Resolution 660. Argument still exists as to the precise date of President Bush's agreement to a cease fire, but on February 23, 1991 the US began the "ground war" on the retreating Iraqi troops, plus Kurd and Kuwaiti civilians.[207] The result was the so-called "turkey shoot" on the infamous "Highway of Death." The orders from General Norman Schwarzkopf were "not to let anybody or anything out of Kuwait City."[208] *Newsday* reported that "many of those massacred fleeing Kuwait were not Iraqi soldiers at all but Palestinians, Sudanese, Egyptians, Filipinos, and other foreign workers."[209] International law forbids shooting surrendering troops (cf. Article 51 of Geneva Protocol I),[210] quite apart from the question whether the bombing was a violation of the ceasefire. Furthermore, Geneva III "outlaws the killing of soldiers who are out of combat."[211]

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204. Cf. "The Myth of Surgical Bombing," in Ramsey Clark and others, *War Crimes: A Report on United States War Crimes Against Iraq* (Washington, D.C., Maisonneuve Press, 1992) pp.83-89.
205. Operation Desert Storm: Data Does Not Exist to Conclusively Say How Well Patriot Performed, (Washington, D.C. US Government Printing Office. September 1992) and Cynthia Peters, Collateral Damage; The New World Order at Home and Abroad, (Boston: South End Press, 1992) pp. 222-227.
206. Thomas A. Keaney, and Eliot A. Cohen, *Gulf War: Air Power Survey Summary report* (Washington, D.C., US Government Printing Office, 1993).
207. Michael Kelly, "Highway to Hell," *New Republic,* April 1991.p. 12.
208. Bill Gannon, "Pool Report with the Tiger Brigade Outside Kuwait City," *Newark Star-Ledger*, February 27, 1991.
209. Knute Royce and Timothy Phelps, "Pullback A Bloody Mismatch," Newsday, March 31, 1991. See also Ramsey Clark and Others, War Crimes: A Report on United States War Crimes Against Iraq (Washington, D.XC. Maisonneuve Press, 1992) pp. 90-94.
210. Clark, *Ibid.*, pp. 20, 76.
211. Ramsay Clark an Others, *War Crimes: A Report on US War Crimes Against Iraq* (Washington, DC: Maisonneuve Press, 1992) p. 91.

Congressional hearings revealed that the cost of this war was expected to be $61 billion, of which the US expected to pay $7 billion. Add to that the $7 billion given away to secure the affirmative votes on Resolution 678. Cash contributions received from other nations listed in order were: Kuwait $12.2 billion; Japan $9.4 billion; Saudi Arabia $9 billion; Germany $5.7 billion; UAE $3.8 billion; and South Korea $150 million.[212]

Nations which contributed to the aerial sorties on Iraq cities
The following data come from an official US government survey.[213]

US sorties	109,390
Saudi Arabia sorties	6,852
UK sorties	5,417
France sorties	2,258
Canada sorties	1,302
Kuwait sorties	780
Bahrain sorties	283
Italy sorties	237
UAE sorties	109
Qatar sorties	43
Total Sorties	126,581

Casualties

The initial "official" estimate of US battle casualties was 615, of which 148 were fatal. Of the fatalities 24% (35 soldiers) were killed by friendly fire. Of the 467 non-fatal casualties, 15% (72 soldiers) were from friendly fire. Estimates of Iraqi deaths ranged from 20,000 (US Department of Defense) to 200,000 (International Red Cross, International Red Crescent, Amnesty International, and UNICEF). The above data come from Congressional Hearings.[214] Battle casu-

212. *Foreign Contributions to the Costs of the Persian Gulf War* , Hearing Before the Committee on Ways and Means, HR, 102nd Congress, 1st Session, July 311, 1991 (Washington, D.C., U. S. Government Printing Office,. 1991)

213. Thomas A Keaney and Eliot A. Cohen, *Gulf War: Air Power Survey Summary Report* (Washington, D.C: US Government Printing Office, 1993).

214. Office of Technology Assessment, *Who Goes There: Friend or Foe?* (Washington, D.C., U.S Printing Office, 1993) and H*umanitarian Dilemmas in Iraq*, Hearing before the International Task Force of the Select Committee on Hunger, HR, 102nd Congress, 1st Session, August 1, 1991 (Washington, D.C. US Government Printing Office, 1992).

alties were not the only cause of death. A Commission from Harvard University estimated that by the fall of 1991 an additional 170,000 children under the age of five would have died from disease and malnutrition brought on by the embargo. Similar predictions came from UNICEF, Catholic Relief Services, and Quaker Middle East representatives.[215]

Phase II of the War: The no-fly zone.

The US, the UK, and France created two "no fly zones" quite independently of any Security Council resolutions. These "zones" had no official UN support. President Clinton had claimed that the enforcement of these "zones" was a US obligation under prior UN resolutions; however, no such resolutions existed either to support the creation of the areas nor was the US under any obligation to patrol them or to bomb them. The bombing raids conducted by France, the UK, and the US were unilateral acts and not justified by any UN resolutions.[216] This second phase of the war against Iraq coincided with the almost decade long sanctions against allowing other nations to assist in Iraqi infrastructure recovery. From the start of the imposition of the sanctions, international reports revealed severe damage to Iraq infrastructure. 1) Iraq's electrical and communications systems had been destroyed.[217]2) Critical shortages existed of medical supplies and equipment. 3) The public water supply was contaminated. 4) Hospitals and other health care facilities had been destroyed. 5) Illnesses from malnutrition had radically increased, and 6) vaccination of children had virtually ceased through the inability to store the vaccines. The US aerial war against the Iraqi infrastructure included, serious damage to eight major multipurpose dams which simultaneously destroyed flood control, municipal water supply and hydroelectric power.[218] Farm herds were decimated, grain storage silos were destroyed. Allied bombing had destroyed 28 civilian hospitals, 52 community health centers, 676 schools, 7 textile factories, 5 engineering plants, and 16 chemical and petrochemical plants.[219]

On March 2, 1991, the SC proposed Resolution 686, which:

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215. Clark, *Ibid.*, pp. 233-238.
216. Phyllis Bennis, Before and After: US Foreign Policy and the September 11th Crisis (New York: Olive Branch Press, 2003) p. 8.
217. Clark, *Ibid.*, pp. 94.
218. Clark, *Ibid.*, pp.10-11.
219. Clark, *Ibid.*, pp. 11-14.

1. Affirmed all prior resolutions
2. Asked Iraq to assume liability for all war losses in Kuwait.
3. Asked Iraq to free all prisoners of war.
4. Asked Iraq to return all Kuwaiti property.
5. Asked Iraq to identify the location of all land mines and booby traps.
6. Asked member states to assist Kuwait in reconstruction.

The vote was 11 yea, 1 nay (Cuba), and 3 abstentions (China, India, and Yemen). NB: The abstention of China vetoed the resolution.

On April 3, 1991 came SC Resolution 687, which:

1. Asked member states to monitor the demilitarized zones.
2. Asked member states to remove their troops.
3. Asked Iraq to destroy all chemical and biological weapons.
4. Asked Iraq to remove ballistic missiles with a range greater than 150 kilometers.
5. Forbade Iraq to develop nuclear weapons.
6. Forbade all nations to sell arms to Iraq,

The vote was 12 yea, 1 nay (Cuba), and 2 abstentions (Yemen and Ecuador). Items 3, 4, and 5 constituted "new" requirements and thus raised the ante for Iraq.

UNICEF published a report April 30, 1998 titled, "Situation Analysis of Children and Women in Iraq." The report noted an increase of approximately 90,000 deaths a year due to the sanctions. For children under five an increase of about 40,000 deaths yearly compared to 1989. The report noted that malnutrition had not been a public health problem in Iraq before the embargo.[220]

On April 5, 1991 the Security Council issued Resolution 688 which emphasized the sufferings of the Kurdish populations, in particular, and urged that the Iraqi authorities allow access to international humanitarian organizations. The vote on the Resolution was as follows: 10-yea; 3-nay (Cuba, Yemen, Zimbabwe); and 2-abstentions (China and India). The abstention by China officially defeated the Resolution, but as in previous instances, the US acted as if the resolution had passed. By some linguistic *legerdemain* the US, the UK, and France inferred that they now had the power to create "no-fly zones," as an act of "humanitarian intervention" in the north and the south of Iraq. The northern zone was to "protect" the Kurds, and the southern zone was to "protect" the Shiites. The

220. Clark, *Ibid.*, p. 237.

areas of the two zones amounted to more than 60% of the total area of Iraq. The three (US, UK, and France) began patrolling the skies immediately. By 1998, heavy bombing of ground targets in these areas was underway. Such bombing continued on a regular basis until 2001.[221]

To carry out the task of determining that Iraq had complied with the ban on weapons of mass destruction Resolution 699 on June 7, 1991 led to the establishment of a United Nations Special Commission (UNSCOM). It consisted of 13 Europeans, 3 Asians, 1 Latin American, 1 African, 1 Australian, 1 Canadian, and 1 US representative.[222] From 1991 until December 1998, UNSCOM carried out extensive inspections utilizing the International Atomic Energy Agency (IAEA). In December 1998, UNSCOM was recalled co-incident with a planned massive bombing campaign by the US and the UK. The report of UNSCOM, however, established that Iraq did not pose any threat from weapons of mass destruction.[223] The Bush administration nonetheless continued to claim that Iraq possessed all the weapons that the UNSCOM report had failed to confirm. A former director of the military affairs office, Greg Thielman, observed in July 2003 that "this administration has had a faith-based intelligence attitude (in) its top-down use of intelligence: we know the answers, give us the intelligence to support those answers."[224] The Bush distortions of the UNSCOM reports were documented by John W. Dean, former counsel to President Richard Nixon.[225] In 2000, the Security Council established a new inspection team, the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC). Hans Blix, former director of the IAEA (1981-1997), was selected as chair while it functioned from 2000 until 2003. His report reinforced the conclusions of UNSCOM that there was no evidence that Iraq posed a threat of weapons of mass destruction.[226]

An illustration of the obfuscation which became rampant was revealed in an Administration claim that Iraq had imported enough yellow cake uranium from Niger to make nuclear bombs. It was pointed out in the *Bulletin of the Atomic Scientists*[227] that it takes one metric ton of good ore from a Niger mine to produce

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221. BBC News Report, February 19, 2001
222. Ramsey Clark, *Ibid.*, pp.38-44.
223. Hans Blix, *Disarming Iraq* (New York: Pantheon, 2004) pp. 260-263.
224. Hans Blix, *Ibid.*, p. 263.
225. John W. Dean, *Worse than Watergate: The Secret Presidency of George W. Bush* (New York: Little Brown and Company, 2004) pp. 199-205.
226. Hans Blix, *Ibid.*

3 kilograms of yellowcake (uranium oxide concentrate). It then takes about 215 kilograms of yellowcake to produce one kilogram of highly enriched uranium, and it takes 2.5 kilograms of the highly enriched uranium to make one bomb. "In other words, just to get enough material for a single nuclear device, the operation would have had to avoid detection while smuggling 4 million pounds of ore."

Resolution 712 on September 18, 1991 requested that the funds for all medical aid to Iraq come from Iraq deposits now held in escrow in other countries. The vote was 11 yea, 1 nay (Cuba), and 3 abstentions (China, India, and Yemen). The abstention of China defeated the resolution.

The third phase of the Gulf War

On November 8, 2002, the Security Council issued Resolution 1441, which was to determine whether Iraq had cooperated with UNMOVIC and had not hindered its search for weapons of mass destruction. The Security Council wanted to determine whether Iraq was in "material breach." To emphasize that 1441 was not an authorization for a new US attack, China, France, and Russia issued a joint statement on November 11, 2002 which stressed that 1441 excluded "automaticity," meaning that before using force the US must come back again to the Security Council for permission by a further resolution. The three nations pointed out that only the SC could determine the existence of a material breach with respect to the inspections and only the SC had authority to determine what action should be taken. Since Hans Blix had reported the failure of UNMOVIC to find any evidence, the issue of material breach appeared moot.[228] The French ambassador, Jean-David Levitte, remarked that "France welcomes the elimination from the resolution of all ambiguity on this point."[229] It was generally believed that 1441 was less about constraining Iraq than about constraining the Bush Administration.[230] In spite of this the US began a third phase of the Gulf War, again without UN sanction.

227. November-December, p. 9.

228. *Ibid.*, pp. 266-274.

229. Phyllis Bennis, "Line by Line Analysis of UN Resolution 1441,"*The Institute for Policy Studies*, November 8, 2002.

230. Mary Ellen O'Connell, "UN Resolution 1441: Compelling Saddam, Restraining Bush,": *Jurist*, November 21, 2002..

The current status of the war

President Bush announced the "mission accomplished" on May 1, 2003. At that time the US soldier deaths numbered 138. One year later, in November, 2004, the US soldier deaths numbered over 1,200, with over 5,000 wounded American soldiers. No data exist of the number of psychologically damaged soldiers. Coalition troop deaths were: 68 from the UK, 19 Italians, 13 Poles, 11 Spanish, 3 Slovaks, 2 Estonians, and 1 Salvadoran,[231] with no end in sight. In spite of a projected date of June 30 to turn over some tentative document to an "Iraqi authority," the turnover was done secretly the day before. It is unclear (November 2004) what document the US gave to the Iraqi coalition government and to what degree the Iraqis now had authority. Major armed resistance continues unabated. From the very beginning on August 2, 1990 the Iraq-Kuwait matter was exactly the kind of case for which the UN Security Council had been created. If the current war ever comes to a close, then these matters will still need to be brought to the Security Council for the negotiation called for originally in Resolution 660 on August 2, 1990. Those first requirements were that Iraq must remove its troops to where they were the day before the invasion, and that negotiations begin. Gradually, the requirements were increased to include 1) regime change, i.e., removing Saddam Hussein personally from office, 2) the removal of his weapons of mass destruction, and 3) the democratization of the Iraq civil and political structure. Nowhere in the UN Charter are there provisions that give any individual state or coalition of Member States the authority to ignore negotiation and "go it alone," let alone to alter the government of a sovereign state. The United Nations was created to enable mankind to get out of the anarchy implicit in sovereign nationalism by both allowing and obligating nations to talk things over. Where else can 191 nations share their common concerns and where else can they settle their disputes judicially? This sad story illustrates what can happen when an individual state, which has a stake in the outcome, determines to play the role of King Solomon.

1. President Bush claimed on September 7, 2002 that an International Atomic Energy Agency report concluded that Saddam was only "six months away from developing a nuclear weapon," when, as a matter of fact, no such report existed.[232]

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231. CNN.com,
232. John W. Dean, *Ibid.*, p. 138.

2. Vice President Cheney claimed in August, 2002 that "President Saddam Hussein will obtain a nuclear weapon fairly soon." This claim was disputed by US military experts.[233]

3. On October 7, 2002 President Bush claimed to possess evidence that Iraq had trained al Qaeda members in "bomb making and poisons and deadly gases."[234] The claim had no foundation in fact. In January 2004 the Carnegie Foundation for International Peace published a study which established, along with a number of other studies, that all of the Bush administration claims about Iraq's possession of weapons of mass destruction were false.[235]

These last 12 years of the US war against Iraq have been a war that should never have been fought. Not only were the "reasons" for the war fraudulent, but at no point in the UN Charter were there provisions justifying such US unilateral action.

The data on casualties as of November 2004 give an idea as to whose troops have suffered most, as well as of the strength of the "coalition." US troop casualties numbered 1075 in November (and still rising) while casualties for all the others amount to less than 5% of the total: Italy—19; Poland—13; Spain—11; Ukraine—9; Bulgaria—6; Slovakia—3; Thailand and Netherlands—2; and Hungary, Latvia, Salvador, and Estonia—1. Approximately ten times as many soldiers have been maimed or severely wounded. No verifiable estimate exists of the total Iraqi casualties, although with all the bombing, and the embargo over the past 12 years, it is probably in the hundreds of thousands.

A final assessment

The three phases of the US-led wars against Iraq erred on two basic decisions. The first phase, the US bombings of Iraq on January 15, 1991, then the no-fly zones 1991-2003, and finally the attacks of 2003-2004, all lacked Security Council approval. Resolution 678 was used by the US to justify the January 15, 1991 attack but that Resolution failed because it lacked the support of China.

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233. *Ibid.*, p. 138.
234. *Ibid.*, p.138.
235. Joseph Cirincione, Jessica T. Mathews, and George Perkovich, *WMD in Iraq: Evidence and Implications* (Carnegie Endowment for International Peace, January 2004). See also. Christopher Scheer, Robert Scheer. And Lakshmi Chandhry, *The Five Biggest Lies Bush Told Us About Iraq* (New York: Seven Stories Press, 2003); and Phyllis Bennis, *Before and After: US Foreign Policy and the September 11th Crisis* (New York: The Olive Branch Press, 2003); John W. Dean, *Worse than Watergate* (New York: Little Brown, 2004).

The no-fly zones were never voted on in the Security Council. They were the result of arbitrary and unilateral decisions by the US, France, and Britain. Finally, Resolution 1441 did not give Security Council support for the bombing starting in 2003, a fact emphasized by the British, French, Russian, and Chinese representatives on the Council.

In the second place, the reasons proffered by the Bush and Blair administrations would not have sufficed even if they had been true. If the possession of weapons of mass destruction or the desire to posses such were adequate reasons for pre-emptive war, then there are many nations already known to be offending, which might have been attacked. Iraq was not on the list of threatening nations. (See appendix.) Eight nations already possess nuclear weapons: US, UK, France, Russia, China, India, Pakistan, and Israel. Three of these nations (India, Pakistan, and Israel) are neighbors of Iraq. Since both the General Assembly and the World Court have condemned the possession of these WMD, all eight nations already stand in violation. Of the 44 countries with nuclear reactors, any one is capable of producing weapons grade material. Iraq has no nuclear reactor. Since WMD include biological weapons (already possessed by 19 nations), we should expect that pre-emptive war against any or all of them would be in order. Furthermore, chemical weapons are already possessed by 23 nations. Why, then, shouldn't pre-emptive war against all of them be sanctioned? Military wisdom and international law would caution against attacking any nation with WMD for the simple reason that they might use them either in a first strike or in reprisal. It was safe for the US to bomb Afghanistan and Iraq because we knew that neither one possessed such weapons.

Non Military Contributions of the UN to the Iraq War

Although the Security Council did not support the US armed invasion of Iraq, the United Nations has participated extensively in humanitarian tasks in the area. A few of such contributions were contained in the March 28, 2003 UN request for $2.2 billion to support the following kinds of assistance:[236]

1. The World Food Program (WFP) together with UNICEF and other agencies and NGOs worked through the Oil-For-Food Program to feed the Iraqi citizens.

236. *A Global Agenda*, 59th General Assembly, pp. 263-2181.

2. The United Nations High Commissioner for Refugees (UNHCR) is prepared to assist as many as 600,000 refugees by providing transport, stockpiling tents, water tankers, health facilities, monitoring the spread of disease and keeping the civilian and humanitarian nature of the camps.

3. United Nations Children's Fund (UNICEF) has worked with the World Health Organization (WHO) to provide vaccines, health care for children and mothers, sanitation, hygiene, and education.

4. The United Nations Development Program (UNDP) will analyze and implement infrastructure needs for health, industry, electricity, water, and transport.

5. The Food and Agriculture Organization (FAO) will help to sustain food availability through planting and technical assistance for poultry and livestock production.

6. United Nations Mine Action Services (UNMAS) will design and implement mine removal, especially the heavy concentration of unexploded mines throughout the country.

7. The United Nations Educational, Scientific and Cultural Organization (UNESCO) will aid in reopening schools, providing books and other teaching materials, support the Iraq Ministry of Education, and assist in the protection of Iraq's cultural heritage after the pillaging of the Iraq National Museum.

8. The International Organization for Migration (IOM) will handle refugee camp management.

9. United Nations Population Fund (UNFPA) will coordinate with WHO and UNICEF to provide obstetric care, information on basic reproductive services, and train community workers to assist in the project.

10. The Office of the High Commissioner for Human Rights (UNOCHR) will monitor and promote protection of human rights of civilians affected by the war, and protect the rights of refugees and those imprisoned.

