Notre Dame Law Review

Volume 79
Issue 4 *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*

Article 9

7-1-2004

Reinventing the Security Council: The U.N. as a Lockean System

Michael D. Ramsey

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Recommended Citation
Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, 79 Notre Dame L. Rev. 1529 (2004).
Available at: http://scholarship.law.nd.edu/ndlr/vol79/iss4/9

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

REINVENTING THE SECURITY COUNCIL: THE U.N. AS A LOCKEAN SYSTEM

*Michael D. Ramsey**

INTRODUCTION

Legal assessments of U.S. action against Saddam Hussein's regime in Iraq in 2002–2003 fall into two broad categories.[1] Some see the U.S. action as a rejection of the U.N. system of collective security and rules on the use of force—a result that might be either applauded or condemned.[2] Others emphasize that the U.S. action, while opposed by many members of the U.N. Security Council, fell within the broad authorization of use of force against Iraq contained in prior Security Council resolutions, so that the letter of U.N. law was respected despite what individual Council members felt at the time.[3]

---

* Professor of Law, University of San Diego.

1 For a range of views, see generally the essays collected in *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003) (containing contributions from Richard Falk, Thomas Franck, Tom Fraser, Richard Gardner, Miriam Shapiro, Jane Stromseth, William Howard Taft IV and Todd Buchwald, Ruth Wedgwood, and John Yoo).

2 *See* Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, WASH. Q., Spring 2003, at 89, 101; Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003); Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May–June 2003, at 16, 16–35; Richard Perle, *Thank God for the Death of the UN*, GUARDIAN, Mar. 21, 2003, at 26.

3 *See* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq*, 4 SAN DIEGO INT'L L.J. 7 (2003); William H. Taft IV & Todd Buchwald, *Preemption, Iraq and International Law*, 97 AM. J. INT'L L. 557, 558–63 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 587–82 (2003). The principal argument is that Security Council Resolution 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/RES/678 (1991), prior to the first U.S. conflict with Iraq, authorized the United States and allied nations to use all necessary force to restore the government of Kuwait *and* to bring peace and stability to the region. Although allied action restored the government of Kuwait in 1991, Saddam Hussein's continuance in power prevented peace and stability in the region, and thus Resolution 678 (which had not been withdrawn) constituted a continuing authorization of military action against the Iraqi regime. Saddam had also signed a cease-fire ending the Gulf War, which he then systematically violated. *See* S.C. Res. 687, U.N. SCOR, 45th Sess., 2963d mtg. at

But focus upon the legality of the U.S. actions standing alone misses a broader picture. As elaborated in this Article, the U.S. action can be fully assessed only against the background of the Security Council's failure to perform its intended role in the maintenance of international security and the enforcement of international security law.

In assessing the Iraq debates, Richard Falk has argued that "the U.N. Security Council served the purposes of its founding by its refusal to endorse recourse to a war that could not be persuasively reconciled with the U.N. Charter and international law."[4] This Article emphatically disagrees. The essential feature of a viable system of collective security is credible and aggressive policing to deter and punish violations of international security law. That feature, I argue, is fully consistent with the U.N. Charter as it was originally conceived, but has been essentially eliminated from modern U.N. discourse by two propositions, that are not properly part of the U.N. legal system, but that played an essential role in the Council's decision not to endorse the war in Iraq. These two propositions are, first, that force should be used only as a last resort, as a response to actual attack or imminent threats of attack; and second, relatedly, that a nation's sovereignty is essentially inviolable, such that the use of force for the purpose of overturning an established government—no matter how illegitimate or reprehensible—can be justified only on the most extreme exigency. Taken together, these propositions have a crippling effect on the ability of the U.N. system to provide effective policing of international security law. This effect can be seen most clearly in the Council's relations with Iraq, not merely in 2002–2003, but throughout the course of Saddam Hussein's unfortunate history in power. The Coun-

---

11, U.N. Doc. S/RES/687 (1991) (highlighting Saddam's various cease-fire obligations, including disarmament and inspections). As everyone recognized, Saddam remained in material breach of his cease-fire obligations in 2002. *See* S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002) (unanimously concluding that "Iraq has been and remains in material breach of its obligations" under the ceasefire resolution). Resolution 678, taken with Resolutions 687 and 1441 and related resolutions identifying Saddam's continuing breach, appears to give sufficient Council approval for the 2003 attack, even though a majority of the Council in 2003 likely opposed it.

I find these arguments on the whole persuasive, as far as they go. But whatever the legal effect of the prior resolutions, plainly the Council in 2003 refused to endorse military action, not because its members thought authorization unnecessary, but because they wanted to block the attack. The purpose of this Article is to consider whether the Council was right not to embrace military action against Iraq in 2003, irrespective of the legal effect of that decision.

4 Richard Falk, *What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 590 (2003).

cil never developed a satisfactory response to Saddam Hussein, because it thought any response must be limited by the force-as-last-resort and inviolability-of-sovereignty imperatives. That failure produced U.S. and allied action outside of the Council, because the United States and its allies perceived that, limited by these imperatives, the Council could not perform its policing function as it was originally intended.

Professor Falk errs, therefore, in arguing that the Council's inaction against Iraq"served the purposes of its founding"; to the contrary, the Council's inaction represented a breakdown in the model of collective security envisioned by the Charter. At the same time, critics of the U.N. system err in ascribing the breakdown to inherent problems in its structure. The challenge is not to blame the United States or the U.N. system for this breakdown but to encourage the Council to vindicate that system, and forestall actions outside the Council, by acting forcefully against violations of international security law for purposes of deterrence and punishment. Particularly after the attacks of September 11, 2001, undeterred and unpunished outlaw regimes are destabilizing and threatening to international peace and security, even when they have no imminent plans for attack. The U.N. Charter places responsibility for dealing with these regimes primarily upon the Council, and largely disables individual nations from action outside of the Council.[5] But nations such as the United States will give up their independent ability to act against outlaw regimes only if they are confident that an effective collective entity will act in their place. As a result, we need a new understanding of collective security that returns it to the original idea of the U.N. Charter and frees it from undue constraints that modern interpretations have placed upon it.

---

5 A substantial amount of literature argues that the U.N. Charter is consistent with a broad notion of preemptive self-defense that could support an individual nation's action against outlaw regimes that constitute only an inchoate menace. *See, e.g.*, William Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365 (2004); *see also id.* at 1387 n.80 (collecting additional sources); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 571–74 (2003). Without mounting a sustained discussion of this position, I think it fair to say that everyone holding this view depends to some extent upon a "flexible" or "evolving" vision of the Charter that allows departure from its actual words. The Charter's self-defense provision permits individual nations to act in self-defense "if an armed attack occurs against a Member of the United Nations"—and not otherwise. U.N. CHARTER art. 51; *see* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 295 (1995) ("[T]he Charter intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs."); *see also* Bradford, *supra*, at 1383 n.67, 1386 n.76 (collecting additional sources endorsing the so-called "restrictivist"—I would say "textualist"—view of the Charter).

This Article proceeds in four parts. Part I describes two models of collective security reflected in U.N. actions since the end of the Cold War. The first model is the successful 1994 action in Haiti, in which a Council-approved U.S. threat of force unseated the military dictator Raoul Cédras and likely prevented a wider humanitarian crisis. This model also formed the basis of the U.S. appeal to the Council regarding Iraq in 2002–2003. The second model is the Council's response to Saddam Hussein, where the Council permitted Saddam to remain in power despite persistent violations of the basic principles of international security law, and so ultimately induced the United States and allied nations to act against the wishes of many Council members. It is also reflected in the response to events in Kosovo, where again the Council failed to formulate an effective response, leading the United States and allied nations to act outside the U.N. system.

Part II describes two competing theoretical models of collective security that echo the practical examples discussed in Part I. The first model is based on John Locke's account of the formation of civil society. Central to Locke's account, this Part explains, is the use of collective force for deterrence and punishment. This forms one side of the "Lockean bargain" that underlies civil society: individuals (or nations) give up their right to defend their own interests (save against immediate attack) in return for a collective guarantee of security. The second model, in contrast, involves a renunciation of the use of force, not just individually but collectively. Its exemplar is the 1928 Kellogg-Briand Pact outlawing war, and more generally the interwar League of Nations, which lacked a collective enforcement mechanism and depended upon the good faith of its members. Part III argues that the "Haiti model" embodies the original understanding of the U.N. system as a Lockean bargain, while the Council's response to Iraq harkens back to the earlier approach of the League that the United Nations, as originally understood, was meant to reject. This Part concludes that the proper role of the Security Council is policing against threats to international security through deterrence and punishment, as in Locke's civil society. In this view, the constraints sought to be placed on Council action by Professor Falk and others—namely that force should only be used as a last resort in response to an extreme and imminent threat—are not part of the U.N. system. Part IV then suggests that if the U.N. system is unable to reclaim its original mission, nations will necessarily act outside of its constraints. However, this Part argues that to be justified in acting around U.N. machinery, nations must remain true to its intent: that is, they must act to enforce fundamental principles of international security, and not merely in pursuit of their own interests. Accordingly, this Article concludes by

defending the U.S. action in Iraq while cautioning against some broad interpretations of the so-called "Bush Doctrine" of preemptive use of force.