Thus, quite apart from the UN role in identifying threats to the peace, providing peacekeepers, or advocating military action (if that ever became appropriate), the UN has a multifaceted role to play in the reconstruction of the infrastructure which makes humane survival possible.

Chapter IV. The Precedent of War Crimes Trials and the Bases for the UN International Criminal Courts

Ancient custom presumed that, in a lawless world ruled by "tooth and claw," war was both a necessity and a right. It seemed not to occur to people that the national laws that saved them from domestic anarchy could, if extended worldwide, spare them from the wars which seemed inevitably to plague them. Questions concerning the morality of internecine slaughter did, however, arise early on the world stage. War was the primary way in which nations protected themselves. It was also the well-established way in which nations extended their power. Yet, at least as far back as Lysistrata, the means and ends of war had been challenged. It was customary for the victors in war to maltreat the vanquished in any way they wished. For example, following the destruction of the Athenian fleet in 405 bce, Lysander, the Spartan naval commander, judged that every warrior, with the exception of Adeimantus, would be condemned to death for offenses against the "traditions of war." He was spared because it was believed that he had opposed the plans to commit the purported offenses.

We noted in Chapter II how judgments about the practices of war arose, flowering in the Augustinian theories that not every war was "just," that laws of war existed, and that offenses against such laws should be punished. The formal prosecution of soldiers for committing supposed crimes of war arose in the Middle Ages when the Catholic Church Councils took upon themselves that authority. These Councils specified the offenses for which trials could be held and prescribed the appropriate punishment for offenders. The notion of war

crimes, if it existed at all, referred both to acts of enemy soldiers as well as to soldiers in the employ of the Pope. The Holy Roman Empire assumed the role of an "objective" judge, and it implemented its decisions through councils, which named the offenses and prescribed the punishments. Obviously their authority did not impress non-Christians. At the Council of Nicaea (AD 325) for example, provision was made for Christians who, after their conversion laid aside their weapons, but later returned to the military profession. They would be charged with thirteen years of penance.[237] Their offense was to be in the army as a Christian, rather than that they had committed some offense of excess, like the killing of civilians. The conversion of Constantine, who then made Christianity the official religion of the empire, logically led to a general permission for Christians to be soldiers. These early Church judgments were primarily ecclesiastical and not based on any distaste with the profession of soldiering. It was assumed that clergy would not participate in killing for fear that such deeds would contaminate the priestly functions. The laity, however, could apparently do the killing business without damaging their eternal life. At the Synod of Charroux in 989, however, soldiers were prosecuted for killing priests, seizing merchants, peasants or women,[238] indicating that the right to kill had limits.

The idea that rules of war existed was further implemented by the Truce of God established for the Archbishop of Arles in 1035-1041, which identified those days where wars were not permitted. If a solder killed an enemy on a truce day, he would be exiled to Jerusalem. If the offender was also a Catholic he would make a special pilgrimage, suggesting that confusion remained over having Christians as soldiers or why it was permissible to kill on some days but not on others.[239] The Truce of the Bishoprics of Besançon and Vienne in 1041 prescribed exile and a money fine for fighting on the wrong days. At later councils the offenses were expanded to include banned weapons or strategies. Incendiaries and the cross bow were both declared criminal on any days. In the 1474 trial of Sir Peter Hagenbach, he was accused of having instituted a "reign of terror" in the town of Breisach without having first declared war. Had he made the prior declaration his acts would not have been acts of terror. The custom prevailed

237. H.J. Schroeder (ed), *Disciplinary Decrees of the General Councils* (London: Herder, 1937) p. 41.

238. Oliver Thatcher and Edgar H. Neal, *A Sourcebook for Medieval History* (New York: Charles Scribner's) p. 412.

239. Donald A. Wells, *War Crimes and Laws of War* (Lanham: University Press of America, 1991) p. 93.

that, if a city refused to surrender, then their women could be raped and the city plundered. On the other hand if the city surrendered, then neither act could be justified.[240] Under Roman Catholic Church Councils precedent was established for believing that laws of war existed and that the prosecution of violators of these laws was justified. The fall of that empire and the rise of sovereign secular nations required a complete rethinking of who had the authority to identify and to prosecute crimes of war. Obviously, the justification for having war crimes trials depended upon the codification of some laws of war.

Early War Crimes Trials in the United States

The Trial of Captain Henry Wirz

In 1865, following the Civil War, Captain Henry Wirz, the commandant of the Southern prisoner of war camp in Andersonville, Georgia, was prosecuted and executed for maltreatment of prisoners. The legal basis for the trial was the US Army manual, *General Orders 100: Instructions for the Government of Armies of the United States in the Field, 1863.* Article 59 of that document affirmed that "a prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured and for which he has not been punished by his own authorities."[241] Article 56 required that captors feed, clothe, house, and provide medical care for prisoners. Since 40% of those incarcerated in the Andersonville camp died of disease or malnutrition, a commission found Wirz guilty of maltreatment of prisoners. President Andrew Johnson ordered that his execution be carried out, and this was done November 12, 1865. The trial made clear that Captain Wirz was a "scapegoat" and that many others higher in the chain of command, including General Robert E. Lee, should have shared in the blame. About 2,000 such commissions were held throughout the Reconstruction period and many Southerners complained about their legality. The US Supreme Court never reviewed the question of their legality, and they ceased to be held after the end of the Reconstruction laws.[242]

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240. Maurice Hugh Keen, *The Law of War in the Late Middle Ages* (London: Routledge and Kegan Paul, 1965) *passim*,
241. Donald A. Wells (ed), *An Encyclopedia of War and Ethics* (Westport: Greenwood, 1996) pp. 489-492.
242. *Ibid.*, pp. 489-492.

Trials of US Soldiers for offenses in the Spanish-American War

Following the Spanish-American War (1899-1902), *General Orders 100* was used to justify further US military tribunals to try American soldiers for violating the "rules of war."[243] As a result of that war, by US estimates, 200,000 Filipino people were killed, another 900,000 were wounded, and an unknown number perished from starvation.[244] Brigadier-General Jacob H. Smith, US Army, was tried April 24-May 3, 1902 for having given orders to Major L.W.T. Waller, Marine Corps, to take no prisoners on the island of Samar. When Major Waller asked whether he was to kill every person able to bear arms, whether they had surrendered or not, he said that the General had replied in the affirmative. When the Major asked if there was an age limit, the General had replied that he should slay everyone down to ten years of age. Since *General Orders 100* had specified that it was a violation of the laws of war to give "no quarter" (i.e. refuse to let soldiers surrender) such an order was a violation of the laws of war. Article 68 had stated that "unnecessary or revengeful destruction of life was not lawful." The final official charge was that the conduct of General Smith was "prejudicial of good order and military discipline."[245] While the Court Martial found General Smith guilty as charged and initially recommended that he be discharged, the final sentence was commuted to a mere admonishment.

A further military tribunal charged Major Edward Glenn, Fifth US Army Infantry, May 23-29, 1902 for having used torture to get information from Tobeniano Ealdama, one of the leaders of the insurrection. The torture used was the "water cure" in which excessive amounts of water were forced into the stomach through the mouth. Articles 56, 61, 71, and 75 of *General Orders 100* forbade using torture and cruelty to exact information. Although Glenn appealed to "military necessity," the Tribunal rejected the excuse. His sentence, however, was merely suspension of pay for one month and forfeiture of $50 a month of his pay for the future.[246]

Lieutenant Preston Brown of the Second US Infantry was tried June 1901 for shooting a prisoner for having tried to escape. Article 77 of *General Orders 100* had ruled that while prisoners could be shot while trying to escape, they should not be shot for having tried unsuccessfully. This is still the rule in the current US

243. Leon Friedman (ed) *The Law of War* (New York: Random House, 1972) Vol. I, p. 800.
244. Wells, An Encyclopedia of War and Ethics, p.56.
245. *Ibid.*, p. 800.
246. *Ibid.*, pp. 814-819.

military manual and is generally considered to be an international law of war.[247] The Court initially found him guilty and sentenced him to dismissal from the service, plus five years at hard labor. President Theodore Roosevelt, however, reduced the sentence to forfeiture of half pay for nine months and a reduction in line ranking as a lieutenant.[248]

Like the trial of Captain Wirz, however, these were not international trials. They were in-house affairs. Since the Army was prosecuting its own soldiers, they were unlikely to find any soldier guilty for having followed superior orders, and the mildness of the actual judgments demonstrated a lack of concern on the part of the court with violations of any "so-called" laws of war, especially where such prosecutions might undermine the authority of the chain of command.

The Hague Court of Arbitration

In 1899 twenty-six nations, and again in 1907 forty-four nations, met at the Hague to consider proposals from Tsar Nicholas II of Russia which included disarmament, limiting weapons that caused "unnecessary suffering," and establishing a Court of Arbitration. The Congress did not agree on disarmament proposals. Indeed, on the matter of limiting weapons, the proposals to ban expanding bullets and projectiles whose "sole purpose was the spread of noxious gases" were both rejected by the US delegate. In fact, Captain A.T. Mahan, the US delegate, was the only person to oppose the ban on the use of gas in war.[249] In any event, on July 27, 1899 the US Congress unanimously adopted the other Hague proposals consisting of 61 articles. The United States, Russia, and the United Kingdom each submitted its own version. The compromised version, which ultimately passed, included a Tribunal for voluntary arbitration. The aim of the Tribunal was not to assign blame or to exact punishment, but to "aid in the prevention of armed conflict by pacific means."[250] The Court could arbitrate only if both parties agreed to do so. It consisted of 17 judges with limited terms with the exception that the judges from Germany, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia would be permanent. While the Court did

247. *The Law of Land Warfare, FM 27-10* (Washington, D.C. Department of the Army, July 1956) articles 167 and 168.

248. *Ibid.*, pp. 820-829

249. James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Baltimore: Johns Hopkins Press, 1909) p. 37.

250. *Ibid.*, Vol. II, p.15.

deal with several notable cases prior to World War I, it was never a proper court. The creation of the World Court and the International Criminal Court under the UN overshadowed and made otiose the Hague Court of Arbitration.

World War I and the Commission on the Responsibility of the Authors of the War and Enforcement Penalties

Articles 228-230 of the Versailles Treaty required that the names of suspected war criminals be turned over to an Allied Commission. Lists of suspects were submitted to the Commission by Great Britain, France, Belgium, Greece, Serbia, Poland, Romania, and Armenia. The crimes to be prosecuted were acts that provoked the war and violations of the "laws of war and of humanity." Offenders, regardless of rank, would be liable for prosecution. A high tribunal was proposed to consist of three members from each of the five major Allied powers and one from each of the remaining Allied nations. The Commission considered six questions.[251]

1. Did Germany and Austria premeditate going to war? The Commission concluded that they and their allies, Turkey and Bulgaria, had deliberately defeated all peace proposals.

2. Was the neutrality of Belgium and Luxembourg violated? The Commission affirmed that it had been violated on August 2, 1914.

3. Were laws and customs of war violated? The Commission ruled that the following acts constituted violations:

A. Systematic terrorism.
B. Murders.
C. Massacres.
D. Killing hostages.
E. Torture.
F. Deliberate starving of civilians.
G. Rape.
H. Abduction of women and girls to forced prostitution.
I. Deportation of civilians.
J. Internment of civilians under inhumane conditions.
K. Compulsory enlistment of soldiers in occupied countries.
L. Deliberate bombing of undefended places.

251. Wells, *Encyclopedia*, pp. 270-273..

M. Collective penalties.

N. Deliberate bombing of hospitals, churches, and schools.

O. The use of deleterious and poisonous gases, expanding and exploding bullets.

P. Demand for no quarter.

Q. Ill treatment of prisoners of war.

R. Misuse of flags of truce.

4. Were heads of state immune from prosecution? While they were immune in domestic courts, no reason existed why this should be the case in international courts.

5. Were only crimes of commission to be prosecuted? No. The Courts should be allowed to prosecute crimes of omission.

6. How should the tribunals be set up? They should be set up in the country of the offender; however, the consent of the offending state was required.

The United States submitted a Memorandum of Reservations to the Commission explaining why it would not participate in the trial process. These reservations included the claim that the only courts legally entitled to prosecute the accused were military courts from the country of the accused. The US did not approve of an international Tribunal. The US insisted, further, that heads of state were immune from prosecution. While the US accepted that war crimes existed as a class, it denied that crimes against humanity constituted a proper class of offenses. The US also denied crimes of omission and since the US affirmed both the doctrine of military necessity and the obligation of soldiers to obey superior orders, these beliefs precluded most prosecutions.[252]

On February 3, 1920 a list of 896 alleged German war criminals was submitted to Baron von Lersner, the German legate. He refused to accept the list. The Commission then sent the list directly to the German government on February 7, 1920, but the Cabinet refused to turn the offenders over to German courts. The Commission finally accepted an offer from the Reich of Leipzig to prosecute a short list of forty-five names. Only twelve were actually brought to trial, and only seven of these were found guilty. The prison sentences ranged from a mere six months to a maximum of four years. At the same time, German Chancellor Hermann Mueller announced that his government had compiled a

252. American Journal of International Law (1920) p. 95.

381-page list of Allied offenders which he might publish. As a matter of fact the German government never published its threatened list. The Allies, however, were so furious over the light sentences that they withdrew in protest from the entire process on January 14, 1922 and announced that they would conduct the trials themselves. Although hundreds of Germans were tried, these trials ceased after the Locarno Treaty of 1925 improved relations with Germany.[253] A widespread belief that these were merely trials of the vanquished by the victors undermined any expectation that they had set a precedent.

Several obstacles hindered the Leipzig trials from the start, quite apart from the unwillingness of the German Courts to prosecute their own citizens. In the first place many of the Allies, including the United States, doubted that soldiers could be prosecuted for a crime unless their own country considered the acts to be criminal. In the second place, international custom prescribed that soldiers could only be tried by courts in their own country and in accord with the military code of that country. Third, the German Courts denied that their soldiers had been ordered to commit any illegal acts and many Americans sympathized with Germans on this score. And fourth, many doubted that prior laws of war existed which named the offenses and the penalties for those alleged offenses.[254]

The Nuremberg and Tokyo Trials

While the Americans were reticent and the British willing to participate in the Leipzig trials, these roles were reversed in the trials following World War II, at which time the Americans were willing but the British were reluctant. The Americans initially proposed to prosecute the German and Japanese leaders. The British Viscount Simon feared that such trials would give rise to propaganda which could be used against the Allies, and the Viscount recommended that Axis leaders should be treated as outlaws who could be shot on sight, even though they may have surrendered. The Soviet Union agreed with the United States, and the two countries eventually persuaded the British to join them in the trials.[255]

Between June 26 and August 8, 1945 the United States, the United Kingdom, the USSR, and France met in London to formulate principles on the

253. Donald A. Wells, *An Encyclopedia of War and Ethics* (Westport: Greenwood Press, 1996) pp. 270-273.
254. Friedman, *Ibid.*, pp.851-52.
255. Wells, War Crimes and Laws of War, pp. 97-104..

basis of which the trials would be conducted. Some fundamental differences existed among the four nations on matters of legal process. The Soviet tradition allowed courts to try cases without the parties being represented, which was not the case in either the US or the UK. The US wanted to include "aggression" and "conspiracy" as crimes. They were alone on this. Only at the last minute did the Soviets agree to prosecute non-Nazis. Anglo-American law allowed the accused to speak in their own defense. Continental law allowed the defendant to make a final unsworn statement not subject to cross examination. This was resolved by allowing the defendants both options.[256]

On August 8, 1945, an agreement was reached for the prosecution and punishment of the major war criminals whose crimes were not localized in any particular place. Following this first trial, further trials under the aegis of Control Council Law 10[257] would be conducted in the specific locale where the offenses had been committed. The first Tribunal consisted of four judges with an alternate. Conviction required assent from at least three judges.

Article VI of the Charter of the International Tribunal stated the crimes for which the accused would be tried.

1. Crimes Against the Peace. These included planning and waging an aggressive war against Poland, Yugoslavia, Greece, Belgium, the Netherlands, Luxembourg, Norway, Great Britain and France as well as the conspiracy to do so.[258]

2. War Crimes. These were believed to have been grounded in the two Hague Congresses of 1899 and 1907. In July 1943, the United Nations War Crimes Commission was established to gather evidence of war crimes. The focus was on the treatment of prisoners of war, atrocities against civilians, inhumane treatment in the concentration camps, execution of hostages, and the killing of non-combatants.[259]

3. Crimes Against Humanity. These repeated the war crimes with special emphasis upon political, racial, or religious persecutions, the massive killing, especially of the Jews, Gypsies, Poles, Communists, homosexuals, and others.[260]

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256. Wells, *Ibid.*, pp. 97-100.
257. *Ibid.*, pp. 101-102.
258. L. Oppenheim, International Law (London: Longmans, 1952) Vol. I, p. 892 and Vol. II, p. 182
259. *Law Reports of War Criminals*, (His Majesty's Stationery Office, London 1948) fifteen volumes.

The Court found these crimes particularly heinous because they could not be justified by any appeal to "military necessity."

The Nuremberg Trials of the major 24 offenders resulted in 11 being hanged, 3 sentences of life imprisonment, 2 sentences of 20 years, 1 of 15 years, 1 of 10 years, one pardoned, two found not guilty, 1 not tried, and 2 suicides.[261] Subsequent trials were held in particular places where alleged crimes had been committed. No accurate count of the total number of persons prosecuted exists, but a military historian estimated that as of January 1949 "exclusive of hearings in Russia there are 2,116 known military tribunal hearings conducted by the United States, Great Britain, Australia, France, the Netherlands, Poland, Norway, Canada, China, and Greece."[262]

An initial trial was held in Tokyo of the 22 individuals whose crimes were located in no special place. This Tribunal consisted of eleven judges (there were four judges at Nuremberg) and seven judges were required to confirm a sentence. The results were 7 hangings, 13 life imprisonments, 1 sentence of 20 years, and 1 of 7 years. It was obvious that the Japanese sentences were more harsh than the German sentences.[263] Considerable disagreement arose among the Council of the Military Tribunal of the Far East, and in view of this, Bruce Blakeney, on behalf of the entire defense council, filed a Defense Appeal to General McArthur charging that the trials had been unfair. The list included the following charges:

1. The prosecution did not present its case fairly.

2. The trials were not fair. Even the Chief Prosecutor admitted that some innocent persons were charged.

3. The prosecution used hearsay (not allowed at Nuremberg).

4. Even the President of the Tribunal doubted whether aggressive war was a crime.

5. A great mass of evidence from defense witnesses was never taken into consideration.

6. In no case did the seven-judge majority agree on the sentence.

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260. US Army Pamphlet 27-161-2, International Law, Vol. II, Chap. VIII, 1b. Cf also Trials of War Criminals Before the Nuremberg Tribunals Under Control Council Law No. 10, Vol. I, p. viii.

261. Wells, *War Crimes and Laws of War*, see appendix for complete list, p. 155.

262. John Alan Appleman, *Military Tribunals and International Crimes* (Westport: Greenwood Press, 1971), p. x.

263. Wells, *War Crimes and Laws of War*, p. 159. For complete list of sentences.

7. Men who had been outspoken against the militarism of Japan and also against its aggression were sentenced along with established aggressors.[264]

Did the Nuremberg and Tokyo Trials set a precedent?

One of the obvious consequences of the Trials was that they led to revisions that appeared in the major manuals on international law. In the introduction to the revision of the classic work by L. Oppenheim, the new editor, H. Lauterpacht, referred to the judgments of the tribunals as "evidence of international law" having been established.[265] He noted parenthetically that the victorious Allies would have "added substantially to the stature of the Nuremberg Trial by agreeing to have their own nationals tried."[266] Further doubt was evidenced when the General Assembly of the United Nations failed to ratify a proposal of the UN Commission on the Codification of International Law to formulate principles derivable from the Nuremberg precedent. The General Assembly was only able to agree to have the report read. In 1954, the same Commission presented a report on the nature of aggressive war and of crimes against the peace, and again the General Assembly rejected it.[267] General Telford Taylor observed that traditional definitions of "aggressive war" had always been obstacles to military success. He noted, further, that "rules of war that interfere significantly with military success do not remain enforceable."[268] Nations at war always assume that they are responding to aggression rather than initiating it. It is significant that the current US claims for the right of pre-emptive war make nonsense of the entire Nuremberg and Tokyo trials accusation that Germany and Japan were guilty of aggression or of crimes against the peace. Unfortunately, the conclusions of the various Tribunals did not present a consistent pattern. While every defendant at the Tokyo Trial was found complicit in aggressive war, only 8 of the 24 Germans were so found. Not even the directors of Farben and Krupp were found guilty although they had provided the arms that made the war possible. While five German diplomats and government ministers were found guilty, no German military leader faced the charge.[269]

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264. Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trials* (Princeton: University Press, 1971) pp. 204-208.
265. L. Oppenheim, *International Law* (London: Longmans, 1952), Vol. II, paragraph 257.
266. L. Oppenheim, *Ibid.*, p.585.
267. Wells, War Crimes and Laws of War, p. 109.
268. Erwin Knoll and Judith Nies McFadden (eds), *War Crimes and the American Conscience* (New York: Holt Rinehart and Winston, 1970), p. 9.

The United States tried General Tomoyuki Yamashita before a military commission in the Philippines and found him guilty of failing to control the operations of his troops and of permitting them to commit atrocities against civilians and prisoners of war.[270] Although Yamashita was found guilty, sufficient evidence existed[271] to establish that he was far less responsible, because of his distance from the offending acts, than comparable US officers at the Son My or My Lai massacres in Vietnam. The findings of the Peers Commission which investigated My Lai and Son My made clear that the American officers were far closer to the events in question than Yamashita was.[272]Although thirty US officers and one enlisted man were charged for what transpired at My Lai, only three were brought to trial: Private Schwartz, Sergeant Hutto, and Lieutenant Calley. These three were not tried under the Nuremberg Charter, but instead under the *Uniform Code of Military Justice.* Within a year, all three were free. The Tokyo Trials, apart from satisfying an "eye for eye" retributive justice, were, essentially embarrassing. A question remained after the trials over whether they had established any legal precedent. The consequences of the use of "weapons of mass destruction," which were used with such wide approval by so many armies, now make it difficult to distinguish what the Germans and Japanese did from what soldiers commonly did, not merely in Vietnam and World War II, but what US soldiers currently do in the wars in Iraq or Afghanistan.

Son My and My Lai: The Trial of Lieutenant William Calley

In waging the Vietnam War it became obvious that US soldiers were being put in positions which made it inevitable that they would commit crimes against the peace, war crimes, and crimes against humanity. For example, at the time of the trials, testimony was received with respect to the use of fragmentation bombs against the Vietnamese. Jean-Pierre Vigier, Director of Research at the National Center for Scientific Research for the French Army emphasized the

269. Marion E. Lozier, "Nuremberg: A Reappraisal," *The Columbia Journal of Transnational Law* , Vol. I and II, p. 64.
270. Excerpts from the Supreme Court opinion on the matter of Yamashita, cited in Erwin Knoll and Judith Nies McFadden, *Ibid.*, p. 194.
271. Erwin Knoll and Judith Nies McFadden, *War Crimes and the American Conscience* (New York: Holt, Rinehart, and Winston, 1970) p. 194.
272. Joseph Goldstein, Burke Marshall, and Jack Schwartz, *The My Lai Massacre and Its Cover-Up,* (New York: Free Press, 1976), p. 52 also John Duffett (ed), *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (New York: Free Press, 1976), pp. 302-309.

essentially indiscriminate nature of these weapons and pointed out that their use meant that civilians would have no protection. Since 50% of all the bombs dropped on North Vietnam were fragmentation bombs, it was clear that the people themselves were the primary targets.[273] The guerrilla setting with the absence of clear military fronts in an essentially domestic people's war led to the breakdown of most of the prohibitions which had been laid down by the Hague and Geneva conventions. Richard Falk, a distinguished professor of international law, observed that guerrilla war not only made conventional rules of war inoperable, but made war crimes inevitable due to the acceptance of new weapons and strategies of war. He noted that counter-guerrilla strategy is "based on an extraordinary ratio of military superiority, resulting in a degree of destruction and disruption disproportionate to the value of the political objectives."[274]

The events leading to the trial of William Calley were first brought to light in a letter written March 29, 1969 to the Secretary of the Army and the Chief of Staff by Ronald L. Ridenhour, a Vietnam veteran. His letter presented evidence that he had gathered on his own that "something very black indeed" had occurred in what was called the village of "Pinkville" (My Lai) on April 23, 1969. This information was officially given to the military Inspector General with instructions to make a full investigation.[275] On August 4, General Westmoreland ordered the Inspector General to turn the matter over to the military Criminal Investigation Division for full inquiry. On November 24, Westmoreland ordered Lieutenant General William R. Peers to conduct an inquiry. On December 13, Secretary of Defense Melvin R. Laird announced that any present or former servicemen discovered to have had any role in the killing at My Lai would be brought to trial.

Peers was asked to discover the answers to two questions: 1) had the Army investigations so far been inadequate? 2) had material evidence been suppressed or withheld? With the aid of a staff of over 90, Peers submitted a four-volume report on March 24, 1970. In his findings he noted: "During the period 16-19 March 1968, US Army troops of Task Force (TF) Barker, 11th Brigade, American

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273. Jean-Pierre Vigier, "Technical Aspects of Fragmentation Bombs," in Duffett *Ibid., p. 258.*

274. Richard Falk, *The Status of Law in International Society* (Princeton: University Press, 1970) pp. 584-585.

275. Joseph Goldstein, Burke Marshall, and Jack Schwartz, *The My Lai Massacre and Its Cover-Up: Beyond the Reach of the Law?* (New York: The Free Press, 1976), p. 1-2.

Division massacred a large number of non-combatants in two hamlets. The precise number of Vietnamese killed cannot be determined but was at least 175 and may exceed 400."[276] Peers' report concluded that the Army investigation had been woefully inadequate and that a cover-up existed. He listed the names and ranks of thirty officers who had known about the massacre and who had remained silent. His list included 2 Generals, 4 Colonels, 2 Lieutenant Colonels, 3 Majors, 8 Captains, 1 First Lieutenant, 5 Second Lieutenants, 1 Sergeant, and 1 SP5.[277]

The trials were not conducted under the Nuremberg rules, but under the more relaxed *Uniform Code of Military Justice (UCMJ)*. Article 118 of the *Code* considered the My Lai kind of offenses non-capital. Only three soldiers were seriously prosecuted. Sergeant Hutto was cleared of all charges. In the case of Private Michael Schwartz, decided October 19, 1971, Senior Judge Morgan ruled that Schwartz was properly charged with pre-meditated murder of 16 civilians and that he should be sentenced to life at hard labor, forfeiture of all pay allotments, and dishonorable discharge. The final disposition, however, reduced his sentence to one year at hard labor, forfeiture of pay allotments, and dishonorable discharge.[278] William Calley was tried and found guilty. He was convicted March 29, 1971 and sentenced to life imprisonment. There was a public outcry in support of Calley. And President Nixon ordered his release from prison pending review. The Third Army Commander on August 20, 1971 reduced the sentence to 20 years. On April 16, 1974 Secretary of War, Howard H. Callaway, reduced the sentence to 10 years. On September 29, 1974 the conviction was overturned by district judge Elliott and on November 9, 1974 Calley was released on bond. On September 10, 1975, the US Court of Appeals for the Fifth Circuit reversed the decision of Judge Elliott, but since only a few days remained of the original sentence, Calley was set free on parole.[279]

It is clear that when soldiers are tried by their own peers in a military court the expectation that soldiers are obligated to obey superior orders, and the assumption that soldiers under fire cannot be expected to question their orders to fire at perceived enemies, have meant that military courts will not be harsh.

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276. *Ibid.*, p. 314
277. *Ibid.*, pp. 317-319.
278. *Court Martial Reports*, Holdings and Decisions of the Courts of Military Review, US Court of Appeals, Vol. 45 (1971-72), p. 854.
279. Wells, *War Crimes and Laws of War*, pp. 138-139. And John Sack, *Lieutenant Calley: His Own Story*, (New York: Viking, 1970).

Doubtless, if the German and Japanese soldiers had been prosecuted by their own military courts, they would likely have received treatment comparable to that of those listed in the report of the Peers commission. Such military courts set little precedent to which an international criminal court might appeal. General Telford Taylor, who played such an important role in the Nuremberg trials, considered the entire Vietnam affair, with the lack of any formal prosecution of American soldiers for their roles, a great tragedy.[280] Calley's own lack of awareness of the magnitude of his actions and a widespread denial that anything unseemly had happened at My Lai[281] suggest that training in so-called laws of war is either lacking or ambiguous. Calley remarked at his trial, "could it be that I did something wrong? Killing those men at My Lai didn't haunt me."[282]

Criminal Courts under the United Nations System

The United Nations International Court of Justice (known as ICJ, or the World Court) is designed to prosecute states. The only penalties this court can assign are financial, demands for return of property seized, or restoration of the status quo. For example, in the case where Nicaragua brought to the ICJ the charges that the US had mined its harbors and plotted to undermine the established government, the Court ruled that the US was guilty as charged and ordered it to pay a $400 million fine and to remove the remaining sea mines. President Reagan declared that the US was not bound by Court decisions and he refused to authorize the US to comply with the decisions of the Court.[283]

The ICJ is not a criminal court because it is unable to prosecute *persons*, as the Nuremberg and Tokyo Courts were able to do. The UN General Assembly was unable to secure support for a resolution affirming that Nuremberg and Tokyo had set a precedent. This reluctance was further demonstrated by considerable resistance in the US Senate to establishing a criminal court which could prosecute persons. The magnitude of perceived war crimes, crimes against humanity, and crimes against the peace generated in the former Yugoslavia, however, brought the Security Council to action in spite of American reluctance.

280. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Time Books, 1970).

281. Martin Gershen, *Destroy or Die* (New Rochelle: Arlington House, 1971), pp. 301-302.

282. Sack, *Ibid.*, pp. 8 and 104.

283. Lori Fisler Damrosch, *The International Court of Justice at the Crossroads* (New York: Transnational Publishers, 1987) pp. 227, 472-476.

The ad hoc Tribunal for Crimes in the Former Yugoslavia

On September 25, 1992, the Representative from Yugoslavia to the Security Council (SC) requested that the SC call on all states to "refrain from any action which might contribute to increasing tension" in Yugoslavia, to honor the cease fire agreements of September 17-19, 1991, and to suspend all delivery of military weapons and equipment to Yugoslavia. The SC did this in Resolution 713. The SC also issued Resolutions 721 and 724 in 1991; Resolutions 737, 740, 745, 749, 752, 757, 758, 760, 761 and 762 in 1992. Resolution 764 urged all parties to resolve their differences through a negotiated political solution. Resolution 771 condemned the violations of humanitarian law occurring and demanded that the International Red Cross be granted immediate and unimpeded access to camps, prisons, and detention centers. On February 22, 1993, the SC issued Resolution 808 which called for an international tribunal for the prosecution of persons responsible.

On May 25, 1993, the SC issued Resolution 827 which urged the collection of data concerning the grave crimes and in a Statute affixed to Resolution 827 the details of an International Tribunal for the Former Yugoslavia were spelled out. The US responded by forming a Commission on Security and Cooperation in Europe and by appointing three "reporters" to investigate reports of atrocities against unarmed civilians and to make recommendations. The three reporters selected were Ambassador Turk of Austria, Ambassador Corell of Sweden, and Mrs. Thune of Norway. These three visited Yugoslavia September 30- October 5 and their recommendations were included in a *Proposal for an International War Crimes Tribunal for the Former Yugoslavia.* These, along with recommendations from other nations, were submitted to the UN Commission on Security. The conclusions of the Commission were known as the Helsinki Accords,[284] and were favorably aired in the US House of Representatives on April 21, 1993.[285]

The Statute annexed to Resolution 827 stated in Articles 2, 3, 4, and 5 that the offenses which would be charged were those listed in the Geneva 1949 Conventions which included genocide, violations of the laws of war, and crimes against humanity.[286] The Statute affirmed that the principle of individual responsibility would hold regardless of the rank of the offender, that the deci-

284. *Hearing Before the Commission on Security and Cooperation Europe.* 103rd Congress 1st Session February 22, 1993.(Washington: US Government Printing Office, 1993)

285. *Implementation of the Helsinki Accords: Prospects for a War Crimes Tribunal for the Former Yugoslavia.* Hearing before the Commission on Security and Cooperation in Europe, 103rd Congress, 1st Session. 21 April 1993.

sions of the Tribunal would take precedence over the national courts, and that when the Tribunal was functioning in its legal capacity its judgments would not be subject to the veto from the Security Council. The affirmation of these decisions appeared in Resolution 827 of the Security Council on May 25, 1993. On April 8, 1993 the International Court of Justice (ICJ) said that Serbia and Montenegro should take measures to prevent genocide in Bosnia and Herzegovina. The Soviet judge demurred and insisted that the same measures should be urged against Bosnia and Herzegovina since the offenses had probably been committed by both sides in the conflict.[287]

The Tribunal consisted of three chambers, a prosecutor, and a registry which would serve the prosecutor and the three chambers. Three judges would serve in each of two of the chambers, and five judges in the third appeals chamber. Member states were invited to supply up to two names to the UN Secretary General, who would then submit a list of not fewer than 21 nor more than 33 names to the General Assembly (GA). The GA would then elect 11 judges who would serve four years. The penalties the courts could assign would be limited to imprisonment plus the return of any property the accused had acquired in the process of committing the offense. It was affirmed that when the Tribunal had finished its task, it would be disbanded. Imprisonment would be in a nation willing to accept the task. The Court would meet in the Hague with the expenses borne by the regular UN budget in accordance with Article 17 of the UN Charter. On May 25, 1993, the SC unanimously approved the Tribunal in Resolution 827.

The first official meeting of the Tribunal was held November 17, 1993 with 11 judges. Richard Goldstone of South Africa was appointed Chief Prosecutor and Ramon Escovar-Salom, Attorney General of Venezuela, was appointed Deputy Prosecutor. When the Tribunal reconvened in January 17, 1994, however, it was reported that Escovar-Salom had resigned to take a position with the Venezuelan government and he was replaced by Graham T. Blewitt of Australia. On February 15, 1994 the German police arrested Dusko Tadic, a Serb, and charged him with participation in genocide, murder, and serious assault. Some German officials recommended that Tadic be prosecuted in Germany instead of being turned over to the Tribunal. This option had been provided for in the

286. Donald A. Wells (ed) *An Encyclopedia of War and Ethics* (Westport: Greenwood Press, 1996) pp. 496-499.
287. *Ibid.*, p.497.

original Statute (Article 9). A similar action was taken in Denmark for a Bosnian Muslim accused of atrocities against the Croats. Also, outside the Tribunal, a Bosnian military court in Sarajevo on March 30, 1993 had condemned to death (a sentence forbidden by the Tribunal) two Serbian Nationalist Army soldiers for rape and genocide against Muslims. The prosecution of rape as a war crime was one of the outstanding successes of the later Tribunal judgments. By jailing offenders for rape under war crimes laws, the court removed the possibility that rape could be regarded as no more than a by-product of conflict, a popular view among many armies.[288] By February 1994, one year after the forming of the Tribunal, not a single case had been presented to the Tribunal.[289]

Many trials have been held in the countries of the accused. Trials were held in Croatian-government controlled areas; in Serbian controlled parts of Croatia; in Bosnian Croat controlled areas; in Bosnian Serb controlled areas; and in Montenegro.[290] The problems of the trials raised by the different situations in Croatia, Serbia, Montenegro, and Bosnia compounded the task. These problems were summarized by Human Rights Watch in June 1995.[291] Among the criticisms raised by virtue of the common practice to evade using the international court in favor of prosecuting the accused in national courts were the following:

1. Most national courts have been unwilling to prosecute their own citizens, and even more so their own troops.
2. Of the cases where nations investigated their own troops, few were ever found guilty of any war crimes.
3. Trials are routinely held without the presence of the accused.
4. Prisoners were mistreated while awaiting trial.
5. Open access of the trials to international monitoring was generally lacking.

Arrests began immediately but delays in the process meant that it was not until November 2000 that Momir Nikolic, a Bosnia Serb army officer, was indicted (after seven years of trial) for helping to organize the execution of more than 7,000 Muslim men and boys in Srebrenica. He was charged with 80 counts

288. *Institute for War and Peace Reporting*, "Prosecuting Rape Cases," March 28, 2003.
289. "Former Yugoslavia: The War Crimes Tribunal one Year Later." Human Rights Watch Helsinki, Volume 6, Issue 3, February 1994.
290. "Former Yugoslavia," *Human Rights Watch Helsinki*, Volume 7, No. 10, June 1995.
291. "Former Yugoslavia: War Crimes Trials," *Human Rights Watch*, Vol. 7, No. 10, June 1995.

of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war. It was estimated that some 8,000 Muslim civilians and other non-Serbs from Vlasenica and surrounding villages were interned in Susica between May and October 1992, including women and children as young as 8. Most of the women were forcefully deported but many of the men were eventually killed. Nikolic's sentence was imprisonment for 23 years.[292] On December 10, 2003 Bosnian Serb army commander Dragan Obrenovic was convicted for his role in the Srebrenica massacre and was sentenced to 17 years in prison. On December 5, 2003, Bosnian Serb General Stanislav Galic was sentenced to 20 years for crimes against humanity. On October 20, 2003, four top Serbian generals were indicted for war crimes. The case of Slobodan Milosevic may take as long as five years, in part because his offenses were committed in Kosovo, Croatia, and in Bosnia-Herzegovina, and also because he has insisted on serving as his own lawyer.[293]

Ten years after the founding of the Tribunal, Judge Antonio Cassese, the Court's first president since 1994, reflected on the "troubled history" of the Tribunal.[294] He commented "most people did not consider, except the Americans and the French, the tribunal a viable solution... even the staff were downhearted." Things did not improve quickly and it was three years before the first trial was held, that of Dusko Tadic, on 7 May 1996. While the court had been formed, in part, to deter any more war crimes, two years later the slaughter at Srebrenica occurred while the court was in session.

The ad hoc Tribunal for crimes in Rwanda

In September 1994, the Government of Rwanda requested the Security Council to establish an international tribunal for "the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law."[295] On November 8, 1994, the UN Security Council issued Resolution 955 which created the Tribunal. The structure of this new Tribunal followed that of the Tribunal for the Former Yugoslavia. Richard Gold-

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292. "Bosnian Camp Chief Gets 23 years," *Institute for War and Peace Reporting*, December 19, 2003.
293. "Milosevic Trial Faces Long Haul," *Institute for War and Peace Reporting* February 28, 2003.
294. "Cassese Reflects on Hague's Troubled History," *Institute for War and Peace Reporting*., January 29, 2003.
295. Resolution 955, Article 1.

stone of South Africa was appointed the Chief Prosecutor and Honore Rakotomana, of Madagascar, was appointed the Deputy Prosecutor. The Tribunal was to prosecute persons responsible for genocide and other serious violations of the laws of war committed in Rwanda and in the territory of neighboring states between January 1, 1994 and December 31, 1994. The latest atrocity with its minority (15%) Tutsi population and majority (85%) Hutu population began when an airplane carrying Rwandan President Juvenal Hamyarimana and Burundi President Cyprien Ntyamira was shot down over Rwanda's capital city, Kigali, April 6, 1994, killing both presidents. On July 18, 1994, the Tutsi declared victory over the Hutus and established a new government of national unity. After three months of war, between 500,000 and 1 million had been slain, mostly Tutsi, and over 2 million refugees, mostly Hutu, had fled to neighboring countries, about half of them to Zaire. After about a year in exile in Zaire, the accused perpetrators of genocide rearmed themselves, preparing to return to Rwanda.