I. Two Models of Collective Security in the United Nations

This Part suggests that two competing models of collective security can be seen in modern U.N. discourse and practice. The first is illustrated by the Council's decisive (though often overlooked) action in Haiti in 1994, and by the U.S. view of the Iraq situation in 2002–2003. In this vision, the U.N. Security Council is empowered to use force (or rather, to authorize the use of force by member nations) to respond broadly to threats against international security. The second, reflected in the Council's opposition to military action against Serbia in 1999 and Iraq in 2002–2003 (and indeed in the Council's approach to Iraq in general), sees the role of force as limited to responses to actual attacks or immediate threats, not as a broader police power.

A. *Haiti: Decisive Action Against Sovereignty*

The U.N. system of collective security reached its high point of decisive action in Haiti in 1994. In 1991, a military coup by General Raoul Cédras toppled Haiti's democratically elected President Aristide, threatening to unleash a flood of refugees abroad and a humanitarian crisis at home.[6] The United States, as the nearest major power and the nation most likely to be affected by refugees, brought pressure on the military government to restore democracy. Initial approaches consisted of diplomacy, diplomatic condemnation, and ultimately economic sanctions instituted by the Security Council.[7] After a round of U.N. sponsored negotiations at Governor's Island, New York, in 1993, Cédras agreed to step down by October 30 of that year and accept a peacekeeping mission. He then failed to relinquish power, and armed demonstrations (sponsored, one may assume, by Cédras) turned back the peacekeepers.[8] The Security Council then passed a series of resolutions calling for Cédras to honor his agreement and re-imposing economic sanctions,[9] none of which had mate-

6 The principal events are recounted in Ryan C. Hendrickson, The Clinton Wars: The Constitution, Congress, and War Powers 46–67 (2002).

7 S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg. at 3, U.N. Doc. S/RES/841 (1993).

8 Hendrickson, *supra* note 6, at 46–67.

9 S.C. Res. 933, U.N. SCOR, 49th Sess., 3397th mtg. at 1, U.N. Doc. S/RES/933 (1994); S.C. Res. 917, U.N. SCOR, 49th Sess., 3376th mtg. at 3–4, U.N. Doc. S/RES/

rial effect. In July 1994—that is, only about nine months after Cédras's repudiation of the Governor's Island Agreement—the Council approved Resolution 940, authorizing nations to use "all necessary means" to remove Cédras.[10] With that resolution in hand, U.S. President Clinton declared, "The message of the United States to the Haitian dictators is clear: Your time is up. Leave now, or we will force you from power."[11]

Clinton then dispatched a substantial force toward Haiti. At the eleventh hour, with the U.S. Navy approaching Haitian waters and the U.S. Air Force flying over Haitian airspace, Cédras agreed to a deal brokered by former President Carter, in which he surrendered power and left the country in September 1994.[12] Aristide returned to power relatively peacefully and U.S. forces did not engage in substantial hostile operations. The U.S./U.N. action did not solve Haiti's problems, but those are beyond the capacity of security related operations to solve.[13] The U.S./U.N. operation did defuse a potential international crisis through a united use of force. Though force was not actually used—making the operation a greater success—there is no doubt that the united willingness to use force, and the direct threat of an immediate use of force, produced the desirable outcome.

The Council's action in Haiti is noteworthy in several important respects. First, it represented a relatively quick resort to force. Neither the United States nor the United Nations engaged in any material negotiations with Cédras based on the status quo. Instead, negotiations focused almost entirely upon the goal of forcing Cédras

---

917 (1994); S.C. Res. 905, U.N. SCOR, 49th Sess., 3352d mtg. at 1, U.N. Doc. S/RES/905 (1994); S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg. at 1, U.N. Doc. S/RES/873 (1993).

10 S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994). This resolution authorized

> members to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governor's Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governor's Island Agreement.

Id.

11 Address to the Nation on Haiti, 2 PUB. PAPERS 1558 (Sept. 15, 1994).

12 *See* Hendrickson, *supra* note 6, at 59.

13 After a relatively uneventful though unproductive decade, Aristide was again forced from power by an internal uprising in 2004, but without the same degree of violence and impending violence that arose in 1994. A new international peacekeeping force, approved by the Council, is now in place. *See Special Report: Haiti after Aristide,* The Economist, Mar. 6–12, 2004, at 22–23.

from power—peacefully if possible, but with the clear commitment to using force to achieve that goal if it was not forthcoming peacefully and promptly. Indeed, the Carter mission that convinced Cédras to surrender took place as U.S. troops moved toward the country with the announced goal of a landing in force. One could easily have argued (and indeed some did argue) that additional rounds of diplomacy, combined with economic sanctions, might wring from Cédras promises to mitigate the severity of his regime and work toward an eventual transfer of power to civilian hands.[14] The Council and the United States, however, found sufficient proof of Cédras's duplicity in his dishonor of the Governor's Island Agreement and concluded that prompt resort to force was appropriate.

Second, the crisis, while important, was by no means an extreme and imminent threat to international law and international security. Cédras had overthrown a democratically elected regime, and his heavy-handed security measures were producing a flood of refugees whose lives were substantially at risk, either from Cédras's forces or from natural elements. Though undoubtedly of great concern, these conditions were regrettably not unusual, and indeed far greater humanitarian tragedies and security threats continued unabated elsewhere at roughly the same time.[15] Haiti, in short, was a crisis, but not a crisis of the first order.

Third, the U.S./U.N. action directly targeted Haiti's internal sovereignty. Cédras had no intent of affecting anything outside his own borders. The refugees were an unintended byproduct of Haiti's internal convulsions. True, Cédras was not elected, and so in that sense lacked legitimacy, but the U.S./U.N. action could hardly be described as anything other than an intervention in the internal affairs of Haiti (not unlike many prior unilateral U.S. actions in Latin America and the Caribbean).[16]

In sum, in Haiti the U.N. system responded to and defused a developing threat to international security. It did so through a quick

14 *See Mexico Criticizes Haiti Resolution*, CHRISTIAN SCI. MONITOR, Aug. 2, 1994, at 20.

15 The practical effect of the potential flood of refugees upon the United States no doubt focused U.S. attention upon this particular crisis as opposed to contemporaneous but more distant ones. *See* HENDRICKSON, *supra* note 6, at 45–46. A realistic view of the reasons why Haiti became a priority should not, however, detract from the operation's success.

16 For this reason, some commentators argue that the Security Council exceeded its authority in Haiti by interfering in the domestic affairs of a member state in violation of Article 2(7) of the U.N. Charter. *See* MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 101–43 (2001).

resort to force, an early response to a situation that was far from crisis proportions, and a direct interference in the internal affairs of a country to achieve the ousting of a particular regime. The fact that war did not actually occur, because the threat of force was sufficient, obscures the degree that the Haiti operation represents the high point of U.N. willingness to use force to displace a sovereign government.[17]

B. *Iraq: Inconclusive Action in Response to Major Threats to Security*

In the U.N. debates of 2002 and early 2003, the United States, Britain, and their allies envisioned a role for the Security Council that echoed the Haiti experience. By any measure, Saddam Hussein was a far greater violator of international security law than Cédras. Saddam had violated fundamental principles of international security law in at least five ways. First, he waged wars of aggression untempered by any material justification beyond territorial aggrandizement, first against Iran and later against Kuwait. Second, he not only pursued chemical, biological, and nuclear weapons through illicit channels, but actually used chemical weapons, against Iran and later against Kurdish rebels. Third, he openly supported terrorism by endorsing not just the Palestinian cause but the methods of terror some of its advocates embraced, by providing financial support to these terrorist organizations, and by his own sponsorship of an attempted assassination of the former U.S. President in Kuwait. Fourth, he conducted campaigns of mass murder and torture against internal opponents. And fifth, he persistently defied Security Council resolutions, beginning with demands that he evacuate Kuwait, continuing throughout the 1990s with regard to treatment of separatist populations and weapons inspections, and culminating in 2002 with Resolution 1441 (which threatened "serious consequences" for continued noncompliance).[18]

---

17 While the Council authorized various other military operations in the post-Cold War era, none of these aside from Haiti displaced a sovereign government. *See* GLENNON, *supra* note 16, at 115–20.

18 S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002). On the actions of the Iraqi regime, see WILLIAM SHAWCROSS, ALLIES: THE U.S., BRITAIN, EUROPE AND THE WAR IN IRAQ 18–38 (2004); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 625 (2003) (noting that "Iraq . . . had defied Security Council resolutions, blatantly violated (in the recent past) the Charter's nonintervention norms, and grossly and systematically abused human rights"); *see also* Taft & Buchwald, *supra* note 3, at 557–58. The Security Council's resolutions themselves recognized Iraq's violations of Council directives on disarmament. *See* S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/RES/1441 (2002) (commenting that "Iraq has been and remains in material breach of its obligations under relevant resolutions"); S.C. Res. 1205, U.N. SCOR, 53d Sess., 3939th mtg. at 2, U.N. Doc. S/RES/1205 (1998) (calling Iraq's actions a "fla-

The basic truth of each of these charges was not in doubt. It may be that any one of them standing alone would not be regarded as a fundamental challenge to international security (though several of them, particularly aggression for territorial aggrandizement, are hard to see in any other way). It may be that realism compels even combinations of them to be overlooked when committed by a sufficiently powerful entity. But Saddam's Iraq was not such a power, and the list of international crimes he accumulated set him apart from almost any other contemporary ruler. (It should be noted that this indictment stands apart from the debated, and as yet unsubstantiated, charges of a substantial weapons of mass destruction program ongoing in 2002–2003.) The essential case against Saddam Hussein was that he was an outlaw on matters of international security. No one seriously disputed that. The question was whether it called for a response with force.