Before this slaughter, Rwanda had about 300 magistrates. After the war only about 40 remained alive. The new president, Faustin Twagiramunga, who did not plan to use the Tribunal, said that he would welcome assistance in setting up domestic trials with foreign judges and lawyers who could function under Rwandan law.[296] It is noteworthy that under Rwandan law the guilty could receive capital punishment (a sentence forbidden under the SC Tribunal).[297] About 30,000 suspects filled the Rwandan jails and the shattered legal system was unable to deal with the situation.[298]

On December 12, 1995, the Tribunal announced its first indictments against eight suspects, charging them with genocide and crimes against humanity. As of March 1996 the Tribunal had issued 10 indictments, although none of the accused were actually in custody.[299] By 1998, 130,000 suspected war criminals were interred in Rwandan jails and the Rwandan courts (independent of the Tribunal) had convicted only 350 alleged offenders. One-third of these received the death penalty and the first 22 executions were carried out April 24,

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296. "Rwanda needs speedy trials," *Peace Watch*, United States Institute for Peace, December 1994.
297. Arming Rwanda: The Arms Trade and Human Rights Abuses in the Rwandan War, Human Rights Watch Arms Project, January 1994, Volume 6, Issue 1.
298. Rwanda/Zaire: Rearming With Impunity International Support for the Perpetrators of the Rwandan Genocide, Human Rights Watch Arms Project, May 1995, Volume 7.
299. American Bar Association Journal, April 1996, pp. 55-62.

1998. Although a small number were acquitted, most of the others received prison sentences. Some officials believed that these executions prompted at least 2,000 prisoners to confess in exchange for leniency. If, in the confessions, they implicated and helped to convict the leaders of the genocide, their sentences could be significantly reduced.[300] Three accused were being held by Belgium, and Zambia was holding two accused. On January 10, 1997, the first case came before the Tribunal, which met in Arusha, Tanzania. The case was against Jean Paul Akayesu, a local government official accused of ordering mass killings in his area. By January 17, 1997, a woman who testified against Akayesu was murdered, along with her husband and seven children, by Hutu extremists. On that same date in a Rwanda court François Bizimutima was convicted and sentenced to death for his role in genocide. As an indication of the lack of civil order, Vincent Nkezazaganwa, Rwandan Supreme Court Justice, was gunned down at his home. On January 24, 2000, Elizaphan Ntakirutimana, a Seventh Day Adventist minister, came before the Tribunal charged with having invited a large group, mostly Tutus, to seek refuge in a church and hospital, and then taking part in a gun and machete slaughter of all of them. On March 7, 2000, the French authorities at Bourges, France, arrested Jean de Dieu Kamuhanda, former Minister of Culture and Higher Education, and transferred him to the UN Detention Facility in Arusha. He was charged with genocide, conspiracy to commit genocide, and crimes against humanity.

On February 15, 2000, Prosecutor Carla Del Ponte announced the arrest of two air force officers, François-Xavier Nzuwonemeye (in his home in Montanban, France) and Innocent Saga Hutu (from his home in Ringkjobing, Denmark). These events illustrate a high degree of cooperation with several nations to support the Tribunal.

The International Criminal Court (ICC)

On December 9, 1948, the UN General Assembly adopted a *Convention on the Prevention and Punishment of the Crime of Genocide* which called for individual criminals to be tried "by such international tribunals as may have jurisdiction." Members of the General Assembly (GA) asked the International Law Commission (ILC) to investigate the possibility of establishing an International Criminal Court. This new court would have the power to prosecute individuals,

300. "Rwandan court sentences 35 for involvement in genocide," The Associated Press, 06/07/98.

much as the Nuremberg and Tokyo trials had, and as the ad hoc Tribunals for the Former Yugoslavia and Rwanda now both have. In 1949 the ILC drafted a preliminary statute but the Cold War blocked the effort, primarily until the GA could agree on the definition of the crime of aggression and had established an international Code of Crimes. In December 1981, the GA asked the ILC to reconsider the idea of an ICC. In June 1989, Trinidad and Tobago urged the creation of such a court, in part to combat drug trafficking, and the GA again asked the ILC to prepare a draft. The law commission submitted a final draft to the GA in 1994 and the General Assembly recommended that a conference of plenipotentiaries be convened to negotiate a treaty to enact a statute for the court.

After many meetings a Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held June 15 to July 17, 1998 in Rome. The Statute for the court was opened for signature by all states present in Rome at the Headquarters of the Food and Agriculture Organization of the UN on July 17, 1998. Thereafter, it was opened for signature in Rome at the Ministry of Foreign Affairs of Italy until October 17, 1998, and after that date, the Statute was open for signature in New York at UN Headquarters. The member states overwhelmingly approved the Statute. As of December 1999 the Statute for the ICC was supported by a vote of 120 aye, 7 nay, and 31 abstentions. The 7 nations voting against the treaty were: US, China, Iraq, Israel, Libya, Qatar, and Yemen. The Statute would not take effect until at least 60 nations had ratified it. Senegal was the first nation to ratify and Italy was the second. The US signed the treaty in December 2000 under the Clinton administration, but the Senate has not ratified the treaty as of 2005. In May 2002, the G. W. Bush administration intimated that they might "unsign" the treaty.

Sixty nations had ratified the Court by April 11, 2002, so that from July 1, 2002 onwards any acts of genocide, war crimes, crimes against humanity committed after this date could be tried by the Court. By July 2003, ninety nations had ratified the ICC. Of the big five nations, only the United Kingdom ratified the ICC without reservations. Russia and China ratified, once the right to opt out of the Court's jurisdiction for seven years became part of the treaty. Since the vote in favor of the court was overwhelming, all the rest of the nations became automatically signatories. It remains the case that the US Senate has not ratified the Court.

In July 2002 a Preparatory Commission oversaw the creation of an advance team composed of eight experts from around the world, who built the necessary infrastructure. This ranged from security measures, construction of a courtroom,

communications networks to media and supporting states, and relevant non-governmental organizations. The Assembly of States Parties met for the first time in September 2002 and adopted a budget, nomination and election procedures for the judges and prosecutors. The first official of the Court appointed was the Director of Common Services, Bruno Cathala, who took office October 15, 2002. In February 2003 the Assembly of States Parties met to elect the first eighteen judges of the Court (seven women and eleven men). The judges were sworn in at the Hague March 11, 2003, and they then elected from their midst Philippe Kirsch of Canada as President; Akua Kuenyehia of Ghana as the first Vice-President; and Elizabeth Odio Benito of Costa Rica as second Vice-President. In April they elected as Prosecutor Luis Moreno Ocampa of Argentina.

The Initial draft of the ILC for the Court stated that the Court would be independent of political pressures, and in particular independent of the Security Council veto. However, the US, China, Russia, and France led an effort to require the ICC to defer both to prior Security Council approval and to the national courts of the offenders. This meant that if a national court of the offender was already considering the case, then the ICC would be prevented from pursuing the case. Only the UK of the "big five" waived these preconditions. This matter was the subject of a US Senate Hearing titled, *Is A UN International Criminal Court in the US National Interest?*[301] Senator Rod Grams, chair of the subcommittee, insisted, "the United States must aggressively oppose the court each step of the way, because the treaty establishing an international criminal court is not just bad, but I believe it is also dangerous."[302] Grams considered the threat of military action a better deterrent than a court. He continued, "Should this court come into existence, we must have a firm policy of non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its ruling and absolutely no referral cases by the Security Council."[303]

The primarily Republican displeasure with the idea of an ICC was conveyed in the US House of Representatives by Resolution #2381, passed under the title, "*Protection of United States Troops from Foreign Prosecution Act of 1999*." It prohibited the US from giving any economic assistance to any country which ratified the ICC. The President was urged to instruct the US representative on the Security Council to veto any attempt to establish such a court. Senator Jesse

301. Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, US Senate, 105th Congress, 2nd Session, July 23, 1998.
302. *Ibid.*, p. 1,
303. *Ibid.*, p. 3-4.

Helms said that the idea of such a court would be "dead on arrival."[304] John R. Bolton, former Assistant Secretary of State for International Organizations Affairs and Senior Vice-President of the American Enterprise Institute, stated: "we should not support any effort to consolidate the work of the existing tribunals for Yugoslavia and Rwanda into the ICC."[305]

Ambassador David Scheffer, the senior US State Department negotiator in the discussions, warned that since the US is the "self appointed leader in humanitarian intervention," we would never accept the idea that any of our soldiers would ever be prosecuted for actions in the over 60 US military interventions conducted since the end of World War II.[306] But if US soldiers in Vietnam, Afghanistan, Iraq, or Panama are protected from prosecution, then why not also Russian soldiers in Afghanistan or Chechnya, or soldiers of Pol Pot in Cambodia or East Timor? Official US administration opposition to the ICC was voiced also by Bill Richardson, then the US ambassador to the United Nations, who shared the views of Bolton, Helms, and Scheffer that the ICC must be subservient both to the Security Council and to the American courts. Indeed, Richardson advocated that the ICC should be independent of the United Nations itself.

On the other hand, Michael P. Scharf, Professor of Law and Director of the Center for International Law and Policy of New England School of Law, testified on behalf of a strong ICC.[307] He reminded the Committee of the acts of Hitler which had prompted the Nuremberg Tribunal and warned that the failure to bring new offenders to justice would encourage further tyrants. He noted that the US opposition to the Court was not shared by virtually any other nation in the world.[308] He noted that both the Yugoslavia and Rwanda ad hoc tribunals were significantly active and had been successful in awarding indictments.

As the ICC Statute stands at present, nations can avoid having their own soldiers prosecuted by the Court by claiming that their own courts are already prosecuting the cases. While the Security Council vetoes cannot be used against ICC actions, the Security Council could deny the Court of any particular case by a general vote. This has not happened to date. Any nation is permitted to "opt

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304. *Ibid.*, p. 8.
305. *Ibid.*, pp. 59-64.
306. *Ibid.*, pp. 10-15.
307. Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irvington on the Hudson: Transnational Publishers, Inc., 1995).
308. *Ibid.*, p. 35.

out of the Court" for a period of seven years. Only after this seven year delay may the Court then proceed to prosecute.

Another contentious issue prompting the US, and some other nations, to reject the jurisdiction of the Court was the question over what kinds of crimes the Court should have jurisdiction. The International Law Commission initially proposed that the ICC would have jurisdiction over the same crimes as at the Nuremberg and Tokyo war crimes trials, namely: crimes against the peace, war crimes, and crimes against humanity. Through efforts, chiefly of the US, a distinction was made between those crimes over which the Court had "inherent jurisdiction" (meaning the Court could proceed without approval from national courts or the Security Council) and those over which national courts or the Security Council had prior authority.

A first casualty was the deletion of crimes against the peace as one of the crimes over which the Court had "inherent jurisdiction." This move made it impossible for the Court to pursue the charge of aggression. In any case, the US continued to insist that the term "aggression" was too ambiguous to be the basis for a war crime. Article 5 of the Statute provides that the Court will, in the future, exercise jurisdiction over aggression once an amendment is crafted which resolves the present ambiguity. However, the treaty does not allow any amendments for a period of seven years after the treaty comes into force, so that the issue is a long way from resolution.

Another casualty was the denial that the Court had "inherent jurisdiction" over war crimes and crimes against humanity. This requirement left the Court impotent unless the Security Council and the relevant national courts gave their approval. In addition, the US was active in deleting the "intentional starvation of civilian populations as a crime." This protected the American policy of embargos against Iraq and Cuba from being crimes, even though the consequences, especially in Iraq, were well known to be massive civilian casualties from disease and malnutrition. Furthermore, the US insisted that war crimes or crimes against humanity had to be "widespread or systemic" before they could be considered criminal. The discovery that, prior to the Rome meetings, the Pentagon had been lobbying foreign military attaches to disapprove the mandate prompted Director of Human Rights Watch Kenneth Roth to write Secretary of Defense William Cohen, expressing concern that the Pentagon was "appealing to the worst instincts of some of the worst abusers of human rights."[309]

As it now stands the Tribunal can impose only one kind of penalty: imprisonment for a limited amount of time. No general agreement exists on life impris-

onment. Latin American countries generally oppose life imprisonment as "cruel and unusual punishment" as well as being inconsistent with the idea of rehabilitation. On the other hand many Arab states, plus non-Arab states like Nigeria, Rwanda, and Trinidad and Tobago, strongly favored life imprisonment. After much debate the maximum sentence was limited to 30 years. To mitigate the effects of the 30-year sentence a provision (Article 110) for mandatory review after a person had served 25 years was included. The Tribunal may, in addition to the prison sentence, impose fines or forfeiture to make reparations to the victims (Article 73). The French had proposed that the ICC could demand states to pay damages, but this was dropped at the initial Rome meetings. The crimes have no statute of limitations and only crimes committed after the Statute came into force can be processed. The Nuremberg and Tokyo trials could not have been conducted had this been a precondition.

Assessments of the ICC

The introduction to the Human Rights Watch commentary on the results of the Rome Conference[310] identified seven questions that needed to be answered if the ICC was to be considered to be a fair and independent judicial institution. These questions were:

A. Do states have to accept the jurisdiction of the Court?

Initial proposals had urged allowing states the right to accept or reject jurisdiction on a case by case process, but this was rejected. The present status of the Statute is that if a state accepts the jurisdiction of the Court, it must do so for all cases. An exception to this appears in Article 124, which allows states the right to opt out of the jurisdiction for a period of seven years, for any crimes committed on their own territory or by their own nationals. The seven year period starts from the date of approval into force of the state in question. The seven year period is not renewable. However, Article 12 raises a further serious limitation. In cases other than Security Council referrals, the ICC will be able to act only if, *either* the state on whose territory the crime was committed *or* the state of the accused is a state party or has accepted the jurisdiction of the Court over the crime on an *ad hoc* basis, if it is not a party. The result of this distinction is that

309. Jim Lobe, "Protests Over Pentagon Lobbying on ICC," *IPS Report*, Washington, April 15, 1998.

310. Justice in the Balance: Recommendations for and Effective and Independent ICC, (Human Rights Watch)

citizens of a state that does not accept jurisdiction can commit crimes with impunity and the country in which the crimes were alleged to have been committed will have no juridical aid. The only current relief from this depends on the willingness of the Security Council to make referrals. Article 16 is a compromise between the view that permanent members of the Security Council would have a veto and the original ILC view that the Security Council had no vote at all. Thus, although no veto is allowed, the entire Council by a vote of nine members could block a case.

B. Who can refer a case to the Court?

The initial plan was to have a Prosecutor independently able to initiate proceedings on his/her own motion (*propio motu)* The resulting revised Statute allows the ICC Prosecutor to investigate allegations by referral of the Security Council (SC) but also on information from victims, non-governmental organizations, or any other reliable source. Thus, the failure of the SC to approve an investigation does not preclude Court action (Article 15). If the Prosecutor believes that the case should proceed, this decision is subject to pre-trial judicial approval. Challenges are permitted before any investigation has been undertaken. Once the Pre-Trial Chamber has made its decision, no challenges as to admissibility are permitted. However, if the Security Council does not refer a case, the present Statute leaves the Prosecutor severely hampered.

State parties and the Security Council may refer situations to the Court but may not name individual offenders. Once the Court accepts a case it decides which individuals warrant investigation. This hopefully avoids needless politicizing. Article 122 states that referrals by the SC are particularly significant since they bind all states whether or not they are parties to the Statute, and this avoids the necessity to get state approval.

C. What checks exist on prosecutorial discretion?

Some feared that the Prosecutor would have too much power. Article 53 spoke to such fears. Before initiating an investigation the Prosecutor must satisfy himself/herself that a reasonable basis exists for a trial. If the Prosecutor decides that no basis exists for a trial, he/she must inform the Trial Chamber and the referring party (either a state or the SC). The referring party may request the Pre-Trial Chamber to review the decision of the Prosecutor. No trial may proceed in any case unless the Chamber approves.

D. Can national courts supersede the ICC?

Many states still believe that the ICC should not be a substitute for national courts. Thus, if the national court of the accused (e.g., Milosevic of Yugoslavia) claimed that it was already dealing with the case domestically, then the ICC was forbidden to take on the case. This would also be the situation as we wait for Iraq to decide when and how to prosecute Saddam Hussein. Article 18 (proposed by the US) provided that when a situation has first been referred to the ICC, and if the Pre-Trial Chamber has approved that it was reasonable to proceed, then the Prosecutor must notify all states that would normally be expected to exercise jurisdiction of the Court's intention. Following this disclosure, any state whether it is a party or non-party to the Treaty, may inform the Court that it is dealing with the matter domestically. The Prosecutor will then defer to the state court, unless the Pre-Trial Chamber authorizes the ICC to continue with its investigation. This deferral to the state court is open to review by the Prosecutor in six months or at any earlier time when the state has demonstrated unwillingness or inability to carry out a genuine investigation. Such a demonstration is not easy to establish.

Under Article 17, states have another opportunity to challenge the admissibility of cases where no state has decided to proceed. Such decisions may be brought to the Appeals Chamber. Unfortunately the requirement in the first draft that states notify the Court of their proceedings was deleted in the final draft.

E. What Crimes may the ICC prosecute?

Article 5 of the Rome Treaty which established the ICC gave the Court jurisdiction over three crimes: genocide, crimes against humanity, and war crimes.

Genocide

The definition of genocide was taken from the 1948 UN "Convention on the Prevention and Punishment of the Crime of Genocide." The UN General Assembly had already declared in Resolution 96, dated December 11, 1946, that genocide is a crime under international law and that it is contrary to the spirit and aims of the United Nations. Article 2 of the 1948 Genocide Convention defines genocide as the commission of any acts with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such," namely:

A. Killing members of the group.

B. Causing serious bodily or mental harm to members of the group.

C. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

D. Imposing measures intended to prevent births within the group.

E. Forcibly transferring children of the group to another group.

Persons charged with genocide will be tried by a "competent tribunal" of the State or territory in which the acts were committed or by an international tribunal which is recognized by the State in question as having jurisdiction. At that time no such international court existed. The UN definition of genocide has at least two troubling aspects: 1) it excludes types certain of one-sided massacres, called "politicides" (e.g. the killing of the kulaks under Stalin), and "auto genocides" (e.g. the slaughter of the Kampucheans by Pol Pot and the Khmer Rouge), and 2) it excludes political groups and social classes.[311]

Although President Harry Truman urged the Senate to support the Genocide Convention, it did not. No action on this matter was taken under the administrations of Eisenhower, Kennedy, or Johnson. The Senate was urged by President Nixon February 19, 1970 to consider the matter, but it was tabled prior to the adjournment of the 91st Congress. President Carter urged support in a letter to Congress May 23, 1977. In the "Genocide Convention Implementation Act of 1988" the Convention was finally voted on favorably by the Senate once genocide was made a crime under US law.[312]

The willingness to practice genocide is a phenomenon which has been seriously discussed.[313] The early US doctrine of "massive retaliation" intended to cause the death of possibly hundreds of millions of persons; American leaders did not seem to find anything wrong with that prospect. Herman Kahn was once asked how many deaths he could accept as "thinkable" or proportional in a nuclear exchange, and his reply was "up to 90 million."[314] Kahn commented that

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311. Wells, *Encyclopedia*, pp. 165-169, "Genocide," by Robert Paul Churchill.
312. *Genocide Convention Implementation Act of 1988*, 100th Congress, 2nd Session, House of Representatives.
313. Robert Jay Lifton and Eric Markusen, *The Genocidal Mentality* (New York: Basic Books, 1990).
314. Walter F. Hahn and John C. Neff, *American SSrategy for he Nuclear Age*, Herman Kahn, "The Nature and Possibility of War and Deterrence," (New York: Doubleday, 1960) p. 221.

while nuclear war might cause a high level of pre-natal death, this would only be a personal and not a social tragedy.[315] In war times, some intellectuals have philosophized that every enemy deserves to be killed. The invention of the airplane and the resulting possibility of aerial warfare began the process of "psychic numbing," so that we were able to bomb civilian centers deliberately and without dismay. Our evil actions have become anonymous. We have developed what the authors called "an Auschwitz mentality."[316]

Crimes against humanity

A group in the Arab League, supported by India and China, attempted to introduce the premise that lonely crimes against humanity would still be counted as crimes against humanity. The prevailing view, however, insists that the acts had to be widespread before they would count, with the result that the Arab League proposal was defeated. Article 7 of the Genocide convention, for example, stated that the acts had to be widespread, systematic, and consist of multiple acts. In spite of opposition from the Vatican and the Arab nations, the definition of genocide included rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or "any other form of sexual violence of comparable gravity" (Articles 7 and 8 Statute of the ICC).

War Crimes

Article 8 of the ICC Statute gives separate lists for national and international war crimes. The international list contains 34 crimes, while the non-international list contains 16 crimes. These all come essentially from Hague and Geneva Conventions. Unfortunately, among the compromises was the deletion of some crimes provided for in Protocol II of the Geneva Conventions of 1977, for example the intentional starving of civilians through embargoes was deleted. The US had been especially involved in this deletion since our embargos of Iraq and Cuba would have constituted war crimes. As is the case for crimes against humanity, war crimes had to be committed on a "large scale" and as part of a "plan or policy" before they would qualify as war crimes.[317]

315. Herman Kahn, "The Case for Shelters," in Seymour Melman (ed) *No Place to Hide* (New York: Grove, 1962) pp. 56-57.
316. Lifton and Markusen, *Ibid.*,
317. "The Rome Treaty for an International Criminal Court" *International Criminal Court Briefing Series*, Volume 2, No. 1

F. How will the Court be financed?

The current Statute lists three sources of funds. (1) Assessed contributions by states parties to a case (Article 115). (2) The UN General Assembly may provide special funding in those cases referred by the Security Council. (3) Article 116 provides for voluntary contributions both by states and by non-governmental organizations. It was suggested that only those states which were party to the Court should have to pay, but this was defeated since it might dissuade nations from participating in the Court. The proposal that the Court expenses should be part of the UN regular budget could have the unfortunate consequence of prompting the US Senate to recommend another round of withholding the national dues.

G. Are the rights of the accused protected?

It was the judgment of Human Rights Watch that the rights of the accused and the victims are protected.[318] Article 55 deals with the rights of suspects and Article 67 deals with the rights of accused persons. The Statute was judged to maintain an adequate balance to protect victims without infringing on the rights of the accused. Articles 68 and 69, on evidence, allow for in-camera hearings and recorded testimony as long as they do not impinge on the rights of either the accused or the victims. Article 60 deals with concern over lengthy pre-trial detention and ambiguously prohibits an “unreasonable period.”

On the plus side, the prosecutor is obligated to investigate both incriminating and exonerating evidence and to make such evidence available to the defense. Furthermore, the Pre-Trial Chamber must hold a hearing before trial begins to confirm that sufficient evidence exists to establish substantial grounds that the accused committed the crime in question. The final version does not allow for trials *in absentia* (Article 63).

The Future of the ICC

An Inter Press Service release dated 14 May 1998 carried the headline, “Can the Criminal Court Survive Without the United States?”[319] The author, Jeffrey Laurenti, Executive Director of Policy Studies for the United Nations Associ-

318. Human Rights Watch Summary of t he Key Provisions of the ICC Statute, September 1998.

319. Jeffery Laurenti, “Can the Criminal Court Survive without the United States?” 14 May 1998.

ation for the USA (UNA-USA), a non-government support group for the UN, remarked: "my own sense is that you don't have to have the United States ratify the Court in the first two or three years to get it going." He suggested that if the Court had some successes in its early years, the United States might be tempted to join. The Court, however, still seems to represent to many Republicans the worst aspect of UN potential power. Marc Thiessen, Senator Helms' spokesman, announced that "Helms considers the ICC to be the most dangerous threat to sovereignty since the League of Nations.[320]

Brent D. Schaefer of the Heritage Foundation shared Helms' view and concluded that the ICC "poses serious threats to US sovereignty and security"; he recommended that the President and Congress declare "unequivocally" that "they will not participate."[321] John R. Bolton, also of the Heritage Foundation branded the ICC as a "product of fuzzy minded romanticism."[322] An article by the Conservative Caucus feared that "American soldiers around the globe could be hauled before international judges on politically motivated charges."[323] Since the preponderance of war crimes are committed by soldiers who assume that they are on "legitimate military missions," it seemed obvious that soldiers would be the primary targets of any criminal court. Bolton suggested the alternative of having such soldiers tried by the same officers who sent them on their mission, an option already provided for in the Statute.[324]

On the other hand, support for the Court was reported by the Institute for Public Accuracy — which spoke to the US State Department concern that the ICC would be able to prosecute American soldiers on peacekeeping missions.[325] Phyllis Bennis, a fellow at the Institute of Policy Studies and the author of *Calling the Shots: How Washington Dominates Today's UN*, stated, "The Pentagon claims that they're against this treaty because they have so many troops on humanitarian

320. *Is A UN International Criminal Court in he US National Interest?* Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, US Senate, 105th Congress, 2nd Session, July 23, 2998. p. 8.
321. *The International Criminal Court: Threatening US Sovereignty*, Heritage Foundation Executive Memorandum, No. 537, July 2, 1998.
322. "Why An International Criminal Court Won't Work" *Wall Street Journal*, March 30, 1998.
323. Proposed UN Court Would Have Authority to By-Pass US Government and Prosecute American Citizens Without Constitutional Protection, Howard Phillips Issues and Strategies Bulletin, June 30, 1998.
324. Gregory Stanton, "End Imperial Impunity", Rome Press release, July 17, 1998.
325. "Backers of International Court Challenges Nay Sayers," *Institute for Public Accuracy News Release*, July 17, 1998.

missions. In reality, US troops are disproportionately absent from peacekeeping missions. The White House doesn't want a Court whose findings could be used to mobilize opposition in case of future US interventions."[326] Such interventions on the part of the US are not, however, likely to be peacekeeping missions; they are pre-emptive wars. Francis Boyle, professor of international law at the University of Illinois, College of Law, remarked, "The idea that US soldiers on peacekeeping missions could be prosecuted under this is completely bogus. What they really want to do is still make it possible for US soldiers, as well as civilians who conduct offensive, illegal operations, to escape jurisdiction. The Pentagon is concerned that future military operations such as its invasion of Grenada and Panama and its bombings of Tripoli and Benghazi would be found to be criminal."[327]

Oddly, the current Statute lists the use of biological and chemical weapons as war crimes, but permits the use of nuclear weapons. Alyn Ware, Executive Director of the Lawyers Committee on Nuclear Policy, observed that such a distinction would "create the ludicrous anomaly that the Court would have jurisdiction if someone killed one person with a poisoned arrow, but not if the person incinerated a hundred thousand with a nuclear weapon."[328]UNICEF Executive Director Carol Bellamy commented, "The good news is that the Court will come into being. The bad news, however, is that there are elements in the statute itself which could deny or severely delay justice for many children and women."[329]The problem is that nations are able to opt out of the acceptance of jurisdiction of the Court for seven years. She noted that this meant that those who have stolen Dinka children in southern Sudan can continue with impunity, and that the maiming, kidnapping, and slaughter at the hands of Joseph Kony and the Lord's Resistance Army can proceed. She also expressed UNICEF's opposition to the idea of setting the age at which children can be recruited into the army without it being a war crime at 15 rather than 18. In spite of these reservations she saw the current Statute as valuable progress.

326. Phyllis Bennis, *Calling the Shots* (New York: Olive Branch Press, 2000) pp. 81-85.
327. Loc cit.
328. cf. www.igc.org/icc
329. "Rights: UNICEF's Mixed Feelings Over New Criminal Court," *World News Inter Press Service* (United Nations, July 20, 1998.

Chapter V. Establishing Justice in the World: The Special Case of the ILO Versus GATT, NAFTA, and the WTO

The Preamble to the UN Charter begins with the announcement, "We the peoples of the United Nations determined to save succeeding generations from the scourge of war which twice in our lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and promote social progress and better standards of life in larger freedom." (See the appendix on the related UN agencies through which the UN does its work.)

Eighty percent of the efforts of the UN are in this area, and the varied goals are pursued through a variety of its agencies such as the Children's Emergency Fund (UNICEF), the World Health Organization (WHO), the Commission on Refugees (UNHR), the Commission on Human Rights (CHR), the Commission on the Status of Women (CSW), the Conference on Trade and Development (UNCTAD), Technical Assistance for Developing Countries (UNDP), Food and Agriculture (FAO), and the International Labor Organization (ILO). The genius of the United Nations is that 191 nations work on these problems collectively. The task has not been all clear sailing. Not every member has the interests of the planet at heart, or not in equal measure. The same selfish economic values which continue to undermine democratic societies also contaminate many of the UN

projects to promote human rights. A glaring illustration of this kind of conflict in the search for international justice through the UN is the history of the relations between the International Labor Organization (ILO), which is an official UN agency, and the World Trade Organization (WTO), which is not an official UN agency.

The primary concerns of the ILO have been with wages, hours, job safety, job security, and the environment. The primary concerns of the WTO have been with profit and with satisfying stockholders. The ILO works for wages as high as possible, while the WTO works for wages as low as possible. Thus, gains for one will be losses for the other and history bears this out. The ILO goals interrelate with other UN agencies like UNICEF, UNCTAD, UNIFEM, WHO, IFAD, UNEP (Scientific Research on the Environment), and UNDP, to mention a few. WTO and NAFTA, however, have has been more compatible with the World Bank and the International Monetary Fund, which they attempt to use to advance the idea that ILO concerns with human rights and the environment are not issues which the WTO needs to worry about. A conflict persists between the social justice concerns of the United Nations Organization and the economic concerns of the business community. It is a conflict between the United Nations' search for workers' rights and the preservation of the environment, on the one hand, and, on the other hand, business concerns with profits and the need to satisfy the desires of shareholders for returns on their investments.

Background of the Concerns of Labor

The rise of industrialism in the 18th century created large factories and produced a class of workers who sold their labor and another class which profited from buying the products of such labor. This new economic system created a work situation in which two classes existed whose concerns were in basic conflict. The aim of the employee was to get the highest wage possible or at least a wage that provided adequate food, clothes, housing and the cultural and educational opportunities associated with the "good life." The aim of the employer was to get labor at the lowest cost possible in order to maximize profit. Some compromise could have been reached, and these differences could have been reconciled if the employers had embraced the well being of the workers and the health of the environment as necessary concerns, and had the employers trimmed their profits and accepted salaries more comparable to the workers' wages. The discrepancy could have been avoided if the profits of the stockholders and the salaries of CEOs had exhibited some plausible balance with the workers' wages.

This did not occur, and the result was that employers became very rich and workers became very poor. The economic system, thus, created a more solidly "class-based" society.

The poverty and misery of the masses and the general lack of concern on the part of the few wealthy was a dominant theme in the English novels of Charles Dickens (1812-1870). In later years it was pointed out that, for the first time in history, an economic system had been created which undermined the social fabric. For the first time in history, a "new type of economy in which the prices of all goods, including labor, changed without regard to their effects on society"[330] was coupled with a democratic political and social system. This meant that from the very start this new economic system worked at odds with democratic political and social values.[331]

At the beginning of the 18th century in London the demand for "casual child employment" led to the establishment of a Child Market in Bethnal Green, where up to 300 children, aged 7-10, gathered every Monday and Tuesday to be hired for a few hours or days.[332] This practice lasted until the beginning of the 19th century when, in an effort to curb child exploitation, England passed the Factory Health and Morals Act (1802) which targeted woolen mills and reduced [*sic*] the work day to 12 hours. In 1833, an Act was passed, limiting the work day for children 9-13 to no more than 9 hours, while children 14 and older could work 12 hours a day.

Early protests against the exploitation of the workers arose from what is called a "socialist" tradition. The socialist Robert Owen (1771-1858), the successful head of the New Lanark mills in Scotland, was sensitive to the grim circumstances of his workers and took steps to ease their condition. He improved the streets of his company town, enlarged and improved workers' housing, and provided better and cheaper food in his company stores. He "reduced" the working day to 11 hours and stopped employing children under 10 years of age.[333] He was, however, an exception to the prevailing practices.

Another early critic was an English socialist, William Cobbett (1763-1835), who, after the Luddite riots of 1811-1812 took up the grievances of both agricultural and industrial labor. He publicized his concerns in a pamphlet, *Slavery in the*

330. John N. Gray, *False Dawn* (New York: The New Press, 1998) p. 1.

331. cf. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957)

332. Sandy Hobbs, Jim McKechnie, and Michael Lavalette, *Child Labor: A World History Companion* (Santa Barbara: ABC-CLIO, 1999)

333. Donald O. Wagner, *Social Reformers* (New York: Macmillan, 1937) pp. 182-183.

West Indies Compared With "Free Labor" in England, which challenged the proposal of William Wilberforce (1759-1833) to make English workers as "well off" as the slaves of the Indies. Cobbett bitingly commented of the British workers that "these poor, mocked, degraded wretches would be happy to lick the dishes and bowls, out of which the Black slaves have breakfasted."[334]

Charles Fourier (1772-1837), a middle class French socialist, first became involved in political issues while living in the highly industrialized city of Lyons. The city was embroiled in strikes, unemployment, and violent class conflict. His solution was to advocate the formation of experimental communities where the needs of all would be met. While his experiments failed, his influence continued, especially due to the criticisms he leveled at some of the consequences of capitalist society including wage slavery, the increased gulf between rich and poor, and the economic and social breach between city and country workers.

Charles Kingsley (1819-1875), a socialist Anglican clergyman, was shocked by the violence which had accompanied the Chartist petition to Parliament and responded to the grievances of the demonstrators. He issued a proclamation to the Workingmen of England as "A Working Parson," and by his writings contributed to the tradition of Christian Socialism.[335] He concentrated on evils in the clothing industry and condemned the "slavery, starvation, waste of life, year long imprisonment in dungeons narrower and fouler than those of the Inquisition, which exist among thousands of free English clothes-makers at this day…."[336] He was followed in this Christian Socialist tradition by Wilhelm Emmanuel Von Kettler (1811-1877), a Roman Catholic priest, who criticized individualism and laissez faire economics in a series of books and pamphlets, notably *The Labor Question and Christianity* (1864). He observed that employers, in a market of surplus workers, pitted workers against workers to see who would work for the lowest wage. He "denounced the evil passions, the competition, and the avarice of society." [337] Pierre Joseph Proudhon (1809-1865), a socialist influenced by Von Kettler, condemned the devastating consequences of the amassing of public property for private use, condemned the renting of that property and coined the phrase, "property is theft."[338] These ideas influenced Louis Blanc

334. *Ibid.*, p. 131.
335. *Ibid.*, pp. 253-271.
336. *Ibid.*, p. 256
337. *Ibid.*, p. 273.
338. *Ibid.*, p. 315.

(1811-1882), Karl Marx (1818-1883), and a host of "social gospel" clergy and laity in the 19th and 20th centuries.

The rise of labor unions at this time was a major expression of the public concerns that spoke to the injustice of this disparity between the incomes of labor and management and the subsequent gulf between the standards of living of the two classes. The rise of labor unions in the latter part of the 19th century was an effort to bridge this economic and social chasm. Indeed, it was the labor movement which provided the basis for the great middle class.

The United States was slow to show concern for the worker's plight. In 1847, New Hampshire became the first state to establish legislation to "limit" [*sic*] the work day when they set 10 hours as the maximum. In 1852, Ohio barred women and children from working more than 10 hours a day. Georgia "limited" the workday to the period from sunrise to sunset.[339] In 1896, fifteen states prevented employers from hiring children under 15 who had not attended at least three months of school in the preceding year. The International Ladies Garment Workers Union was founded in 1900 and other unions followed; however, management consistently used legal weapons like court injunctions to break strikes and counted on the loss of pay to break striking workers' morale. On July 3, 1835 the first strike occurred in the US to limit the work day for children at the silk mills in Paterson, NJ to 11 hours a day for a six day week. In July 1851, two railroad strikers were shot and killed by the state militia in Portage, NY. On January 13, 1874, in New York City, mounted police charged a demonstration of unemployed men, women, and children, beating them with billy clubs. On June 21, 1877, ten coal mining union organizers were hanged in Pennsylvania. On May 1, 1888, the governor of Wisconsin ordered the state militia to fire on 2000 Polish strikers in Rolling Mills, killing five. On November 22, 1909, 20,000 members of the International Ladies Garment Workers Union went on strike in New York City. The judge in the case told the arrested women and girls, "You are on strike against God." In 1913 John Kirby, President of the National Association of Manufacturers announced that "The trade union movement is un-American, illegal, and an infamous conspiracy."[340]

George Baer, president of the Philadelphia and Reading Railroad, stated at the time of the strike against the railroad, "The rights and interests of the labor

339. Elizabeth McKeon, *Workers Rights in A Global Economy* (New York: United Nations Association, 1999) p. 7/

340. Gerard Colby, "Decade of Despair," in *Du Pont Dynasty: Behind the Nylon Curtain,* (Lyle Stewart, 1984) pp. 347-357,

man will be protected and cared for, not by the labor agitators, but by Christian men to whom God in his infinite wisdom has given control of the property interests of the country and upon the successful management of which so much depends."[341] He was known as "Divine Right Baer" and is remembered for his closing remarks to the Anthracite Coal Commission in February 1903. "These men don't suffer. Why, hell, half of them don't even speak English."[342] Clarence Darrow, the lawyer for the striking miners, called him "George the Last," and he pointed out that most of the miners were recent immigrants and unable to speak English, but that this was irrelevant to their plight. On March 22, 1903, Darrow won the case and the miners were awarded a pay increase of 10% and an eight-hour day.

Finally, the US federal government entered the arena and in 1903 President Theodore Roosevelt signed legislation establishing a Department of Commerce and Labor, which recognized the rights of labor. The question was whether this right was no more than a hunting license.

The Birth of the International Labor Organization (ILO) under the League of Nations

The influence of the trade union movements in various countries provided a major stimulus to establishing the 1916 Labor Conference in Leeds, England and a similar conference in Berne, Switzerland in 1919. The results of these conferences were presented at the Paris Peace Commission which produced the Versailles Treaty and the League of Nations. On February 1, 1919, the Commission established an International Labor Organization (ILO) as part of the proposed League. Article 13 of the Paris Treaty included the League as part of the Versailles Treaty. The functions of the ILO were formalized in Article 427 at the first meeting of the Labor Commission.[343] Samuel Gompers (1850-1924), then President of the American Federation of Labor, led the drafting of the first ILO constitution. Fortunately, it was not known at that time that the US would not become a part of the ILO, since Gompers was clearly an ideal choice.

The first problem of the ILO was to determine the membership of the committee. It was decided that the ILO would be represented by nominees from labor, management, and government. Article 393 provided for a committee of 16

341. James O. Castagnera, "Workers Don't Suffer," *The Progressive Populist*, 2003.

342. *Ibid.*, p. 1.

343. John Tessitore and Susan Wolfson (eds), *A Global Agenda: Issues Before the 49th General Assembly of the United Nations* (New York: University Press, 1994), p. 35.

chosen by governments, 8 by employers, and 8 by labor. As a matter of fact most governments selected management persons with the result that the ILO normally consisted of 24 management persons and 8 labor persons. As a consequence, from the very beginning the labor needs were given a back seat and soon the ILO was formally separated from the League due to the desire of the business community to exclude the needs of labor and to avoid presenting labor with a platform from which to make its needs known. The first Labor Commission consisted of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the UK, and the US.[344]

A second initial problem was whether to issue Recommendations or Conventions. The latter were like treaties and required Senate ratification to become law in the US. Recommendations were friendly hopes, similar to later United Nations General Assembly Resolutions, which could be conveniently ignored. Between 1919 and 1934, the Commission issued 44 Conventions and 44 Recommendations. The US Senate ratified none of the Conventions and rejected most of the Recommendations. The first formal meeting of the Labor Commission was held in Washington, D.C., a source of some embarrassment since the US had not ratified the treaty which established the League of Nations under which the ILO functioned. Indeed, it was not until 1933 that a full delegation of four American observers participated in the work of the ILO.[345]

It was fitting that the first Director of the ILO was Albert Thompson, a major figure in the French Socialist movement. He was succeeded by Harold Butler of England (1932-38), who had served as deputy under Thompson; then John Winant, former governor of New Hampshire and advocate of the Civilian Conservation Corps (1934-41); Edward Phelan (1941-48) an Irishman and former member of the British Labor movement; and David Morse, an American, Chief Counsel of the Petroleum Labor Policy Board in the US Department of the Interior (1948-70). In 1941, due to the war and at the urging of President Roosevelt, the ILO office was moved to Montreal.