Unlike in Haiti, the U.N. system responded in Iraq only at the outermost margins. To be sure, the Council endorsed the U.S.-led campaign to oust Iraq's forces from Kuwait in 1991, imposed economic sanctions, and engaged in protracted and inconclusive diplomatic maneuverings over weapons inspections. But none of these actions made any material progress in what should have been the ultimate objective: to force Saddam Hussein to acknowledge a regime of international security law or to drive him from power.

The 1991 Gulf War, viewed at the time as a resounding success, in fact is emblematic of this failure. The supreme threat to international security is aggression for territorial aggrandizement. No collective system that tolerates it can survive. Territorial aggrandizement was, pure and simple, what lay behind Iraq's attack on Kuwait. To its credit, the U.S. and its allies succeeded in pushing the Council into a defense of Kuwait (although the Council likely would not have acted decisively without U.S. pressure, and a substantial body of opinion at the time held that economic sanctions were the appropriate response).[19] But

grant violation"); S.C. Res. 1137, U.N. SCOR, 52d Sess., 3831st mtg. at 2, U.N. Doc. S/RES/1137 (1997) (highlighting "continued violations"); S.C. Res. 1115, U.N. SCOR, 52d Sess., 3792d mtg. at 1, U.N. Doc. S/RES/1115 (1997) (citing "clear and flagrant violations"); S.C. Res. 1060, U.N. SCOR, 51st Sess., 3672d mtg. at 2, U.N. Doc. S/RES/1060 (1996) (identifying "clear violations"); S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg. at 23, U.N. Doc. S/RES/707 (1991) (noting Iraq's "flagrant violation" of its obligations).

19 *See Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L L. 63 (1991) (containing contributions from David Caron, Lori Fisler Damrosch and Theodor Meron, Thomas Franck and Faiza Patel, and Michael J. Glennon); John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or*

the system balked at doing more than reversing Saddam's territorial conquest. Saddam emerged from the war not materially worse off (except perhaps in prestige) than he entered it. Indeed, after a period of consolidation against domestic enemies in the wake of the war, arguably he was stronger after the war than before. He made a bold bid against the first principle of international security law, and faced with a less resolute U.S. President he might well have succeeded; in any event, the price for him in the long run was not substantial. Of course, this was not entirely the Council's fault—the United States and its allies stayed their military hand after the recovery of Kuwait, although the language of the authorizing U.N. resolution seemingly would have permitted further action to remove Saddam from power.[20] But text aside, the United States clearly would have been acting against the weight of international opinion to continue, and few voices within the Council or the international diplomatic community favored a comprehensive military solution.[21]

For other transgressions of the 1990s Saddam got off even more lightly. From reports about Saddam's palaces and lifestyle, it seems clear that while his subjects starved he was little affected by the array of economic sanctions that the Security Council imposed.[22] Similarly, the low-level military reprisals by U.S. and British forces during the balance of the 1990s did little to effect Saddam's willingness to comply with Security Council resolutions relating to weapons inspections or to protect his domestic opponents from torture and murder.[23]

The Council's response to Saddam is a striking contrast to the 1993–1994 events in Haiti. First, the U.N. system viewed the use of

---

Disorder?, 25 CORNELL INT'L L.J. 1 (1992) (expressing reservations about need for and legality of the Gulf War).

20 *See* S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27–28, U.N. Doc. S/RES/678 (1990) (authorizing "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) [relating to withdrawal from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area").

21 *See* Franck, *supra* note 2, at 612. Franck argues that the U.S.-led coalition was not authorized to move on Baghdad even as a technical legal matter, a position that seems hard to square with the text of Resolution 678. *But see id.* at 612 n.18 ("The U.N. Resolution never called for the elimination of Saddam Hussein. It never called for taking the battle into downtown Baghdad.") (quoting President George H.W. Bush). *See generally Agora*, *supra* note 19; Quigley, *supra* note 19 (discussing the legal aspects of collective military action against Iraq in 1991).

22 SHAWCROSS, *supra* note 18, at 34–35. On economic sanctions generally, see Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 274 (Lori Fisler Damrosch ed., 1993).

23 *See* HENDRICKSON, *supra* note 6, at 138–59.

force as a last resort against Iraq. That was the centerpiece of opposition to U.S. actions in 2002–2003. No one denied that Saddam had a long history of violating international security law at that point, nor that he remained completely unreconciled to any vision of collective security through law or through the United Nations. The entire argument against military action rested upon the proposition that, *at that time*, he posed no immediate threat to any other nation. Second, the system saw force as an appropriate response only to the most extreme violation of international security—invasion for territorial aggrandizement—and only to the extent absolutely necessary to reverse that particular violation. Thus once Kuwait was restored, the justification for the use of force—in this view—dissipated, even though Saddam remained unrepentant. That is, force could be used to restore the status quo, but not to deter and punish violations. Third, Saddam's regime was not itself considered a legitimate target, despite his record of persistent violation. Removing Saddam from power was not permitted to become an object of the Gulf War, and in the events of 2002–2003 the goal within the U.N. system was always described only as weapons inspections.[24]

As Richard Falk observes in his defense of the Council,

> [t]he diplomatic repudiation of the United States in the Security Council resulted mainly from the factual unpersuasiveness of the U.S. arguments about the threats associated with Iraqi retention of weaponry of mass destruction and the claims of linkage between the Baghdad regime and the Qaeda network, and the alleged failures of deterrence and containment. There were no doubts about the brutality of Saddam Hussein's rule [nor, Falk might have added, about

24 The Council's reaction to events in Kosovo in 1998–1999, it should be noted, is consistent with the "Iraq model." Again, no one doubted that Serbia's Slobodan Milošević was engaged in substantial violations of international humanitarian law in Kosovo, with international repercussions including waves of refugees and destabilization of surrounding nations. *See* HENDRICKSON, *supra* note 6, at 117–37. The Council called upon Serbia to end the "use of excessive force by Serbian police forces" and imposed economic sanctions. S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg. at 1, U.N. Doc. S/RES/1160 (1998). Like Saddam, Milošević ignored the Council's direction. As with Saddam, Milošević's transgressions far exceeded anything that had occurred or was likely to occur in Haiti. But the United States and its allies were unable to gain Council approval for a resolution authorizing use of force against Milošević. The argument against U.N. action was that the matter was internal to Serbia, at least to the extent that no attack had occurred or was likely to occur on neighboring countries, and so the use of force against Serbia's sovereignty was unjustified. *See* GLENNON, supra note 16, at 28–30 (recounting events at the Security Council concerning Kosovo).

> his persistent violations of international security law], but there was little support for recourse to war on such grounds.[25]

Falk continues:

> [R]ather than 'a failure' of the United Nations, the withholding of such a mandate represented a responsible exercise of constitutional restraint. The facts did not support the case for preemption, as there was neither imminence nor necessity. As a result, the Iraq war seemed, at best, to qualify as an instance of preventive war, but there are strong legal, moral and political reasons to deny both legality and legitimacy to such a use of force.[26]

In sum, the Council was not bound to act—indeed, seemingly was bound not to act—absent a showing of imminent threat. This philosophical proposition was an indispensable element of the case against use of force in Iraq.[27] It is in material tension with the Council's role in Haiti (where, self-evidently, no such imminent threat existed) and, as discussed in the next Part, with a view of the Council as a collective enforcer of international security law.

II. Competing Theories of Collective Security

A. *The Lockean Vision of Collective Security*

This Part discusses two theoretical visions of collective security among nations. The first can be traced to the ideas of John Locke. Locke, of course, was not primarily a philosopher of international law, but his account of how "civil society" is formed from the state of nature contains important insights for attempts to form civil society among nations.[28] In Locke's well known "state of nature," individuals outside of (or prior to) civil society stood in a position of equality to each other, in the sense that they had no superior force to govern

25 Falk, *supra* note 4, at 595.

26 *Id.* at 598; *see also* Franck, *supra* note 2, at 616 (stating that the key to the Council's decision was that "the overwhelming majority of nations . . . believed that Iraq did not have a significant number of weapons of mass destruction or, if such weapons and the necessary delivery systems existed, that they could be found by the instituted system of inspections").

27 To be clear, I am speaking only of the legal and moral debate as manifested at the time and afterwards. Realists might argue that the decisions of individual state-members of the Council likely arose from geostrategic considerations rather than their own justificatory rhetoric. *See* Shawcross, *supra* note 18, at 97–104 (discussing motivations of France and Germany during the Iraq crisis). Without denying the need for a certain amount of realism, some insight can be gained as well by considering the argumentation at face value.

28 John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

relations between them.[29] That did not mean, according to Locke, that there were no laws between them, for there was the "Law of Nature . . . which willith the Peace and Preservation of all Mankind"; as he continued, "The State of Nature has a Law of Nature to govern it, which obliges everyone: And reason, which is that Law, teaches all Mankind, who but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions."[30] But because the state of nature lacked a superior force, enforcement of the Law of Nature lay with each individual:

> [T]he Execution of the Law of Nature is . . . put into every mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its violation. For the Law of Nature would, as all other laws that concern Men in this world, be in vain, if there were no body that in that state of nature, had a power to execute that Law and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, everyone may do so. For in that State of perfect equality, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, everyone must have a right to do.[31]

And, Locke added, "[e]ach transgression may be punished to that degree, and with so much Severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrifie others from doing the like."[32]

This of course made for an unruly condition, for

> it is unreasonable for Men to be Judges in their own cases, that self-love will make men partial to themselves and their friends. And on the other side, that ill nature, Passion and revenge will carry them too far in punishing others. And hence nothing but confusion and disorder will follow . . . .[33]

The "proper remedy for the inconveniences of the state of nature," Locke said, was civil society:

> There, and there only, is political society, where every one of the Members hath quitted this natural power [to execute the law of nature], resign'd it up into the hands of the community in all cases that exclude him not from appealing for protection to the Law established by it. And thus all private judgement of every particular Member being excluded, the Community comes to be umpire, by

29 *Id.* at 269–76.
30 *Id.* at 271.
31 *Id.* at 271–72.
32 *Id.* at 275.
33 *Id.* at 274.

> settled standing Rules . . . and punishes offenses which any Member hath committed against the society.[34]

Locke primarily addressed the way governments are formed among individuals, so his principal model was the policing power of the state. Plainly, then, he contemplated the broad use of force by "the community" to deter and punish violations. Indeed, that was essential to his system, for he saw "civil society" as a bargain in which the individual gives up the individual right of policing *in return for* the protection of the collective force. Further, Locke was clear that the individual did *not* give up the right of immediate self-defense; the powers transferred to the collective were deterrence and punishment.

Though focused on individual security, Locke's reflections have important implications for collective security among nations—perhaps more practical ones, for Locke's account of how domestic governments are formed was, even to his mind, likely somewhat metaphorical. Locke himself recognized that the best practical example of the state of nature was the condition existing between nations, which (prior to collective security arrangements) had no superior force to govern relations.[35] Indeed, Locke's state of nature corresponded with contemporary international law theory, which identified a "law of nations" governing relations among nations but posited no superior power to enforce it. Thus, as in Locke's state of nature, each nation had the power to execute the law of nations by insisting upon its rights through force. This was the basis of just war theory at the time, under which nations could make war to insist upon their rights under the law of nations.[36] And, as in Locke's hypothetical state of nature, that produced a messy situation, in which nations went to war frequently over minor or pretextual matters.

Locke lived before the first moves toward collective security, but he would have understood them as attempts to form a "civil society" among nations just as he imagined had been done among individuals. But here it is important to recognize a critical component of Locke's civil society: the "Magistrate" to whom individuals delegate their power to execute the law of nature. That is the critical bargain in Locke's formation of society: individuals give up their right to protect their own security (save in emergencies) *in return for* assurance that the superior power will maintain security. In sum, the *sine qua non* of

---

34 *Id.* at 324.

35 *Id.* at 271.

36 *See* J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 186–87 (Thomas Nugent trans., Joseph H. Riley 1859) (1735); EMMERICH DE VATTEL, THE LAW OF NATIONS 310–15 (Joseph P. Chitty ed., 1839) (1758).

a Lockean system is an effective power of collective enforcement through deterrence and punishment.[37]

B. *Collective Security as the Renunciation of the Use of Force*

Locke's system is not the only way to look at collective security. A competing vision is that collective security can be achieved through the collective renunciation of force and the undertaking to resolve disputes peaceably as a matter of moral and legal obligation. That vision appeared most forcefully after World War I in the collective security arrangement of the League of Nations[38] and particularly the 1928 Kellogg-Briand Pact renouncing war.[39]

The structure of the League was to an extent Lockean in original inspiration: the world's nations would form a civil society by giving up their right to use force in return for security through the League. The difficulty was that the League never figured out how to meet its end of the Lockean bargain. At least initially, this was not because the problem went unperceived. Early proposals would have provided the League with a military force to implement its directives and once those were abandoned important criticisms focused on the League's lack of enforcement power.[40] But the Lockean aspects of the League were crippled from the outset by at least three insuperable problems.

37 This is not to say that, in Lockean terms, no international law can exist as law without a sovereign enforcer. *Cf.* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 200–02 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). Many aspects of international law flourish without military enforcement, because nations find it in their interest to promote international cooperation and find ways to punish (diplomatically, economically, reputationally) nations that do not play by the rules. *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979). A Lockean system of collective international security, however, would insist on collective force backing its rules for entirely practical reasons.

38 *See* LEAGUE OF NATIONS COVENANT, *reprinted in* GEORGE SCOTT, THE RISE AND FALL AND OF THE LEAGUE OF NATIONS 407–18 (1973). For leading sources on the League, see ELMER BENDINGER, A TIME FOR ANGELS: THE TRAGICOMIC HISTORY OF THE LEAGUE OF NATIONS (1975); SCOTT, *supra*. A more tendentious account, which nonetheless captures much of the League's philosophical underpinning, is contained in PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES 23–31 (rev. ed. 1991). For a leading account of British interwar policy, reflecting sharp criticism of the League, see CORELLI BARNETT, THE COLLAPSE OF BRITISH POWER 237–577 (rev. ed. 2002).

39 Treaty Providing for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, 46 Stat. 2343, 2 Bevans 732 [hereinafter Kellogg-Briand Pact].

40 *See* BENDINGER, supra note 38, at 91–92 (recounting a French proposal to create a military force for the League "so superior to that of all nations or to that of all alliances that no nation or combination of nations can challenge or resist it."); BARNETT, supra note 38, at 244–45 (describing British criticism of the League).

First, the nations could not agree on the formation of a supranational "police" force; the idea was scrapped, and any realistic hope of the League being able to direct military force was further undermined by the adoption of a unanimity rule in its Council (the executive body, composed of great powers plus an array of smaller nations).[41] Second, the nations that might have served as enforcers of League principles proved not up to the task—Britain and France because they were morally and physically exhausted by the efforts of the First World War, and the United States because it declined to participate.[42]

But thirdly, the Lockean aspects of the League were undercut by a competing vision of collective security that depended upon the collective moral and legal *renunciation* of the use of force. The League was born of an essential revulsion at the idea of war, itself born of the appalling and senseless horrors of World War I. The idea that nations would renounce war and substitute peaceful dispute resolution through arbitration, or through the moral force of the League, was obviously attractive. As one historian describes it, leading founders of the League "saw it not as a device for resisting aggression by collective force but as a substitute for such force, operating chiefly through 'moral authority.'"[43] President Woodrow Wilson, a preeminent force in the founding of the League, observed:

> My conception of the League of Nations is just this: that it shall operate as the organising moral force of men throughout the world, and that whenever, or whatever, wrong and aggression are planned or contemplated, this searching light of conscience will be turned upon them, and men everywhere will ask, "What are the purposes that you hold in your heart against the fortunes of the world?" Just a little exposure will settle most questions. If the Central Powers had dared discuss the whole purposes of this war for a single fortnight it never would have happened . . . .[44]

---

41 *See* LEAGUE OF NATIONS COVENANT art. 5.

42 On the U.S. failure to participate, prompted in large part by fear of entanglement in foreign peacekeeping, see BENDINGER, supra note 38, at 133–60.

43 JOHNSON, *supra* note 38, at 31. As a result of the "horrors and calamities of war," Corelli Barnett writes,

> the British in general felt that a new way must be found of conducting world affairs. They therefore convinced themselves that disputes between nations would henceforth be peacefully settled by means of the League's machinery of talk, and that the unpleasant question of armed coercion of a bandit great power might never arise.

BARNETT, supra note 38, at 247–48.

44 SCOTT, *supra* note 38, at 32 (quoting Wilson's speech in France, Dec. 21, 1918). On Wilson's views generally, see THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER (1992).