Since the US was not a member of the League of Nations, it was not surprising that the same United States congressional leaders who had rejected the League were never enthusiastic about the ILO from its inception. The major reason was, quite simply, that the American Federation of Labor and the US

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344. David A. Morse, The Origin and Evolution of the ILO and Its Role in the World Community (New York: Cornell University Press, 1969).

345. Francis Graham Wilson, *Labor in the League System* (Stanford: University Press, 1934).

Chamber of Commerce had radically different concerns and values. It seemed pre-ordained, therefore, that the US Senate rejected most of the ILO conventions. These included Convention 29 against forced labor and slavery; Convention 87 on the right of labor to organize; Convention 98 on the right of labor to be free of employer interference in organizing unions; Convention 100 calling for equal pay for equal work regardless of gender; and Convention 102 calling for workers' insurance (which was branded as "Socialist" by the US Senate).[346] Exception was made, however, for military service, prison labor, and for emergencies such as forest fires and earthquakes.

The American tradition at this time held that Americans should be free from government encroachment, and American business policy claimed that "buyers in the market do not ask whether a producer treats employees generously; they only look at product and price. The market does not guarantee job security, or a return on investment, nor does it guarantee a living wage, or higher pay for extra hours. Most notions of economic 'rights' therefore are fanciful."[347] It is important to remember that when President Franklin Roosevelt's "New Deal" tried to establish workers' rights to organize and bargain collectively, angry employers took the matter to the Supreme Court, which invalidated the National Industrial Recovery Act, "whose provisions on wages, hours, and the right to collective bargaining were deemed unconstitutional."[348] The union movement reached its highest point of effectiveness in the 1950s when union membership reached 26% of all working Americans.[349] The ratio in 2004 was less than 10%. Highly unionized jobs in the Northeast and Midwest moved to the South, where unionization was slight and then the same jobs were outsourced to third world countries leaving the US with fewer and fewer "blue collar" jobs, the very jobs which historically provided the union strength and also which created and maintained the great "middle class."

The ILO in the United Nations

In 1946 the ILO became the first specialized agency formally established within the United Nations. It was soon joined by the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the United

346. Walter Galenson, *The International Labor Organization* (Madison: University of Wisconsin Press, 1981) pp. 27-28.

347. Elizabeth McKeon, *Ibid.*

348. *Ibid.*, p. 10.

349. *Ibid.*, p. 12.

Nations Educational and Scientific and Cultural Organization (UNESCO), and scores of others. The American civic tradition had, for generations, protected individual liberty from government interference. This notion went back as far as the Bill of Rights of 1788 which assured citizens that government would not interfere. It was not obvious, however, how this applied to the relations between employers and employees. Many employers assumed that once the employee had come on the employer's property, the owner had an absolute right to set the rules.[350] This claim influenced early American attitudes about the proper role of government. It was difficult for the workers to argue against this presumption of employers' rights. Any interference with the rights of management on the part of the workers (or by government) was seen as a violation of the owner's rights. The prevailing position of employers was that since the "market" did not guarantee a return on investment, there was no reason why it should guarantee a living wage or job security for the workers. The ILO, therefore, found itself in an unfriendly environment.

Consider, for example, the long struggles over the question of child labor. Does government have any role to play or do employers and children have to fight it out? The ILO stepped in to monitor this matter, and proposed that the age of 18 was the minimum for employment. The United Nations estimated that over 350 million children (under 18) worldwide were at work. Africa and Asia accounted for over 90% of the child work force.[351] A meeting in Kampala, Uganda February 5-7, 1998 sponsored jointly by government, employers, workers in Uganda, the ILO, and the Organization of African Unity brought together representatives from 22 African countries. They reported that Benin had 27% of its children at work; in Burkina Faso 51% of the workers were children; in Burundi the number was 49%; and in Kenya, Ethiopia, Niger, and Uganda the numbers were between 40% and 46%.[352] Even in the US an estimated 800,000 children were working in agriculture in 1991 with up to 48% of them exposed to dangerous pesticides.[353] It was reported in December 1997 that the Khmer Rouge army included child soldiers as young as 8.[354]

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350. *Ibid.*, p. 6.
351. Siddiqi Faraaz and Harry Anthony Patrinos, *Child Labor: Issues, Causes and Interventions*, Human Capital Development and Operations Policy Working Paper.
352. "12th Asian Regional Meeting: Child Labor is Growing in Africa," *World At Work*, (No. 23, 1998)
353. Amy Printz Winterfield, "Freedom from Economic Exploitation-Basic Children's Rights," *American Humane Association* (December 1997)

In 1955, W. L. McGrath recommended to the National Association of Manufacturers and to the Chamber of Commerce that they break all relations with the ILO on the excuse that the presence of the Soviet Union was "socializing the institution."[355] The Eisenhower administration, however, was strongly supportive of the ILO and President Eisenhower appointed Joseph E. Johnson, president of the Carnegie Endowment for International Peace, to look into the matter. Johnson's committee strongly opposed the withdrawal. On June 30, 1970 at the plenary session of the ILO a vote was held on workers' rights. The vote was 135 in support, and none opposed; however, 197 members abstained (the US was in the abstaining group). The matter was laid to rest in America by the US Senate action to withhold funds for the ILO no matter where it was located.[356] This issue again became inflamed when the ILO criticized US involvement in Vietnam, condemned Israeli labor practices in occupied Arab territories, and gave observer status to the PLO. These actions prompted President Ford in November 1977 to pull the US out of the ILO. At a decisive Cabinet level meeting Labor, Commerce, the AFL-CIO, and the Chamber of Commerce voted for withdrawal, while the State Department and the National Security Council voted to remain. The US did withdraw with the immediate consequence of a reduction of 22% of the ILO funds provided by the US. A State Department memo of 1977 wryly expressed the official view: "we must consider the peculiar unpopularity of the ILO with Congress. The ILO has been one of the more unpopular international organizations; withdrawal would remove this source of irritation."[357] In 1980, under President Carter, the US rejoined the ILO.

The ILO has established seven "core" conventions that identify workers' rights in the workplace and which the ILO urged all nations to endorse. These conventions are:

Convention 29 — Against Forced Labor (1930)

Convention 87 — The Freedom of Association and Protection of the Right to Organize (1948)

Convention 98 — The Right to Collective Bargaining (1949)

Convention 100 — Equal Remuneration Regardless of Sex (1951)

354. Sandy Hobbs, Jim McKechnie, and Michael Lavalette, *Child Labor: A World History Companion* (Santa Barbara: ABC-CLIO, 2001, p. 29.

355. Galenson, *Ibid.*, p. 32.

356. Hearings Before the Subcommittee of the Committee on Appropriations, U. S. House of Representatives, 1970, p. 69.

357. *Ibid.*, p. 128.

Convention 105 — Abolition of Forced Labor (1957)

Convention 111 — No Discrimination in Employment (1958)

Convention 138 — Minimum Age to Work of 18 (1973)

No nation can be forced to subscribe to these conventions, although it was always hoped that the moral persuasion of the example set by other nations would be sufficient to attract compliance. It is no surprise, however, that in the US, where most of the legislators come from management, none of these ILO conventions have been ratified by the Senate. Fortunately, many first world nations did not follow the US example. Germany, France, and Italy support all seven conventions. Russia and the other members of the European Union support six. Britain and Brazil support five. Japan supports four; India supports three; and China supports one (Resolution 100, on equal pay regardless of sex.)[358] The US supports only part of one convention (29, on forced labor).The least support worldwide came for the convention banning child labor. Of the 175 members of the ILO, only 63 supported it without reservations.

American opposition came from industrialists who realized that, if these conventions were ratified, their factories would, in principle if not in fact, be unionized, and most of the factories they had set up in third world countries would be in violation of the conventions. Pentagon objections arose because they wanted to be able to draft 17-year-olds into the armed forces and to proselyte children in the lower grades. In the Trade Act of 1974 Congress had insisted that all American business, and the foreign businesses with whom they might trade, would have to comply with minimal labor standards in order to get preferred trading status. As we shall see, however, those nations (including the US) which support GATT (General Agreement on Tariffs and Trade), NAFTA (North American Free Trade Association), and WTO (World Trade Organization) argued that this contradicted their premise that workers' rights were irrelevant to international trade. Even the relatively benign Clinton Work Place Rules, designed to prevent injuries from repetitive motions, proved too burdensome and the Republicans in the Senate with support from five Democrats voted to repeal them.[359]

Support for the rights of management over those of the workers came from Senator Jesse Helms, then Chairman of the Senate Foreign Relations Committee

358. McKeon, *Ibid.*, p. 43.

359. *Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations*, Hearings before the Committee on Ways and Means and the Subcommittee on Trade, HR, 103rd Congress, 2nd session, January 26-February 22, 1994.

(1995), who called for "terminating or greatly reducing" most of the UN funds for the International Labor Office (ILO), the Industrial Development Organization (UNDP), the Population Fund, the World Food Program, and the Development Fund for Women..[360]

General Agreement on Tariffs and Trade (GATT)

It is particularly troubling that GATT, NAFTA, and the WTO all developed outside of the United Nations organization. To a significant degree the aims of these three groups conflicted with the kinds of humane concerns of the UN and did not reflect the worldwide concern on which the UN was founded. In 1947, GATT was created as an international trade organization, initially within the UN. It was to be revised every seven years in what are called "rounds." The rules of the first GATT allowed third world countries the right to impose restrictions to protect their farmlands and industries from foreign takeover. The preamble to the 1947 GATT affirmed that relations among nations in trade and economics should be conducted with the aim of raising standards of living and ensuring full employment.[361] Any such concerns vanished in the Tokyo Rounds (1973-79), which did not require GATT members to adhere to labor codes.[362] In November 1982, a ministerial meeting of GATT members was held in Geneva, further confirming this position. In 1987 the UN General Assembly, investigating sustainable development, concluded that GATT was the chief cause of environmental degradation.

In November 1992, the US and the European Union (EU) settled some of their differences in agriculture in a deal known as the "Blair House Accord." Final revisions in the area of agriculture, known as the Marrakech Accord, were made in April 15, 1994 and affixed to the final GATT of 1994 (the Uruguay Round) which transformed GATT into the World Trade Organization (WTO). The US Senate approved this final GATT by a vote of 76 to 24 and the House approved it by a vote of 288 to 146. Supporters claimed that the bill would produce hundreds of thousands of jobs in the US by increasing exports and would give Americans access to cheaper goods. Opponents claimed that it would encourage multinational companies to move job to countries with low wages

360. Bennis, *Ibid.*, p. 71.
361. Terry Collingsworth, *In Focus: An Enforceable Social Clause*, General Council, International Labor Rights Fund, Institute for Policy Studies, Vol. 3, No. 28, October 1998.
362. Robert Kuttner, "Another Great Victory of Ideology Over Prosperity," *The Atlantic Monthly*, October 1991.

and widespread child labor, and would cede US sovereignty to a new trade bureaucracy over which Americans would have little control.

Consistently the new GATT rules considered most of the rights that were spelled out in the first 1947 GATT as obstacles to free trade. After all, "businesses ignore environmental costs in their calculation of total cost. Since the environment comes mostly free to them, they abuse it with abandon."[363] The 1994 GATT allowed free access to third world countries by first world banks, insurance corporations, and communications industries. There was an inconsistency, however, since business leaders relied on cheap labor which conflicted with any effort to raise wages (a pre-requisite to raising the standard of living). "Nike," for example, "shifted its shoe and apparel productions from Oregon to Korea, Indonesia, and Vietnam and then to China and Bangladesh, not to spread the benefits and raise the standard of living for the working poor, but to take advantage of the merciless competition for investment between developing countries that have been forced to undercut each other in the race to offer the world's lowest wages."[364] Products are made with third world wages and sold at first world prices; thus, in the third world, sustainable development has not been an objective of international business. Neither NAFTA, GATT, nor the WTO contains any enforceable social clauses. If any government commits serious violations of the rights of workers, the only punishment may be a sanction. GATT, NAFTA, and the WTO have a host of rules to protect intellectual property rights, but none for workers' rights.

The US, in spite of its good intentions to reduce damage to the environment, could not, under GATT rules, "maintain an embargo on tuna harvested in a way fatal to dolphins."[365] The US was again frustrated when Massachusetts passed a law which penalized countries doing business with Burma where human rights and labor conditions violated ILO standards, but the WTO through Japan and other states in the European Union successfully challenged Massachusetts.[366] "The country that can offer the cheapest production costs 'wins' by merit of production being moved there, but people working in that

363. Ravi Batra, The Pooring of America: Competition and the Myth of Free Trade (New York:1993) p. 234.

364. Collingsworth, *Ibid.*

365. Lori Wallach and Michelle Sforza, *Whose Trade Organization?* (Washington: Public Citizen, 1999) p. 24.

366. *Ibid.*, p. 172.

country, under horrific conditions and paid starvation wages, lose, as do the people in the competing countries."[367]

An initial report in 1987 on the effects of NAFTA concluded that 600,000 Americans had lost their jobs. Ninety percent of the American companies who had promised to create jobs had not done so. Sixty-five percent of the laid off workers now had lower paying jobs. Sixty-two percent of the companies had used Mexico and other lower paying nations as excuses to drive down American wages. In the Maquilladoras auto industry production for the Mexican market from 1994 to 1995 the market had dropped by 72%., while production for export to the US had grown by 36%.[368]

The World Trade Organization (WTO)

In 1994 at the Uruguay Round of GATT (the round to end all rounds), the name was changed to the World Trade Organization (WTO) and it formally distanced itself from UN jurisdiction.[369] The WTO was ratified by the US Senate in that same year, 1994, without the support of a single environmental, conservation or animal rights group.[370] The agricultural aspects of the resulting WTO agreements were devastating to third world countries who saw their traditional agricultural life-style being taken over by first world agricultural giants. This could have been predicted, given the remarks of US Agricultural Secretary John Block: "The idea that developing countries should feed themselves is an anachronism from a bygone era. They could better ensure their food security by relying on US agricultural products which are available in most cases at lower cost."[371] Such a policy has been a boon to the US and the EU agricultural giants and a disaster to small farmers in Africa, Asia, and Latin America, where forty years

367. *Ibid.*, p. 174.

368. *Report on NAFTA*, Hearing Before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations, 105th Congress, first session, March 5, 1997.

369. *Trade Agreements Resulting From The Uruguay Round of Multilateral Trade Negotiations*, Hearings before the Committee on Ways and Means and its Subcommittee on Trade, HR, 103rd Congress, 2nd Session, January 26, February 1, 2, 8, and 33, 1994. See also "GATT: Implications on Environmental Laws." Hearing before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, House of Representatives, 102nd congress, first session, September 27, 1991. Also "GATT: the Experts View," Hearing before the subcommittee on Economic Policy, Trade, and Environment of the Committee on Foreign Affairs. House of Representatives, 103rd Congress, second session, February 8, 1994.

370. Lori Wallach, *Ibid.*, p. 13.

ago the people went from a virtual self-sufficiency to dependency. South Korea has been a typical example. Between 1973 and 1983, the imports of wheat, corn, and beans increased almost 300%. The low prices of these imports discouraged local production, and South Korea's food self-sufficiency decreased from 27% in 1965 to 6% in 1983 in wheat; and from 36% to 27% for corn; and from 100% to 25% for beans. The US has become their chief supplier.[372] Since 92% of the South Korean workforce still derives more than half of their income from producing rice, which costs five to seven times more than foreign rice (which is often subsidized); South Korea faces a potentially very serious social explosion with the "disintegration of the rice farming household."[373]

Among the losses experienced in developing countries as a result of GATT and the WTO have been rules that protect the environment. Lori Wallach, Director of Global Trade Watch, reported that "since it was created in 1995 the WTO has ruled that every environmental, health or safety policy it has reviewed is an illegal trade barrier that must be eliminated or changed."[374] The US Environmental Protection Agency (EPA) gasoline regulations were struck down by the WTO.[375] Under WTO and GATT the protests made by the International Labor Organization against products made by child or forced labor were declared illegal.[376] With the enforcement of GATT, tuna caught with dolphin-deadly purse seines were on the market in the US by 1999.[377] Due to US and European Union (EU) auto industry pressure, Japan's clean air rules based on the Kyoto Treaty are denied under GATT and WTO. At the 1996 Singapore Ministerial Declaration, the WTO announced that it would not deal with labor problems, but would let the independent ILO handle such matters as workers' rights, wages, working conditions, and the environment. Thus no WTO agreement had to take into account such matters.[378]

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371. "The Uruguay Round of GATT, the World Trade Organization and Small Farmers," prepared by Kamal Malhotra, Co-Director of Focus on the Global South (FOCUS) Bangkok, Thailand for the regional *conference* on "MonoCultural Cropping in Southeast Asia," June 3-5, 1996, in Songkhla, Thailand.
372. Ibid.
373. Ibid.
374. Wallach, *Ibid.*, p.4.
375. *Ibid.*, p. 19.
376. *Ibid.*, p. 24.
377. *Ibid.*, p.25.
378. Lori Wallach, *Ibid.*, p, 173.

Furthermore, the Uruguay GATT, now called the WTO, set the limits on which issues countries can set policies and how rigorous health and safety issues are allowed be on food supplies. For example, the WTO ruled against a ban on beef containing hormone residues because the European Union could not prove definitively that these residues in meat could harm human beings. The WTO ruled against Australia's strict rules and quarantine on raw salmon. To avoid a WTO challenge to South Korea's strict rules on meat inspection and food safety shelf life, South Korea weakened its rules on both.[379] Pressure from the US through the WTO threatened Thailand to disband its Pharmaceutical Review Board (PRB) which was endeavoring to produce medicines at an affordable price. The PRB was able to produce Flucanozole (used to treat a form of meningitis) at $1, for which the global firm Pfizer charged $14; the WTO threats forced them to bow to Pfizer.[380]

The ILO challenged the WTO for rejecting the rights of the workers with respect to wages, working conditions, the right to organize unions, and the use of child workers.[381] For these and other reasons many governments and Non Governmental Organizations (NGO) are calling for a ban on any further trade or investment negotiations under the WTO or GATT. These are the primary reasons for the persistent protests against WTO meetings.

The North American Free Trade Association (NAFTA)

NAFTA was established in 1994 as a trade agreement between Canada, Mexico, and the United States. Initially it was intended to include protections for workers' rights as well as to expand trade; however, from its inception, negotiations on all workers' rights issues have been referred to the International Labor Organization which, incidentally, had been denied any role in WTO or GATT. Under NAFTA, as under WTO and GATT, management used the threat of plant closure and the loss of capital at the bargaining table, in challenging union organizing drives and wage negotiations with individual workers. What they said to workers either directly or indirectly was that, if they asked for too much or didn't give concessions or tried to organize, strike, or fight for good jobs with good benefits, management would close the shops and move them across the border. This is precisely what many plants did.[382]

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379. *Ibid.*, pp. 53-63.
380. *Ibid.*, pp.112-115.
381. *Ibid.*, pp. 173-188.