To implement this vision, the critical provision of the League's Covenant was Article 12, by which

> [t]he Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council [an assembly of nations similar to the U.N. Security Council], and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.[45]

This of course did not, at least formally, go the full way toward renouncing the use of force—it only required attempts at peaceful settlement first. But since the League had no substantial mechanism to enforce either the commitment to peaceful settlement or the terms of any settlement that might be developed, it depended instead upon the moral undertakings of its members. As one treatise puts it, "[t]he system of collective security envisaged in the Covenant rested, essentially, on the notions of disarmament (Art. 8), pacific settlement of disputes and the outlawry of war (Arts. 11–15), a collective guarantee of the independence of each member (Art. 10), and sanctions (Arts. 16 and 17)."[46] But the sanctions, as a military matter, were illusory, for practical and philosophical reasons—and so the Covenant depended fundamentally on the moral and legal undertakings of its members.[47]

As a result, the League could not operate as a Lockean system, using collective force to deter and punish threats to security—both because as a practical matter it lacked the power to function as an enforcer, and because it rested in substantial part on the belief that collective force would not be necessary. It depended instead upon its members acting in good faith to renounce the use of force, backed up by some vague suggestions of economic sanctions. That faith was explicitly enshrined in the 1928 Kellogg-Briand Pact, whose signatories renounced the use of force without distinguishing between force used for aggressive purposes and force used to respond to threats to international security. "The High Contracting Parties," its first article declared without qualification, "in the names of their respective peoples

45 LEAGUE OF NATIONS COVENANT art. 12.

46 D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 15 (5th ed. 2001).

47 As Wilson described it, "What we seek is the rule of law, based upon the consent of the governed and sustained by the organized opinion of mankind." President Woodrow Wilson, Address to the U.S. Senate (Jan. 22, 1917), *quoted in* GLENNON, *supra* note 16, at 15. One can see here starkly the substitution, in Wilson's thought, of moral force (the "organized opinion of mankind") for actual force (which is what sustains the rule of law against transgressors in a Lockean system).

. . . condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."[48]

C. *The Iraq Debate and the Competing Visions of Collective Security*

Returning to the modern debate over the appropriate role of the Security Council, it should be clear that one model of Council action responds to Lockean imperatives and the other does not. In the "Haiti model," the Council, acting through the military force of member nations, acts in the place of individual nations to enforce international security law. Its role contains a strong element of deterrence and punishment, and in particular it sees itself as authorized to attack and drive from power regimes that violate fundamental principles of international security law. The analogue to domestic police (Locke's "Magistrate") is close: police do not merely respond to immediate violations to restore the status quo ante, but act aggressively against lawbreakers to remove them from civil society.

As a result, when the United States wished to take action against the military regime in Haiti, it did not do so unilaterally. Instead, it appealed to the collective. Its case was premised on Cédras as an international lawbreaker (although not, as has been pointed out, one of especially compelling magnitude). Nonetheless, the Council considered the problem in Haiti sufficient to take forceful action.[49]

In contrast, in the "Iraq model" the policing function—that is, the use of force against transgressors—is not merely taken away from individual nations, but is in large part eliminated altogether. The use of force is limited to immediate responses to actual attacks or imminent threats, only as a last resort and only to restore the status quo ante. Thus, in the 1991 Gulf War, once Saddam's forces had been

---

48 Kellogg-Briand Pact, *supra* note 39, art. 1, 46 Stat. at 2345–46, 2 Bevans at 732–33. Of the Pact, Scott says that "[n]othing could characterise more aptly the hopes and illusions of the late 1920s." SCOTT, *supra* note 38, at 185. On the ultimate rejection by many League supporters of a Lockean model, Barnett quotes a leading British voice, speaking in the late 1920s: "One of the most advanced French advocates of the League once said to me that the true guarantee of peace in Europe was a strong French army and a strong British navy. The sort of man who thinks that is the sort of man who ought never to be allowed to touch international affairs." BARNETT, *supra* note 38, at 284 (quoting Gilbert Murray).

49 As noted, *see supra* note 16, some commentators have argued that the Council overstepped in Haiti because no issue of international security existed. Although I disagree with that conclusion, the issue is not material to the point made here. Whatever one's view of Haiti, there can be no doubt that the situation in Iraq in 2002–2003 involved issues of international security as opposed to purely domestic matters. *See infra* Part IV.

expelled from Kuwait, the U.N. system appeared to think that its use of force was successful and complete. In Iraq in 2002–2003, the U.N. system thought force could not be justified because there was no imminent threat of attack by Iraq, even though Iraq had violated an array of international security principles; the system thought that the only permissible interest of the United Nations was to encourage Saddam to accept weapons inspections, rather than using force to remove Saddam, the persistent transgressor, from power.[50]

The Council's "Iraq model," then, is not a Lockean bargain that takes the policing power from individual nations and assigns it to a collective. It is not a reallocation for a more efficient use of force, but rather a renunciation of force as an instrument of international order (in most circumstances) and commitment to alternative dispute resolution (economic sanctions, diplomacy, negotiations) for most international security disputes. It echoes (although does not entirely adopt) the Wilsonian vision of the League of Nations.[51] As discussed below, after the catastrophic failure of the League, the pure version of collective renunciation of the use of force lost much of its appeal.[52] But that vision underlies the "Iraq model," with the modification that most commentators would (at least in theory)[53] endorse the collective use of force against actual or imminent attacks. Again, the fundamental disconnect in 2002–2003 between the United States and its allies, on one hand, and the France/Russia/Germany position on the other, was that one side argued a Lockean vision of collective security that envisioned aggressive policing by the Council, and the other did not. This can be fairly characterized as the fundamental division in modern international security law, and the Iraq controversy brought it forcefully to the forefront.[54]

III. The Original Understanding of the United Nations

This Part argues that what I have called the "Haiti model" of collective security is faithful to the original principles of the United Na-

50 *See supra* Part I.B.

51 *See supra* note 38 and accompanying text.

52 *See infra* Part III.B.

53 The qualifier is necessary because many people (including almost half of the U.S. Congress) declined to endorse the use of force even to reverse Saddam's conquest of Kuwait, and a more compelling case for a collective use of force is difficult to imagine. *See generally* Quigley, *supra* note 19 (challenging the necessity of the use of force in the Gulf War).

54 As Richard Falk acknowledges, the debate was "not just factual, whether Iraq was a threat and whether the inspection process was succeeding at a reasonable pace; it was also conceptual, even jurisprudential." Falk, *supra* note 4, at 590.

tions, while the "Iraq model" arises from values that are not part of the original U.N. system, but instead look back to the ideals of the League. As discussed above, the Iraq model depends upon a vision in which force is used only as an absolute last resort, only in immediate response to direct threats to international security, and only as necessary for an immediate abatement of the threat rather than in pursuit of deterrence and punishment. It is contended that these principles are enshrined in the U.N. Charter.[55] This Part argues that they are not, and that instead the Charter embraces the "Haiti model" of early and decisive force to deter and punish violations of international security law at the expense of national sovereignty.

A. *Text of the Charter*

The "last-resort" view of military force cannot be located in the U.N. Charter read as a whole and, instead, has been engrafted onto the system by later generations of international lawyers and diplomats without foundation in original U.N. principles.

As an initial matter, no such principle can be found in the text—quite the contrary. To be sure, Article 2(4) directs that members of the United Nations shall refrain from the use of force (or threat of force) against other members.[56] Correspondingly, Article 51 adopts a narrow exception for force used in self-defense, permitting it only in the case of actual armed attack.[57] Read together, the two provisions appear substantially to limit a nation's ability to use force in response to threats to international security. Indeed, Article 2(4) echoes Article 1 of the Kellogg-Briand Pact in its apparently comprehensive renunciation of war (adding only the self-defense qualification).[58]

The critical point, however, is that these limitations apply only to actions *outside* the U.N. system of collective security. Unlike the Covenant of the League, the Charter envisions a Security Council with substantial military force responding to international security threats. In fact, the Charter's text envisions a stronger Council than actually exists, for it provides that member nations will place armed forces at the

55 *See id.* at 590 (arguing that the Iraq war "could not be reconciled with the U.N. Charter" because no threat was imminent).

56 U.N. CHARTER art. 2, para. 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, or in any other manner inconsistent with the Purposes of the United Nations.")

57 *Id.* art. 51. ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack ccurs against a Member of the United Nations . . . .").

58 *See supra* note 48 and accompanying text.

disposal of the Council.[59] In practice, nations have been unwilling to do this, and the system has substituted the Council's authorization of force by member nations directly.[60] But in either event, the Charter says nothing about the Council using force only as a last resort or only in response to imminent threats of attack.

Rather, the Council's mandate, from Article 39, is broad: "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 . . . to maintain or restore international peace and security."[61] And those measures explicitly include a relatively unqualified resort to force: should the Security Council consider that measures provided for in Article 41 (embargo, etc.) would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

Thus Articles 2(4) and 51, together with Articles 39 and 42, encompass the Lockean bargain. The limits on an *individual* nation's ability to use force are strict: no use of force except in response to an *actual* armed attack. But the prerequisites for the Council's use of collective force are minimal: only that the Council "determine[s] the existence of any threat to peace" and the "Council consider[s]" that nonforceful measures "would be inadequate or have proved inadequate . . . to maintain . . . international peace and security." Once this relationship is recognized, it should be clear that Article 2(4) does not establish principles of sovereignty and non-use of force *that constrain the Security Council*—only that constrain individual nations. The whole point of the Council's military arm is to give nations a way to act collectively against the sovereignty of a transgressor where they could not act individually.[62]

---

59 U.N. CHARTER art. 43 ("All members of the United Nations . . . undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.").

60 GLENNON, *supra* note 16, at 90.

61 U.N. CHARTER art. 39.

62 Indeed, Article 2(7) makes clear that the Council can act against sovereignty in a way that individual nations cannot:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . [but this provision] shall not prejudice the application of enforcement measures under Chapter VII [relating to the actions of the Council].

Id. art. 2, para. 7. That is, once the Council identifies a threat to peace against which nonmilitary actions would be inadequate, it can take actions that would otherwise

The "Iraq model's" fundamental misreading of the Charter is reflected in the two major crises with Iraq, in 1990–1991 and 2002–2003. In 1990–1991 one might suppose that events vindicated the Charter system, because the United States sought and received permission to drive Saddam's forces out of Kuwait. But on any reading of the Charter's text, the United States *did not require* the Security Council's permission to oust Iraq's forces from Kuwait, because Article 51 gave it a right of joint self-defense—that is, defense of an ally—in response to an armed attack, which had surely occurred. The permission-of-the-Council approach must mean something *more* than defense against an armed attack, else the permission is superfluous. And indeed that is presumably how the United States understood matters, for it did not ask merely for permission to defend Kuwait (which it did not need), but *also* for permission to "use all necessary means . . . to restore international peace and security to the region," which the Council granted.[63] In short, the Council gave the United States a general police power against Iraq, which the United States likely would not have had otherwise due to the narrow drafting of Article 51 and the broad drafting of Article 2(4). Unfortunately, once the battle for Kuwait was won, both the United States and the United Nations forgot the broader authorization and treated the matter as essentially closed. But arguments that the United States *could not* proceed against Baghdad, because that was not necessary to defend Kuwait,[64] must rely on something contained in neither the Charter nor the Council's resolution.

Similarly, in 2002–2003, the argument was made that the United States could not proceed against Saddam unless Saddam attacked first (or an attack was imminent).[65] Leaving aside the fact that the Council-authorized police power against Iraq remained in effect from the previous war, that would have seemed a correct reading of the Charter's text. But the further argument was made that the *Council* would not and should not authorize any U.S. action, because there was no imminent threat and there remained possible peaceful avenues to restore the inspections regime.[66] Again, that argument has no basis in the Charter's text. Neither Article 51 nor Article 2(4)—the only possi-

---

appear to be interventions in matters of domestic sovereignty—including displacement of sovereign governments such as Iraq's or Haiti's.

63 *See* S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27–28, U.N. Doc. S/RES/678 (1990).

64 *See* Franck, *supra* note 2, at 612.

65 *See* Falk, *supra* note 4, at 595–98.

66 *Id.*; Franck, *supra* note 2, at 616.

ble textual sources—apply to Council actions, only to individual actions.

Instead, Articles 39 and 42 of the Charter authorize the Council to use military force to combat "threats to peace" in order to "maintain or restore international peace and security." Thus the textual question properly before the Council was not whether there was an imminent threat to the United States, or even whether Iraq had a program for developing weapons of mass destruction, but whether Saddam's persistent violations of Council directives and international law were a threat to international security against which nonmilitary means had been ineffective.

B. Context of the Charter

This reading of the Charter's text is confirmed by its context. The Charter was drafted against the background of the League of Nations, the failed interwar effort at collective security. The essential idea of the drafters of the Charter was not to repeat the failures of the League, a goal that further supports the Council's power and duty to act decisively against emerging threats.[67]

As discussed, the League, for practical and ideological reasons, relied upon faith in its members' collective moral and legal commitment to refrain from the use of force—rather than a Lockean conception of collective force—to maintain international peace and security.[68] The League never seriously grappled with its Lockean problem: it depended not upon enforcement but upon belief that its members would not violate fundamental principles of international security law. That faith proved tragically misplaced. It quickly became apparent that many nations did not embrace the League's non-use of force directive—whatever they might say on paper—and those that did lacked the ability to respond. That became clear even as the League came into being, as wars raged in Eastern and Southern Europe with no effective League response.[69] In the 1930s, the League

---

67 As Ruth Wedgwood observes, "[t]he United Nations Charter is appropriately read, even now, as an attempt to overcome the failures of Woodrow Wilson's League of Nations and its covenant of inaction. . . . This should inform the reading of [the Charter]." Wedgwood, *supra* note 3, at 576. Leading accounts of the founding of the United Nations, emphasizing the influence of the League experience, include TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. (1997); EVAN LUARD, A HISTORY OF THE UNITED NATIONS (1982); and RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945 (1958).

68 *See supra* Part II.B.

69 SCOTT, *supra* note 38, at 51–76.

witnessed the escalating succession of war and intimidation, from Japan's aggression against China, Hitler's rearmament, Italy's seizure of Abyssinia, Hitler's reoccupation of the Rhineland and occupation of Austria, and ultimately Hitler's demands upon Czechoslovakia and Poland that re-ignited war. The essential lesson of each of these episodes was that the League failed to respond with force as needed to contain threats to international security. By 1939, the League and the collective non-use of force was wholly discredited, and Britain and France moved to contain Germany outside the League system.[70]

When the nations reconvened after the war, they did so with full appreciation for the League's failures. One supposed lesson of the League was that the nonparticipation of the United States had doomed it, and in 1945 the United States was correspondingly prepared—as it was not in the interwar period—to play a leading role in protecting international security.[71] But U.S. absence had not been the League's only problem. Because it depended too heavily on good will, the League lacked the ability to do anything about nations which acted outside the law. So a second lesson of the League was that the democratic powers' disarmament (in particular in Britain) after the First World War could be blamed in part for the Second: lack of armaments meant inability to respond to Hitler and related threats in their early stages.[72] At the founding of the United Nations, the United States and its allies had an enormous share of the world's military and economic power and had no intention of disarming. And further, the United States had (for a brief moment) a nuclear monopoly. So the United Nations, unlike the League, had a real prospect of having the power to enforce international security law against most potential transgressors.

A third lesson of the League was that failure to respond to aggression produced more aggression. Conventional accounts recite a succession of nonresponses: to Japan (1931), to Italy (1935–1936), and to Germany (1938).[73] (One should add earlier and lower-level nonresponses, especially to Poland's seizure of Vilna from Lithuania in 1920.[74]) Part of the intended role of the Council, therefore, was to coordinate a military response to such acts, which under the League had proved impossible. But it is a mistake to think of this as the Council's chief role. Article 51 of the Charter carefully reserved (as the

70 *See generally* sources cited *supra* note 38.

71 *See* RUSSELL, *supra* note 67.

72 *See* BARNETT, *supra* note 38, at 494–506 (recounting British disarmament and the extent it constricted British policy in the interwar period).

73 *See generally* BENDINGER, *supra* note 38; SCOTT, *supra* note 38.

74 *See* BENDINGER, *supra* note 38, at 177–80 (describing the Vilna episode).

League's covenant and the Kellogg-Briand Pact had not) individual nations' right to so-called "collective" self-defense.[75] This meant that members could act *outside* the Council to respond to aggression against another nation, at least until the Council had the opportunity to formulate an effective response. So the Council was not principally a weapon against actual aggression—as reflected in the 1991 Gulf War, where the Council's approval would not have been prerequisite to the U.S. defense of Kuwait.[76]

Moreover, the peril of nonresponse to actual aggression was not the only—and perhaps not even the primary—lesson of the League's inaction. World War II was so long and costly in large part because Germany had built up an enormous offensive military capacity prior to embarking upon its first full-scale threat of aggression (which came quite late, in Czechoslovakia, in 1938). The Treaty of Versailles ending the First World War, while perhaps justly criticized for overreaching in some respects, established at least three formidable barriers to the reemergence of German offensive power. Long before Germany undertook any actual aggression, it systematically violated each of these key provisions of international security law, in each case without material response from the League powers, and with disastrous consequences for the League powers' ability to respond to German aggression when it did occur.

First, the Versailles Treaty generally required German disarmament, severely limiting the size of its army and navy, and forbidding an air force altogether; the Treaty also prohibited manufacture and possession of most heavy offensive weaponry.[77] Nonetheless, Germany began covert rearmament as early as the 1920s, a program that greatly accelerated once Hitler came to power in 1933. Though nominally secret in its early stages, Britain and France knew well enough what was going on, and in 1935 Hitler openly announced the introduction of a draft and the existence of the German air force (both forbidden by the Treaty).[78] The League powers, to the extent they had a coherent response, alternated between deploring Germany's re-

75 U.N. CHARTER art. 51 (referring to the "inherent right of individual or collective self-defense if an armed attack occurs").

76 The chief model of collective self-defense presumably was the declaration of war by Britain and France against Germany in response to the German attack on Poland in 1939—declarations not approved by the League and in some tension with the Kellogg-Briand Pact.