The US economy, due to NAFTA, lost 3.2 million jobs between 1992 and 1998.[383] NAFTA cost jobs in every state in the US. The major losses were in those states with a high concentration of industries, where the plants were simply moved to Mexico.[384] One of the primary arguments for NAFTA was that it would bring new jobs to the United States. In addition, the globalization under NAFTA reduced the wages of unskilled workers in the US.[385] After 38 months of NAFTA, 600,000 workers in the US had lost their jobs; 90% of the companies who promised to create jobs had not done so; 65% of the laid off workers had lower paying jobs; and 62% of the companies used Mexico and other low wage nations as bargaining chips to drive down wages.[386] Canada reported similar statistics. Between 1989 and 1997, 870,700 export jobs were created, but during the same period 1,147,100 jobs were destroyed, with a net loss of 276,000 jobs.[387]

H. H. Cutler, one of the world's largest apparel companies, sewed clothes in Haiti under a contract with the Walt Disney Company and with NIKE. At present, 75% of Cutler's production is outside the US. While wages in their Grand Rapids, Michigan plant had averaged $6.50 an hour, wages in their Haiti plant averaged $0.30 per hour. With the blessing of NAFTA they decided to move their plants to China, Indonesia, Pakistan, and the Philippines where wages are even lower than Haiti, and where they will not be bothered by "human rights concerns" or by religious organizations meddling in their labor conditions. Wages in China are $0.13 an hour.[388]

The US Department of Defense (DOD) has a $1 billion investment in the garment industry, which makes it the 14th largest retail apparel business in the

382. Kate Bronfenbrenner, "We'll close! Plant closing threats, union organizing and NAFTA," *Multinational Monitor*, Vol. 18, No. 3. Pp. 8-13.
383. Robert E. Scott, "The Facts About Trade after NAFTA: Rising Deficits, Disappearing Jobs, Briefing Paper." (Washington, D.C, Economic Policy Institute).
384. *Ibid.* See especially Table 1-2 :NAFTA job loss by state.
385. Robert E. Scott, "The Facts About Trade and Job Creation," Issue brief (Washington, D.C.: Economic Policy Institute.)
386. *Report Card on NAFTA.* Hearing before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations. 105th Congress, 1st session, 1 5 March 1997.
387. Bruce Campbell, "False Promise: Canada in the Free Trade Era," April 2001 EPI briefing paper. See also Andrew Jackson "Impact of the FTA and NAFTA on Canadian Labour Markets," in B. Campbell et al, *Pulling Apart: The Deterioration of Employment and Income in North America Under Free Trade*, Canadian Centre for Policy Alternatives (Ottawa, Canada, 1999)
388. Ibid.

world. Yet, the DOD has failed to adopt the Workplace Code of Conduct which aims to improve and monitor work conditions in its suppliers.[389] The Pentagon is the major purchaser (about 40% of its clothing) from Chemtex, a Taiwanese company in Nicaragua, where the workers, mostly women, labor 65 hours a week earning $.30 to $.40 an hour. This is not the kind of information that should make soldiers proud to wear their uniforms.[390]

Under NAFTA, no high level policy discussions occurred concerning the failure to consider workers' rights. WTO did not care, NAFTA did not care, GATT did not care, the DOD did not care, and a sufficient number of members of Congress did not care, either. None of these events would have happened had WTO and NAFTA been under UN supervision.

Under this new global economy, which lacks enforceable rules, products are made with third world labor costs and sold at first world profit. As if this were not enough, a new effort to link the corporate community to the UN has been initiated as an NGO named the Business Community of the UN (BCUN); it has been linked with the UNA of the USA. On June 27, 1997, 37 invited participants were co-hosted at a meeting by Ambassador Razli Ismail, President of the UN General Assembly and Mr. Bjorn Stigson, Executive Director of the World Business Council on Sustainable Development (WBCSD). The chief fifteen leaders in attendance were high level representatives of government including three heads of state, the UN Secretary General responsible for presiding over the UN Commission on Sustainable Development, the Secretary-General of the International Chamber of Commerce, and ten CEOs of transnational corporations. Two token academics and two NGOs were asked to observe. The outcome of the meeting was not surprising since the Clinton administration sent as its representative Larry Summers of the Treasury. He was the one who advocated shipping more toxic waste to low income countries because people die early there, anyway and, since they have less income earning potential, their lives are "less valuable."[391]

Human Rights

It is safe to say that "the human rights era began in earnest with the formation of the United Nations."[392] On December 10, 1948, the General Assembly

389. Peter Philips, *Censored 2000*, (New York: Seven Stories Press, 2000)

390. *The Progressive*, February 2000, p. 30.

391. David C, Korten, "The United Nations and the Corporate Agenda," *Natural Life*, September 1007, #67.

(GA) adopted and proclaimed a Declaration of Human Rights and at the time called on all the member States to publicize the text of the document and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions." The Preamble asserts that the rights delineated "should be protected by the rule of law." The 30 articles delineate five kinds of rights:

1. Civil rights: free speech and the right peacefully to assemble.

2. Political rights: free elections for all, the right to a nationality and free movement from country to country.

3. Cultural rights: to practice a religion or none, to preserve ones language and culture, and free education.

4. Legal rights: equality before the law, innocence until proved otherwise, *habeas corpus*, and speedy trial.

5. Economic rights: a living wage, a meaningful job, the right to have unions, protection against unemployment, job security, fair housing, social security, and universal health care.

Officially, the US government has been comfortable with the first four rights, although citizens are not guaranteed of getting the rights so much as they are allowed a "hunting license" that allows them to try to get them. With respect to economic rights, the situation is radically different in the US from what the United Nations resolutions promise. While the US system urges citizens to try to get ahead economically, as individuals, too little emphasis has been placed on the responsibility of individuals for the general social good. Americans have assumed that "life, liberty, and the pursuit of happiness" were private and personal rights. Somehow, in the country's history, America has failed to include most of the economic rights found in the Declaration of Human Rights. America has failed to grant to American citizens the *right* to a job, to a livable wage, and to security from unemployment. Since 40 million Americans have no health insurance and many more have inadequate insurance, it is clear that health is not an American right, either. Since less than 10% of the work force is unionized, it is clear that the right to form a union (promised in the declaration of Human Rights) is not an American right. The US has an economy where 10% of the people own 90% of the wealth, where off-sourcing of jobs to third world countries creates unemployment at home, and where the salaries of the top CEOs average 10,000% above the minimum wage guaranteed by law. It is clear,

392. Jeremy Rifkin, *The European Dream (*New York: Penguin, 2004) p. 275.

therefore, that economic rights have never been high priorities in the American plan. It is also obvious that the US does not "proclaim the declaration of human rights nor cause it to be disseminated, displayed, and read and expounded principally in schools," let alone in the press, radio, or television.

Some of the economic rights guaranteed in the Declaration (identified in Articles 23-25) which are at odds with US practice and policy, include:

1. The right to have a "freely chosen job under just and favorable conditions" (Article 22). This is frustrated by the lack of laws protecting the workers in the workplace.

2. The right to a "remuneration ensuring for himself and his family an existence worthy of human dignity," (Article 23) is violated by the minimum wage under which such an existence is denied.

3. The right to "form and join trade unions" has been denied, as shown by the fact that 90% of US workers are without a union. In 1949 the ILO adopted a Convention on the Right to Organize and Collective Bargaining.

4. The right to "a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control," (Article 25) is belied in the US where some 44 million people are without access to health care and even more have access only to inadequate health care, where there is a fear that the social security system is failing, and unemployment is rampant.

The Rights of Children

In 1923, the International Save the Children Alliance (founded by Eglantyne Jebb) drafted the initial version of the Convention on the Rights of the Child, which was adopted by the League of Nations in 1924. Few nations at that time had any official documents that recognized that children had any rights at all, and few nations had laws protecting the special needs of the young. This adoption by the League of Nations in 1924 of the *Geneva Declaration of the Rights of the Child* proposed the following commitments:

1. "The child must be given the means requisite for its normal development, both materially and spiritually."

2. "The child that is hungry must be fed, the child that is sick must be helped, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored."

3. "The child must be the first to receive relief in times of distress."

4. "The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation."

5. "The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men."

These rights were re-affirmed and extended by the United Nations in a new *Declaration of the Rights of the Child* in 1959. This document was a non-binding resolution and should not be confused with the binding *Convention on the Rights of the Child* adopted by the General Assembly of the United Nations on November 20, 1989. The following were part of the rights guaranteed to the child in 1959.

1. Every child is entitled to all rights without regard to race, color, sex, language, religion, political opinions, property, birth or other status.

2. The child shall be guaranteed by law and other means to develop physically, mentally, spiritually, morally, and socially "in a healthy and normal manner and in conditions of freedom and dignity." (Principle 2)

3. "The child shall enjoy the benefits of social security." (Principle 4)

4. Handicapped children shall be given special treatment. (Principle 5)

5. "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages."

6. Children shall be "protected from practices which may foster racial, religious and any other form of discrimination."

On December 12, 1989, the General Assembly approved the rights of every child, as an act by the international community and in unequivocal terms. The UN Commission on Human Rights transmitted this document to the Economic and Social Council which had, in turn, submitted it to the General Assembly for its final approval. It is indeed remarkable that this Convention was ratified by nations large and small, free and not so free, advanced and developing, representing hundreds of languages and scores of political and social systems. No one nation could have crafted it, and only by the most persistent and painstaking cooperation was it accomplished at all. While no one nation currently lives up to its high standards, the Convention stands as an ideal toward which all should strive.

A 1997 report by Terry Collingsworth, General Counsel for the International Labor Rights Fund,[393] highlighted some of the problems that generated abuses of child labor. The author noted that "poverty is an immediate reason why families send their child to work, but putting children to work in lieu of education condemns them to a life of poverty." Reference was made to legislation introduced by Senator Tom Harkin (D-Iowa) to ban products made with child labor from being imported into the US. The general reaction from export-oriented industries was denial, plus the charge that his legislation was "protectionist."

One of the first successful efforts to develop a program to deal with child labor was in the South Asia hand-knotted carpet industry, led by Kailash Satyarthi, Chair of the South Asian Coalition on Child Servitude (SACCS), based in India. It was named the RUGMARK Foundation. This foundation was aided by a group of Indian carpet manufacturers and exporters who were worried that they would lose access to the American market. They joined forces with SACCS and UNICEF to provide monitoring that certified that they were making carpets without child labor. The children who had formerly worked in their factories were placed in RUGMARK schools. A similar success was achieved in the Bangladesh garment manufacturing industry which depended on the US for 60% of their export market. When a US-based Child Labor Coalition called for a boycott of garments made in Bangladesh made by child labor, the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) made an agreement with UNICEF and the International Labor Organization (ILO) to end

393. "Child Labor in the Global Economy," *Foreign Policy in Focus*, Vol. 2, No. 46, October 1997.

all child labor and to place their former child employees in schools. About 10,000 children were enrolled in these educational programs and were paid a small stipend to offset their loss of income.[394] Unfortunately NAFTA, GATT, and the WTO do not recognize such "social sanctions" and have prohibited preventing the importation of products made with child labor.

The Preamble to the Convention recalled that the Universal Declaration of Human Rights (1948) in Article 25, paragraph 2 affirmed that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." The following represent some of the significant elements in the 1989 Convention.

Article 1. "A child means every human being below the age of eighteen years."

Article 6. "Every child has the inherent right to life."

Article 14. Recognizes the "right of the child to freedom of thought, conscience and religion."

Article 16. "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation."

Article 24, 2a "[E]nsure[s] the provision of necessary medical assistance and health care to all children.."

Article 26. "States Parties shall recognize for every child the right to benefit from social security, including social insurance."

Article 28. Primary education is compulsory and free for all. Encourage free secondary education, including vocational skills, available to all children. Make higher education accessible to all on the basis of capacity.

394. Ibid.

Article 32. "The right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health."

Article 34. "Protect the child from all forms of sexual exploitation and sexual abuse."

Article 38. Assure that children who are younger than 15 do not take a direct part in armed hostilities.

Child soldiers

The General Assembly has shown special concern over the widespread use of child soldiers. In 1996, the former First Lady of Mozambique, Gracha Machel, wrote a comprehensive report on "Children in Armed Conflict." Among her recommendations were that the age of recruitment should be raised to 18 and that all children now in the armed forces should be demobilized. In 1998, she married President Nelson Mandela. That same year she was honored with an International Achievement Award for her role in helping children worldwide. On January 21, 2000 the UN reached an agreement on an *Optional Protocol to the Convention on the Rights of the Child,* which raised the minimum age for recruitment to 18. The report of UNICEF, April 15, 2000, that the deployment of Children is a war crime was inspired in large part by the report of Machel.

UNICEF proposed that the International Criminal Court (ICC) should rule against the recruitment of children regardless of whether they were not used in front line tasks or were used merely as messengers, drivers, or cooks. UNICEF Executive Director Carol Bellamy said that the ICC should give a "clear signal" that atrocities against children would not go unpunished.[395] The Office of the UN Special Representative for Children in Armed Conflict stated that in the past ten years about two million children had been killed in armed conflict, some as young as 8 years old. In addition, 12 million children had been made homeless and half of the world's estimate of 53 million refugees and displaced persons had been children.[396] UNICEF has been involved in demobilizing child soldiers in Rwanda, Sierra Leone, Sudan, and the Democratic Republic of the Congo.

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395. Thalif Dean, Deployment of Children A War Crime, April 15, 2000.
396. Ibid.

The Hague Conferences have shown leadership in promoting conventions for the protection of children. Among these were the Hague *Convention on the Civil Aspects of International Child Abduction* (October 1980); *Convention on the Protection of Children with Respect to Adoption* (May 29, 1993); and *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement with Respect to Parental Responsibility and Measures for the Protection of Children* (October 19, 1999).[397]

Health and Refugees

A thirteen-year effort by the World Health Organization (WHO) in conjunction with scores of non-governmental organizations (NGOs) succeeded in eradicating smallpox and also helped to wipe out polio from the Western Hemisphere. The last death from smallpox was in 1987. Since then, the virus is believed to exist only in the laboratories of Russia and the Center for Disease Control (CDC) in Atlanta, Georgia.[398] UN drinking water supply and sanitation efforts resulted in 1.3 billion persons receiving safe drinking water and 759 million receiving sanitation for the first time. Instances of malaria are, however, increasing, especially in Sub-Saharan Africa where yearly deaths are estimated at between 1.5 and 3 million.[399] A Colombian medical doctor, Manuel Patarroyo, developed a new and promising vaccine and he gave "control" over it to the WHO and UNICEF for further testing and distribution. UNICEF and a number of other agencies have been working on a cholera outbreak in Somalia through a water chlorination program. WHO has noted a rise in TB and estimates 30 million deaths in the next decade.[400]

One of the major challenges the WHO faces is the spread of "emerging" and "re-emerging" diseases.[401] These include outbreaks of typhoid in Tajikistan, meningitis in West Africa, Ghana, and Togo, monkey pox in Zaire, O'nyong-nyong fever in Uganda, yellow fever in Bolivia, Dengue fever in the Cook Islands, and Ebola fever in Gabon. In 1974 only 5% of the children in developing countries were immunized against polio, measles, tetanus, whooping cough, diphtheria, and tuberculosis. By 1995, as a result of WHO and UNICEF leadership,

397. Hans Van Loon, "Hague Convention of 29 May 1993 on Protection of Children and of Cooperation in Respect of Intercountry Adoption," *The International Journal of Children's Rights 3*, pp. 463-468, 1995.

398. *A Global Agenda*, 1994-95 (Lanham, MD, University Press of America, 1994) p. 231.

399. *Ibid.*, p. 231.

400. *Ibid.*, p. 233.

401. *A Global Agenda* 1997-98 (New York: Rowman and Littlefield, 1997) p. 244.

80% of the children have been immunized, thus saving the lives of over 3 million a year.[402]

The UN has provided famine relief to over 230 million people in nearly 100 developing countries. Since the estimated number of hungry persons in the world is about 786 million, we have a long way to go to meet the needs fully.[403] Refugees and asylum seekers are of special concern to the UNHCR (United Nations Commission for Refugees) a group that is estimated currently at 13 million: about 5.7 million in Asia, 3.3 million in Africa, 2.2 million in Europe, 645,000 in North America, and 37,000 in Latin America.[404] In 1998 on the 50th anniversary of the WHO, the new director, Gro Harlem Brundtland, a specialist in preventive medicine and a three-time Prime Minister of Norway, commented that she would concentrate on developing the health sector in poorer nations and in combating emerging and re-emerging diseases.[405]A Convention on the Status of Refugees was adopted in 1951.

The current UN Assistance Mission to Afghanistan (UNAMA) had, by the spring of 2003, repatriated more than 1.8 million refugees, constructed 40,000 shelters, provided 250,000 metric tons of food assistance, provided school feeding programs for 150,000 children, and dug more than 2700 wells. In spite of these programs, "Afghanistan continues to have some of the worst health indicators in the world."[406]

The 2004-2005 publicity over potential mismanagement of the oil-for-food program is a timely reminder of the eagerness with which certain opponents of the UN are quick to lay blame in the wrong place. It must be recognized that the program gave unpleasant alternatives to the Saddam Hussein regime. But the program was devised and run by the Security Council, not by the UN Secretariat. Kofi Annan is not responsible. All of the 36,000 contracts involved were approved by the SC Committee, which is dominated by the United States and the UK. Objections were raised about imports that might have given Iraq dual-use technology with which to reconstitute weapons programs. "There was not one objection about oil-pricing scams, although UN officials brought these to the attention of the committee no fewer than 70 times."[407] Furthermore, the sum

402. A Global Agenda, 1994-95 (Lanham, MD: University Press of America 1994) pp. 233-234.
403. *Ibid.*, p.178.
404. A Global Agenda, 2003 p. 133.
405. A Global Agenda, 1998, p. 237.
406. *Ibid.*, p. 139.

of money involved is vastly inflated and incorrectly includes the value of smuggled oil going back to 1991, even though the oil-for-food program did not begin until 1996.

Food and Agriculture

The UN reported in 1995 that one seventh of the world population, nearly 800 million, mainly in developing countries in the Southern Hemisphere, "lack access to a diet adequate for normal human life."[408] Four UN agencies deal with problems of food and agriculture: Food and Agriculture (FAO), World Food Program (WFP), International Fund for Agricultural Development (IFAD), and the World Food Council (WFC).[409] The emphasis of IFAD differs from conventional economic wisdom in its perspective that it "is not that growth achieved by the better off will pull the poor out of poverty, but that the mobilization of the poor themselves can uphold their dignity and free them from the shackles of misery."[410] Again the UN reported, "clearly there is no lack of consensus on the single central fact: chronic hunger persists for a seventh of the human race despite the availability of enough food to feed everyone."[411]

In addition to the four agencies listed above, world food issues are addressed also by UNICEF, UNEP (UN Environment Programme), UNDP (UN Development Programme), and UNHCR (UN High Commissioner for Refugees). One of the indications of unbalanced distribution is the fact that "forty percent of the total cereal consumption, mainly maize and most of the soybeans, did not reach the tables of the poor, because it was fed to animals."[412] To speak to these kinds of maldistribution a World Food Summit was held in November 1996 in Rome by the FAO. Delegates came from 186 countries, more than 1500 NGOs, and almost 2000 were journalists. Unfortunately, the world press virtually ignored the Summit and its proposals. The notable contribution by the Summit was a Plan of Action with seven commitments.

1. To ensure an environment designed to eradicate poverty, produce a durable peace with sustainable food for all.

407. London Financial Times, December 4, 2004.
408. A Global Agenda 1994-95, p. 176.
409. *Ibid.*, p. 76-77.
410. *Ibid.*, p. 177.
411. *Ibid.*, p. 180.
412. A Global Agenda, 1995-96, p. 149.