77 BARNETT, *supra* note 38, at 249

78 *Id.* at 394–402 (discussing rearmament and the British/French reaction). Barnett reports that Germany had achieved substantial superiority over Britain by 1936. *Id.* at 443.

armament and seeking a negotiated solution that effectively ratified the violations.[79] At no time, though, did the League powers seriously consider military action to enforce the treaty obligations (and the League itself did not address the matter). Yet as one military historian points out, "German rearmament was the key to the future; it was that fundamental violation of the Treaty of Versailles which, if left unrestricted, must eventually pave the way for the destruction of all the rest of the post-war settlement."[80]

Second, the Versailles Treaty initially gave the Allied forces the right to militarily occupy the Rhineland—that portion of Germany west of the Rhine river, on the eastern border of France and Belgium. The 1925 Locarno Treaty withdrew Allied forces in return for Germany's pledge to keep the Rhineland demilitarized.[81] This pledge was of enormous strategic significance in creating a buffer zone between France and Germany, and preventing Germany from establishing effective border defenses. Not only had Germany used the Rhineland as the staging ground for its 1914 assault on France, but denial of German fortifications in the region meant that a French attack on Germany would quickly carry into Germany's industrial heartland.[82] In 1936, wholly in violation of the Locarno pledges, the German army re-occupied the Rhineland; no justification existed for the re-occupation, and Hitler—no doubt emboldened by the League's ongoing nonresponse to the Italian invasion of Ethiopia—barely bothered to give one.[83] Documents recovered after the war indicated that the German military opposed the move, thinking that it would produce an armed response from the League (or at least from France) in which Germany would be humiliated. Hitler insisted, correctly, that no response would be forthcoming.[84]

---

79 *See* BENDINGER, *supra* note 38, at 279–93. Germany's rearmament dramatically altered the balance of power in Europe, as its prohibited armament exceeded Britain's in many areas. *See* SCOTT, *supra* note 38, at 100, 282–83, 291–307; *see also* BARNETT, *supra* note 38, at 413–16.

80 BARNETT, *supra* note 38, at 395.

81 BENDINGER, *supra* note 38, at 209–31, 367–68

82 *See* BARNETT, *supra* note 38, at 249, 331 (discussing the strategic importance of the Rhineland).

83 *Id.* at 382–83.

84 BENDINGER, *supra* note 38, at 367–70; SCOTT, *supra* note 38, at 369–73. In Scott's description of the tepid British response:

> Widespread in Britain was a feeling that, although technically in breach of treaties, Germany was committing no great crime in sending troops into territory which was, after all, German. . . . [The British government] seized hopefully upon Hitler's declaration of good intentions, of his willingness to conclude new security pacts, of his readiness to return to the League of Na-

Third, the Versailles Treaty expressly forbade union between Germany and Austria.[85] The reasons were geostrategic and evident from the map: in addition to enhancing Germany's population and industrial base (already larger than any other country in Europe other than Russia), annexing Austria would allow German forces to advance to the Italian border and to surround Czechoslovakia on three sides. In March 1938 Hitler occupied and annexed Austria, which offered no material resistence and ostensibly approved the annexation. The League (of which Austria had been a member) was embarrassingly silent—apparently concluding that this did not constitute aggression since the Austrians supposedly approved of the union with Germany; Britain and France, the chief architects of the Versailles settlement, had nothing meaningful to say on the matter.[86]

The combination of these three developments placed Hitler in an enormously powerful position once he began threats of immediate aggression against Czechoslovakia in the second half of 1938. To be sure, the League's failure to confront other acts of aggression (by Poland, Japan, and Italy) no doubt suggested to Hitler that he too might go unconfronted. That proved correct once he began issuing demands on Czechoslovakia. But by mid-1938 Hitler had already become sufficiently powerful that the democracies' only alternative to surrender would have been a catastrophic war.[87] Any realistic assessment of how Hitler could have been defeated without a costly war must focus on the events that allowed Germany to become, by 1938, an awesome offensive power. And that assessment could yield only one conclusion: that League powers critically failed to respond to developing threats to international security when costly war could still have been averted.

The post-war design of the Security Council, then, should be seen principally as an effort to remedy this failing. Actual aggression could be blocked by the coordinated acts of individual nations in response, as permitted by the Charter's Article 51. The experience with Hitler's

---

> tions. He had, he said, no further ambition but to live in peace and friendship with the rest of the world.

SCOTT, *supra* note 38, at 371–72.

85 *See* BENDINGER, *supra* note 38, at 127–28

86 On the annexation of Austria and accompanying lack of response, see SCOTT, *supra* note 38, at 386–87. Bendinger indicates that Britain previously implied it would not oppose Austria's annexation. BENDINGER, *supra* note 38, at 385. In any event, Britain plainly declined to take a decisive line on the matter, either before or after it occurred.

87 *See* BARNETT, *supra* note 38, at 506–07, 526 (recounting pessimistic British assessments of possible responses to the Czech crisis).

Germany, though, showed that this was not enough—not only must aggression be resisted, but emerging threats must be dealt with before they became fully developed. But the identification of developing threats (as opposed to actual aggression) was a more sensitive enterprise that might not be safely vested in individual nations, for fear of misuse. Accordingly, the Charter did not allow individual nations to act in response to developing threats; to avoid the failures of the League, it created the Security Council with the powers to do so.

As a result, the United Nations at least had the potential of a satisfactory Lockean bargain: members gave up the right to enforce international security law (except in the limited circumstances of Article 51), but, unlike in the League where nothing replaced it, the enforcement power shifted to the Council. Assuming the Council acted as it should, that should have produced the beginnings of the process Locke described: the substitution of civil society for the state of nature. Of course, it did not happen that way for many years, because the rise of the Cold War prevented the Council from acting as it was designed. But this does not take away from the fact that the United Nations was designed as an instrument to apply collective force against threats to international security, not as a collective renunciation of force in the image of the League.

IV. IRAQ AND THE COLLAPSE OF THE LOCKEAN BARGAIN

We can now see the U.S. appeal to the Council in 2002–2003 as an appeal that the United Nations live up to its side of the Lockean bargain. In the U.S. account, the United States had agreed in the Charter to give up unilateral use of force (save in extraordinary circumstances) on the understanding that the Council would use force to defend international security—in particular, to deter and punish violations of international security law.[88] In Iraq, there could be no

88 *See* Address to the U.N. General Assembly in New York, 38 WEEKLY COMP. PRES. DOC. 1529, 1532 (Sept. 16, 2002) [hereinafter Address] (calling on the United Nations to "serve the purpose of its founding" and enforce its resolutions as part of its role in international law); *see also* Prime Minister Tony Blair, PM Statement Opening Iraq Debate (Mar. 18, 2003), *available at* http://www.number-10.gov.uk/output/page3294.asp (arguing the imperative of backing up Security Council resolutions with force). Blair stated:

> I have come to the conclusion after much reluctance that the greater danger to the U.N. is inaction: that to pass Resolution 1441 [on Iraqi disarmament] and then refuse to enforce it would do the most deadly damage to the U.N.'s future strength, confirming it as an instrument of diplomacy but not of action, forcing nations down the very unilateralist path we wish to avoid.

Id.

doubt of fundamental breaches of international security law, and so, in Lockean terms, the Council was obligated to act. Its failure to act would constitute an abdication akin to the failures of the League. This vision underlies President Bush's call that the United Nations "serve the purpose of its founding"[89] by responding to Iraq.

In the opposing view, the United States and the international system generally had agreed to renounce the use of force (save in extraordinary circumstances) without any corresponding guarantee of collective uses of force (except, again, in extraordinary circumstances); the essence of the U.N. system, in this view, was not the collective use of force but the collective *renunciation* of the use of force, subject to narrow exceptions for attack or imminent threat of attack. The Council's role, in this conception, was much more limited: to respond only to an imminent attack, not to exercise a general police power. In Iraq there could be no justification for the use of force—unilateral *or* collective—because there was no attack or imminent attack, and no other use of force, even collectively, was permitted.[90]

Once the argument is framed in these terms, the U.S. position on Iraq appears fundamentally sound and the Council's position seems tenuous at best. As discussed, the Charter does not embody the renunciation of the collective use of force. To the contrary, both its text and context confirm that it is a Lockean bargain to shift the use of force to a collective entity but not to substantially renounce it. The fundamental lesson of World War II, which the Charter's drafters took to heart, was that failure to use force early in response to threats to international security leads to tragic consequences in later years. The idea of substantial renunciation of the use of force by the entire system is not part of the Charter, but is a holdover from the League and especially from the Kellogg-Briand Pact. In particular, the idea that the Council should only act militarily as a last resort, in response to an imminent threat of attack would mean that the Council could have been no more effective than the League in dealing with the rise of Hitler. Hitler did not pose an *imminent* threat prior to 1938, so presumably the "imminent threat" version of the Council could not have authorized action against him. Yet the League's failure to take early action against Hitler was exactly what drove the drafters of the Charter.

It might be argued, of course, that the Council in 2002–2003 simply did not share the U.S. view that Saddam posed a challenge to international security. The structure of the Council exists to ensure that

89 Address, *supra* note 88, at 1532.

90 *See* Falk, *supra* note 4, at 590.

no single nation identifies and acts against developing threats (as opposed to actual attacks). The Council is (or is supposed to be) a deliberative body that evaluates claimed violations of international security law, so the United States should not expect the Council to accept its arguments uncritically. With the argument put this way, though, the Council's decision seems much more difficult to defend. No one could seriously deny that Saddam Hussein was a persistent violator of basic notions of international security law. International security law exists to maintain international peace and security; a leader such as Saddam who challenges its fundamental principles is necessarily a threat, because he lives outside the "civil society" of nations that the security system seeks to develop. The Council recognized the threat, in its continuing attention to the situation in Iraq and its many directives to Saddam (all of which he ignored). The question was whether this challenge should cause the collective entity to act with force, which is essentially a question of whether the collective entity has a policing function.

Defenders of the Council, such as Professor Falk, do not deny that Saddam was a persistent violator of international security law, but rather insist that no military action should be taken against him except in response to an imminent threat and in the absence of all other alternatives.[91] But a Lockean police power contains no "last resort" or "imminent threat" imperatives, nor does the Council's mandate. Evidence that Saddam had defied and would continue to defy the basic framework of international security law was overwhelming, and that should have been enough to prompt—indeed to demand—military action.

Iraq, then, represents the collapse of the Lockean bargain reflected in the Charter—as indeed had the earlier Kosovo episode.[92] That in turn explains the U.S. decision to act outside the Council system. Indeed, the U.S. decision to act outside the Council system was nothing novel, but rather a continuation of the Cold War approach to international security. During the Cold War, as essentially everyone recognized, the Council could not act as originally designed, because of the extreme hostility among Council members. As a result, the United States took its international security measures largely outside the Council system.[93] That was inevitable, because the Council institu-

91 *Id.*

92 *See supra* note 24.

93 For example, U.S. actions during the Cuban missile crisis are difficult to square with the Charter. *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 8–24 (1974) (describing the crisis); High Seas, 4 Whiteman DIGEST § 2, at 523–24 (same); Quincey Wright, *The Cuban Quarantine*, 57 AM. J. INT'L

tionally could not uphold its end of the Lockean bargain. After the end of the Cold War, the United States attempted to resurrect the original understanding of the Council, and briefly there seemed some hope of success. Events in Kosovo in 1999 and especially in Iraq in 2002–2003 showed, however, that the Council was not prepared to act as an aggressive enforcer, but was captive to an ideology of the limitation on use of force that fundamentally undercut the Lockean bargain originally intended.

As a result, the United States and its allies in Kosovo, and then in Iraq, saw no imperative in upholding their end of the Lockean bargain, and reverted to enforcement of international security law outside the Council. This cannot be attacked on collective security grounds, for the collective security system had failed. There was no credible argument in Iraq that substantial violations of international security law had not occurred. The only argument against an imperative of intervention depended on claims that the use of force should be greatly limited and that a nation's sovereignty (in Iraq's case, the integrity of an outlaw regime) is violable only in the direst emergency. But that argument appeals to principles that are not part of the original U.N. bargain and are not part of a realistic approach to collective security. Instead, it appeals to the belief that security can best be achieved by global renunciation of force (even in enforcement)—a principle of the interwar League that was largely discredited and which the United States never seriously accepted.

The implications for the future are clear: the Council must refocus on the Lockean principles of collective security, including a robust use of force, to deter and punish violations of international security law. Leaders such as Saddam Hussein and Slobodan Milošević must understand that actions that defy the system of international security will be punished by collective force, specifically with the goal of removing them from power. Otherwise, the system contains no credible deterrent and no credible enforcement power. As a result, what is needed is for the Council to embrace a serious campaign to use force against outlaw regimes.

Calls for the Council to act with more resolution are common enough. As Jane Stromseth has argued,

---

L. 546, 555–56 (1963) (arguing that President Kennedy's use of force to blockade Cuba and prevent Soviet missiles from landing was not permissible as a self-defense measure under Article 51 of the Charter); *see also* Dean Acheson, *Remarks by the Honorable Dean Acheson*, 57 PROC. AM. SOC'Y INT'L L. 13, 14 (1963) ("[T]he propriety of the Cuban quarantine [was] not a legal issue. . . . The survival of states is not a matter of law.").

> the Security Council faces a severe test of its credibility. The future effectiveness and durability of the Security Council will depend on its willingness to take credible enforcement action in response to threats to peace and security. If the Charter system is to serve as a bulwark against those who would potentially use weapons of mass destruction, then the Council must be prepared to enforce its demands—to stand up to those who would defy its will.[94]

The Council's ability to do this, however, further depends on reconceptualizing its role as an aggressive enforcer of international security law, rather than as an entity whose use of force depends upon the demonstration of an "imminent" attack. A verbal formulation that sets too demanding a standard for the collective use of force provides an easy refuge for those who are reluctant to act. Instead, the Council needs to embrace responsibility for ensuring that fundamental principles of international security law are enforced, and that the persistent violation of such principles is in itself sufficient basis for action. The Council has shown, in the Haiti episode in 1994, that it can act in this way.[95] That successful operation can provide a model for future Council actions.

The alternative, as the Kosovo and Iraq episodes demonstrated, is that nations will act outside the system to accomplish the results the system was supposed to have—but has not—achieved. Professor Stromseth adds: "[I]f France and others are not willing to support coercive diplomacy backed by a credible—and authorized—threat of force, then the United States will cease to turn to the Council and the Council's role in responding to threats to peace and security will be diminished."[96] That is the inevitable result of the collapse of the Lockean bargain: if the "Magistrate" does not provide an effective regime of deterrence and punishment (*not* merely a regime of emergency response) there will be no resulting civil society and no

---

94 Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 636 (2003); *see also* Elias Davidsson, *The U.N. Security Council's Obligations of Good Faith*, 15 FLA. J. INT'L L. 541 (2003) (arguing that the Council has duty to authorize the use of force in appropriate situations); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1519 (2003) (criticizing the Security Council for failing to authorize action against Saddam). Secretary-General Kofi Annan has suggested that the Council "may need to begin a discussion on the criteria for an early authorization of coercive measures to address certain types of threats, for instance, terrorist groups armed with weapons of mass destruction." Kofi Annan, *In Annan and Chirac's Words: 'Fork in the Road' and 'Call a Summit,'* N.Y. TIMES, Sept. 24, 2003, at A13.

95 *See supra* Part I.A.

96 Stromseth, *supra* note 94, at 637.

resulting duty of obedience to either the "Magistrate" or the legal system he represents.[97]

Conclusion

The events of 2002–2003 were a culmination of a debate over the role of the Security Council in collective security. On one side, the United States insisted that the Council's role was to enforce (that is, deter and punish violations of) international security law. Saddam Hussein, an undisputed persistent violator of international security law, in this view was an appropriate target of collective force. The opposing side argued that force could be used only in response to an extreme emergency and only to avert the emergency (not to punish past or to deter future transgressions). On this view Saddam was not an appropriate target of collective force because no such emergency existed (a point largely conceded by the United States and its allies).

This Article has argued that the United States had the better of this debate for two essential reasons. First, a realistic system of collective security must include robust methods of deterrence and punishment through force. That is the lesson of John Locke's theory of civil society, whose formation depends upon a bargain to surrender individual rights of deterrence and punishment to a collective body that will act to those purposes. It is also the lesson of the League of Nations and the Kellogg-Briand Pact, which had no collective mechanism for enforcement through military action and proved unable to contend with the rise of transgressor states such as Hitler's Germany. Second, the strong vision of collective security is embodied in the original understanding of the U.N. Charter, which renounces individual but not collective policing. In particular, the Charter was a response to the failure of the League and the Kellogg-Briand Pact, and to the broader ideal that peace could be obtained by global renunciation of force.

As a result, the U.S. action in Iraq should be understood as a response to a breakdown in the U.N. system, in which the Council became captive to renunciation-of-force ideals that are not part of its

97 As Locke emphasized, the "Magistrate" had a duty of protection, and failure to uphold that duty meant that the "Magistrate" could no longer command allegiance of subjects. LOCKE, *supra* note 28, at 410–11. As Locke put it:

> There is one way more whereby such a Government may be dissolved, and that is, when he who has the Supream Executive Power, neglects and abandons that charge, so that Laws already made can no longer be put into execution. . . . For Laws [are not] made for themselves, but to be by their execution the Bonds of Society.

Id. at 411.

Charter. It was thus an entirely predictable reaction to the Council's failure to fulfill its end of the Lockean bargain. Where Locke's "Magistrate" lacks the power, or will, to act as enforcer, civil society will break down and nations, or individuals, will pursue their individual rights of enforcement. That is regrettable, but not reprehensible, nor is it remedied by anything other than the "Magistrate" performing its functions.

The implication, then, is that the United States may be justified in acting around the Security Council when that system fails to respond to undeniable threats to, and violations of, international security law. That precisely describes what happened in Iraq. But it also suggests caution in future episodes. Locke's state of nature was not a state of lawlessness. Breakdown of collective security encourages and may indeed entitle nations to act outside the system of collective security, but it does not follow that they are thereby entitled to act outside all of international law. They are not entitled to act simply to suit their own interests; rather, they are entitled to perform the enforcement role that the collective entity should be, but is not, performing. This suggests some limit on the so-called "Bush Doctrine" of preemptive warfare.[98] The problems at the United Nations may allow the United States to act outside the Security Council to counter violations of, and threats to, international security—but no more than that. As a result, actions outside the Council should be tied to (1) failure of the Council to act after an appropriate request, and (2) persistent and unmistakable violations of international security law by the target of U.S. action.

---

98 NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (setting out the Bush Administration's idea of preemptive action); *see* Bradford, *supra* note 5, at 1422–25 (describing and defending implications of the National Security Strategy); Yoo, *supra* note 5, at 571–76; *see also* Stromseth, *supra* note 94, at 635 (describing the Strategy as reflecting "a doctrine of preemption whose parameters are uncertain and that is potentially very broad in scope"). As suggested in the text, one way to narrow and focus the United States' claimed right of preemption is to limit it to regimes that are persistent violators of basic principles of international security law.