2. To implement policies to accomplish these ends.

3. To pursue the development of sustainable food, agriculture, fisheries, forestry and rural life.

4. Strive for trade policies conducive to offsetting food security.

5. Prevent and prepare for natural disasters and man-made emergencies.

6. Promote optimal allocation of public and private investments to foster human resources.

7. Follow up the Plan of Action with the international community.

The UN reported in 1999, however, that "the world has demonstrated no general improvements in food production."[413] UNICEF was praised as the "most highly reputed UN voice for infants and children on food and population issues."[414] The UNFPA's report, *State of the World Population 1997*, put its new focus on "the areas of sexual rights and reproductive health. It set out a legal framework and advocated legal and policy reforms to promote reproductive rights."[415] In 2000 the FAO maintained again that the world produces enough food but that lack of access to the food is caused by poverty.[416] In its *State of Food Insecurity in the World, 2003* report the FAO reported that the "latest estimates signal a setback in the war against hunger." In only 19 countries did the situation show progress, and in the last half of the 1990s the number of hungry increased by 18 million, primarily in Sub-Saharan and in East and West Africa. Although the hungry in China decreased by 58 million, India had an increase of 19 million.[417] In April 2004, twenty-four African nations faced food emergencies, and special appeals came from Central African Republic, Angola, Darfur in Sudan, Eritrea, Ethiopia, African Great Lakes Region, Kenya, Lesotho, Rwanda, Swaziland, and Tanzania.[418]

Population

Four major conferences have been held touching on the problems of over-population: The UN Conference on Environment and Development (UNCED) 1992; The International Conference on Population and Development (ICPD) 1994; the Fourth World Conference on Women (1995); and the World Summit

413. A Global Agenda, 1998-99, p. 140.
414. *Ibid.*, p. 141
415. *Ibid.*, p. 145.
416. A Global Agenda, 1999-2000, p. 140.
417. A Global Agenda, 2004-95, p. 39.
418. *Ibid.*, p. 40.

for Social Development (1995). The results of the UNCED were typical in that it treaded carefully on matters of family planning, birth control, and abortion. “In the end, most references to population as an important factor in environmental degradation were deleted.”[419] Even though unsafe abortion was seen by most countries to be a major health problem, “no issue proved more controversial than access to safe abortion.”[420] The ICPD conference held in Cairo, September 5-13, 1994, estimated world population by 2050 to be somewhere between 7.9 billion and 11.9 billion.[421] A significant change in US policy was announced, namely, “to support reproductive choice, including access to safe abortion.”[422]

The UN Search for Justice in Perspective

The difficulties faced by the ILO are symptomatic of the difficulties faced by all of the social program efforts of the UN agencies. There is no getting around the fact that the UN itself was founded by sovereign national governments with mixed agendas, and that they were both encouraged and discouraged by a host of non-governmental groups with varied economic, social, religious, cultural, and ethnic concerns. These sovereign nations protected themselves by establishing the General Assembly where nations regardless of size each had one vote, and where their resolutions had advisory status only. Sovereign nations still insist that General Assembly resolutions are not international laws. The permanent five nations protected themselves from resolutions which they opposed by the power of the veto in the Security Council. It seems oxymoronic for 191 nations to pretend such modesty when they issue internationally approved resolutions.

All of the UN special agencies have faced opposition either from national governments or from non-government economic, religious, or social special interest groups. This has been true for the World Health Organization, the Food and Agriculture Organization, and UNESCO. This has also been true for many of the General Assembly Resolutions that spoke to matters of justice. How can we explain why the US Senate refused to ratify the Convention on the Rights of the Child (1989), all of the ILO conventions against child labor, unsafe working conditions, the rights to organize unions, and equal pay for men and women; the Convention on the Elimination of All Forms of Discrimination against Women

419. A Global Agenda, 1994-95, pp. 183-84.
420. *Ibid.*, p. 189.
421. A Global Agenda, 1995-96, p. 154.
422. *Ibid.*, p. 155.

(1981); and the complete dismissal of labor rights from the concerns of the World Trade Organization, NAFTA, and GATT? While the WTO insists that all corporation rules are universal, all labor rules are declared to be specific to each country. This means that the ILO is helpless to challenge labor abuses in other countries while, on the other hand, the WTO doesn't have to pay attention to such abuses.

Amazingly, however, the Security Council has been able to agree to send peacekeepers currently to 16 trouble spots and through the efforts of the World Court, the Security Council, and the Secretary General over 80 potential wars have been averted. It is important to remember that only the UN has peacekeepers. Nations possess only armies of soldiers to deploy when they invade the sovereign soil of nations.

The 1994 annual UN report, *A Global Agenda*, emphasized the role of the Commission on Sustainable Development (CSD) which reported to the Economic and Social Council that "developed countries have a special responsibility for supporting sustainable development because of the pressure they place on the global environment and the technologies and financial resources they command."[423] The Commission encouraged developed countries to cooperate in developing changes in consumption and production patterns, suggesting "public awareness campaigns and economic mechanisms that encourage energy conservation, use of renewable energy resources, the minimizing of waste, reducing the packaging of goods, water conservation, and environmentally sound purchasing, processing, and pricing decisions."[424]

Following the Earth Summit of 1992, the 47th General Assembly adopted Resolution 188 which established an intergovernmental negotiating committee for the Elaboration of an International Convention to Combat Desertification, which affects about 1/6th of the world population, 70 percent of all drylands, and one-fourth of the total land area of the world.[425]

Four UN agencies work on problems of food and agriculture. They are: FAO (The Food and Agriculture Organization; WFP (the World Food Programme), which combats hunger and social decay in poor countries; the IFAD (International Fund for Agricultural Development) which works with small

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423. A Global Agenda, Issues Before the 49th General Assembly of the United Nations, (Maryland: Lanham University Press, 1994) pp. 155-56.
424. *Ibid.*, p. 157.
425. *Ibid.*, p.168.

farmers and other low income rural people; and the WFC (World Food Council), which seeks to combat the underlying causes of famine.[426]

The UN population demographers estimate that by 2050 the world will have between 7.8 and 12.5 billion persons. However, if fertility remains at the present level, the number of persons by 2050 would be 21 billion. Four major international conferences have provided the substance of the UN programs: 1) The 1992 UN Conference on Environment and Development, 2) The 1994 International Conference on Population and Development, 3) The 1995 Fourth World Conference on Women, and 4) The 1995 World Summit for Social Development. The unanswered question is "whether the international community will be mobilized to find the necessary political will and financial resources to stabilize world population.[427] Incidentally, on October 12, 1999, Adnan Nevic, born in a Sarajevo hospital at 2 minutes after midnight, was acclaimed as the 6 billionth person in the world (even though another 370,000 were also born on that same day).[428]

The World Conference on Human Rights held in Vienna, June 1-25, 1993, "served both to highlight the importance of human rights and to spark debate worldwide about the whole gamut of issues that fall under the 'human rights' issue."[429] The 53-member Commission on Human Rights has addressed the following areas of problems through six committees:

1) International Covenant on Civil and Political Rights: Human Rights Committee (18 members).

2) International Covenant on Economic, Social and Cultural Rights Committee: (18 members).

3) International Convention on the Elimination of All Forms of Racial Discrimination Committee. (18 members).

4) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Committee (10 members).

5) Convention on the Rights of the Child Committee (10 members).

6) Convention on the Elimination of All Forms of Discrimination Against Women Committee (23 members).[430]

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426. *Ibid.*, pp 176-177.
427. *Ibid.*, pp. 183-184.
428. A Global Agenda, 2000-01. p. 146.
429. *Ibid.*, p. 201.
430. *Ibid.*, pp. 205-206.

The Commission on Human Rights has conducted, with varying degrees of success, specific human rights actions in Afghanistan with respect to the treatment of women; the Commission has criticized China, notably for its use of the war on terrorism to attack labor activists and religious believers; the Commission has criticized Chechnya over the issue of forced disappearances of citizens and extra-judicial killing; the Commission has judged Cuba, where dissidents have been imprisoned; it has judged Iraq, where human rights abuses were committed under Saddam Hussein; it has judged Iran, where activists were killed and women were discriminated against; the Commission condemned Israel for its actions against Palestinians in the occupied territories with emphasis on the high collateral damage to civilians; it criticized Indonesia for systematic human rights violations; it has criticized the Democratic Republic of the Congo for the 30 year war with its high civilian deaths and the use of children in the army; and criticized the United States for violations of civil rights through the war on terrorism.[431]

A mention of a few of the resolutions on human rights which the US has yet to ratify highlights how far we have yet to go.

1. The *Charter of Economic Rights and Duties of States*, passed by the General Assembly in 1974, which affirmed that: "no state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure advantages of any kind." The only countries that have signed but failed to ratify are Cambodia, Liberia, and the US.

2. *Additional to the Geneva Convention of 1977*, Part IV, Section 1, Chapter III, Article 54:(1) which affirmed that:

a. "Starvation of civilians as a method of warfare is prohibited."

b. "It is prohibited to attack, destroy, remove, or render useless objects indispensable to the agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out the civilians, to cause them to move away, or for any other motive." All of these prohibitions have been violated in the American wars and embargoes against Iraq.

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431. A Global Agenda: Issues Before the 58th General Assembly., pp. 119-127.

3. The *International Conference on Nutrition* issued a World Declaration on Nutrition and Food, citing data from the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), which stated: "access to nutritionally adequate and safe food is a right of each individual. We affirm that food must not be used as a tool of political pressure." Powerful US business interests, especially in tobacco and in pharmaceuticals, opposed specific recommendations of the WHO and FAO favoring access to generic drugs to fight AIDS and SARS and advocating a ban on tobacco advertising. The US was the only member nation of the WTO to block, in December 2001, a multilateral initiative for access to affordable medicines by third world countries. Obstacles raised by Washington lobbyists were so great that the American Cancer Society, the American Lung Association, the American Heart Association, and the Campaign for Tobacco-Free Kids told the lobbyists to "pack up and go home instead of continuing to work at weakening the draft treaty."[432] The US food industry, led by the sugar producers' association, claimed that both FAO and WHO misled the consumers regarding the maximum amount of sugar that should be included in a healthy daily diet.

4. In December 1997, the UN General Assembly voted that: "starvation of civilians is unlawful." The US delegate voted against the claim.

A commission ordered by Kofi Annan issued in December 2004 its report on how the UN can be improved. Among the suggestions proposed to amend and improve the present United Nations are the following. It is proposed that the Security Council should be expanded, perhaps to 24, to include nations which now exert a major economic and political leadership they did not have in 1945. It has been suggested that nations like Brazil, India, Germany, and Japan might be given permanent positions on the Council. In addition, nations in Africa and Central and South American are asserting their right to at least some permanent standing. In addition, it has been suggested that the number of permanent nations with the veto might be increased. However, the report recognized that the present mood of the nations with the veto power makes it extremely unlikely that this would be allowed to happen. It is not inconceivable, however, that the permanent five might limit the kinds of issues on which their veto can be exercised. Nor is it beyond reason to expect that major powers, like the United States, China, France, Russia, and the United Kingdom will one day give recom-

432. Leonard Sachetti, "US Clashes with World Health Organization," May 1, 2003, Inter Press Service.

mendations of the General Assembly the international legal status that they deserve.

Kofi Annan warned, "in our disillusionment after the last war, we gave up the hope of achieving a better place because we had not the courage to fulfill our responsibilities in an admittedly imperfect world."[433] Secretary General Annan continued, "almost exactly 60 years later, we once again find ourselves mired in disillusionment, in an all too imperfect world. It is easy to stand at the sidelines and criticize. And we could talk endlessly about UN reform. But our world no longer has that luxury. The time has come to adapt our collective security system, so that it works effectively and equitably."[434]

433. *The Economist*, December 4, 2004, p. 25.
434. loc cit.

Postlude

In his September 2003 address to the General Assembly, Secretary-General Kofi Annan asked for the creation of a High-level Panel to assess current threats to international peace and security. It was named the "High-level Panel on Threats, Challenges and Change." The recommendations of this Panel were submitted to the Secretary General on December 1, 2004. In his letter of transmission, the chair of the Commission, Anand Panyarachun gave special thanks to States that had made financial contributions to the work. The United States was notably missing from the list. The SG noted in his cover letter of appreciation that "extreme poverty and infectious diseases are threats in themselves, but they also create environments which make more likely the emergence of other threats, including civil conflicts." He commended the report for calling attention to the deterioration of our global health system and for emphasizing the significant function of the General Assembly in establishing rules and norms governing the use of force. Since this penetrating document deals with the problems of the UN which we have been considering, it will be helpful to call attention to the recommendations of the report as a way of drawing some conclusions. Each item is referenced using the number of the article in the Report.

The Limits of Self-Protection

> Article 24, "No State, no matter how powerful, can by its own efforts alone make itself invulnerable. Every State requires the cooperation of other States to

make itself secure." Going it alone is not a viable national policy. Is America the only one of the permanent five who thinks otherwise?

Article 27. "Civil war, disease and poverty increase the likelihood of State collapse and facilitate the spread of organized crime, thus increasing the risk of terrorism." Again, the Report is a reminder that what happens in one nation affects all nations, and that terrorism has deep roots in the social, economic, and political imbalance. This fact is the subject of the subsequent discussion of terrorism.

Terrorism

145. "Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse."

147. "In some instances the war on terrorism has eroded the very values that terrorists target: human rights and the rule of law."

148. "It is imperative to address the root causes and strengthen responsible States and the rule of law and fundamental human rights."

Defining Terrorism

All attempts to define terrorism usually fail to deal adequately with two issues: 1) the ways in which terrorism is practiced by States, and 2) the tendency of some definitions to undermine actions of peoples under foreign occupation. Both of these are addressed explicitly by the Commission report. The Commission reminds States that:

160. The Geneva conventions already adequately condemn both weapons and strategies that deliberately target civilians. This fact emphasizes the fecklessness of the Bush administration claim that we need to rewrite the Geneva conventions concerning the treatment of prisoners as well as the claim that September 11 exhibited a "new" kind of war. What happened on September 11 was already understood and covered by the Geneva Conventions. There was nothing new about it. Geneva conventions have served the world well in establishing limits to what is permissible in war. States must not undermine these international laws. We must not forget that the Nuremberg and Tokyo war crimes trials held after World War II were based upon the conviction that the Geneva conventions were international laws. What made 9/11 an act of terrorism was that it deliberately targeted civilians as the Geneva conventions so clearly affirmed. The deliberate targeting of civilians was not invented at the time of 9/11.The carpet bombings practiced by the Allies during World War II were also acts of terrorism, and the bombings of Hiroshima and Nagasaki were gross acts of terrorism by this definition. Indeed, most aerial warfare skirts the boundaries of terrorism.

161. The objection that peoples under foreign occupation had the right to resist and that no definition of terrorism should override this right is well taken, but we

> must recognize that "there is nothing in the fact of occupation that justifies the targeting and killing of civilians." Both the Israeli soldiers and the Palestinian insurgents are equally condemned *when they target civilians*. This also holds for aerial bombing that deliberately targets civilians, as most aerial warfare does. Anyone who trashes the Geneva conventions puts the international community into harms way and sanctions total war on the civilian population.

THE USE OF FORCE

> 185. Article 51 of the UN Charter allows States the right of individual or collective self defense. However, section 185 specifies that "a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it, and the action is proportionate. The problem arises when the threat in question is not immanent but still claimed to be true." The Panel importantly recommends, however, that the decision should not be made by the individual State, nor any coalition of States, but should rather be presented to the Security Council for its judgment.

The report asks under what conditions we expect the Security Council to legitimize war. In view of the original intent of the UN to "rid the world of the scourge of war," any decisions to used armed force would seem to constitute a violation of that goal. Nonetheless, the Commission suggested five criteria which must be met before the UN should justify abandoning its primary mission. These were borrowed from the much abused arguments of the medieval "just war" theorists. The criteria are: 1) the threat must be serious; 2) the aim must be to halt or avert that threat, 3) it must be a last resort, 4) the means used must be proportional to the threat; and finally, 5) the consequences must be balanced against the chances of success or failure. The history of efforts since the 5th century to apply these Augustinian criteria demonstrates that all such arguments have tended to be sophistry when individual nations assumed the right to make the case. Historically, nations have had no difficulty in justifying their wars using these five criteria. It is questionable whether the Security Council would ever have the Olympian objectivity to succeed where no nation has ever succeeded.

If war is to be condemned, then it is oxymoronic to invent rules that justify us in waging the very process we condemn. This fact has not deterred leaders from creating rules allowing exceptions from the prohibitions against stealing, lying, or killing. The arguments States have used for justifying any particular war they wanted to wage have always justified too much. No nation is objective enough to make these assessments for its own wars, and while asking the Security Council to make these decisions is a vast improvement over self-analysis, the fact is that the task is so overwhelmingly self-contradictory that the

Security Council has sanctioned only one armed conflict (in the Congo) in 60 years. This fact argues strongly for the unacceptability of any decision short of a unanimous consensus of all 191 States making such a calculation.

> 233. "All combatants must abide by the provisions of the Geneva Conventions. All member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court, and all refugee conventions."[435] The frivolous and specious arguments of Alberto Gonzales which endeavored to explain why President Bush may, at his pleasure, trash the Geneva Conventions, demean the legal profession. Such reasoning authorizes every national leader to do likewise. Indeed, the safety of all soldiers, including Americans, is shown disrespect and the argument puts all soldiers in harm's way. Indeed, if we reject Geneva, we cannot, logically, identify war crimes, crimes against the peace, and crimes against humanity. A world without Geneva and Hague rules would mirror the one identified by Hobbes as being "nasty and brutish" and one where the natural state is the "war of all men against all men."

A More Effective United Nations

Synopsis: "The United Nations was never intended to be a utopian exercise." It was meant to be a collective system that worked, provided that nations allowed it to do so. When the Charter of the United Nations provided the most powerful States with permanent membership on the Security Council and the veto, a weakness was built into the system. Perhaps it was expected that the nations with the veto would use their power for the common good and that they would promote and obey international law. President Truman said at the time of the founding of the UN, "We all have to recognize, no matter how great our strength, that we must deny ourselves the license to do always as we please." The report has already been criticized for not dealing with the issue of the veto. The US and the other permanent five members are to blame for making the Security fundamentally undemocratic. It does not take a Socrates to be able to imagine a "better" system, as World Federalists have through the years proudly pointed out. But, the UN exists and World Federalism is only a dream, however rosy. It was not the intention of the Commission to conjure up a whole new organization as if it were "full blown from the crest of a wave." Its task was to seek ways to improve the existing United Nations.

The Panel recommends that the Security Council be enlarged. Part of the reason is that, "The ability of the five permanent members to keep critical issues

435. General Assembly, p. 62.

of peace and security off the Security Council's agenda has further undermined confidence in the body's work." In addition, the five nations which formed the UN in 1945 are no longer the major world powers. Other nations need to have a role in the Security Council. Two options are proposed.

> Model A:
>
> 1. Add six new permanent seats distributed among the four geographical areas: 2 from Africa, 2 from Asia and the Pacific, 1 each from Europe and the Americas.
>
> 2. Add 13 two-year non-renewable seats as follows: 4 for Africa, 3 for Asia and the Pacific, 2 for Europe, and 4 for the Americas, making a total of 24 seats.
>
> Model B.
>
> 1. Add eight 4-year renewable seats: 2 each for Africa, Asia and the Pacific, Europe, and the Americas.
>
> 2.Add 11 two-year seats as follows: 4 for Africa, 3 for Asia and the Pacific, 1 for Europe, and 3 for the Americas, making a total of 24 seats.

The commission recommends that "under any reform proposal, there should be no expansion of the veto." Furthermore, the permanent members are asked to "pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses." The commission might have suggested modifying the veto so that if 20 of the 24 proposed members of the enlarged Council agreed, the veto could not be used. It did not do so.

Commission on Human Rights

> 274. "The institutional problem we face is two-fold: first, decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations, and no amount of institutional reform will bring it back." In particular, NAFTA and the WTO function quite without any UN oversight, and they are divorced from the concerns of the ILO about both the rights of the workers and the health of the environment. Of special concern to the authority of the UN are the relations of the World Bank, the International Monetary Fund, (IMF) the Agency for International Development (AID) and the Food and Agriculture Organization (FAO) as they are undermined by the World Trade Organization and NAFTA.

In the second place, too many specialized agencies have been developed independent of the principal UN organs, especially the Economic and Social Council, whose role has been reduced to one of coordination.

COMMISSION ON HUMAN RIGHTS

> 283. "We are concerned that in recent years States have sought membership of the Commission not so much to strengthen human rights but to protect themselves against criticism or to criticize others." Since it seems irresolvable to establish criteria for who deserves membership in the Commission, it was recommended that all 191 States be members and, furthermore, that the Human Rights Commission no longer be subsidiary to the Economic and Social Council, but be a charter body standing along side.

In his letter of appreciation to the Commission, Secretary General Kofi Annan stated, "The report offers the United Nations a unique opportunity to refashion and renew our institutions. I wholly endorse its core arguments for a *broader, more comprehensive concept* of collective security: one that tackles new and old threats and addresses the security concerns of all States — rich and poor, weak and strong. The Panel's insistence that we must see the interconnectedness of contemporary threats to our security is particularly important. We cannot treat issues such as terrorism or civil wars or extreme poverty in isolation. Our institutions must overcome their narrow preoccupations and learn to work across issues *in a concerted fashion.*" The United Nations is the best we have, and long before they seek to do without it, nations have a prior obligation to deal with it more faithfully.

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