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The Report of the U.N. High-Level Panel and the Use of Force in Iraq in 2003

Feisal Amin al-Istrabadi*

> "[R]eferral to the Security Council that results in no action is worse than no referral."

¶1 The military intervention removing the Iraqi Baathist regime in 2003 has, since its initiation, seemingly haunted the United Nations. In his annual address opening the Fifty-eighth Session of the General Assembly six months after Iraq's liberation, the Secretary-General began his speech – delivered in French – with the words, "The last twelve months have been very painful for those of us who believe in collective answers to our common problems and challenges."[1] Later that year, he appointed a panel of experts to assess common threats and the appropriateness of the use of force in addressing those threats. The resultant report, *A More Secure World: Our Shared Responsibility*,[2] was issued in late 2004, and Iraq figured prominently in the authors' work. As might be expected under the circumstances, the report contains harsh criticism of the decision of the "coalition of the willing"[3] to intervene in Iraq without U.N. sanction. The terms of reference governing the panel had seen to that result: a *raison d'être* of the Panel was to derogate interventions such as those in Iraq and press the case for collective security under the Charter.[4]

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[1] U.N. GAOR, 58th Sess., 7th plen. mtg. at 2, U.N. Doc. A/58/PV.7 (Sept. 23, 2003). Of course, the specter of Iraq also loomed large the previous year. The Secretary-General's speech that year pre-figured the High-level Panel's criticisms of the intervention in Iraq. He repeatedly advocated for multilateralism and what he termed "the rule of law," rejected unilateralism and cautioned that no State "can fend for itself." U.N. GAOR, 57th Sess., 2nd plen. mtg. at 1, U.N. Doc. A/57/PV.2 (Sept. 12, 2002). On the other hand, he also called upon the Security Council to "face its responsibilities" should Iraq's defiance continue. *Id.* at 3.

[2] *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, U.N. Doc. A/59/565 (Dec. 12, 2004) [hereafter Report]. The published version of the Report which includes all endnotes is available at http://www.un.org/secureworld/report3.pdf.

[3] President George Bush used this phrase in late autumn 2002, calling upon Saddam Hussein to disarm. The President continued, "However, should he choose not to disarm, the United States will lead a coalition of the willing to disarm him and at that point in time, all our nations . . . will be able choose whether or not they want to participate." *Bush: Join coalition of willing*, CNN.COM, Nov. 20, 2002, http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato/ (last visited Nov. 25, 2005).

[4] Report, *supra* note 2, at 119, ¶¶1, 2, and 4(b) and (c):

> 1. The past year has shaken the foundations of collective security and undermined confidence in the possibility of collective responses to our common problems and challenges. It has also

¶2 But there are fundamental inconsistencies in the Report that this paper will analyze. *First*, the Report seemingly advocates a position that, to have legitimacy under international law, military intervention must be authorized by the Security Council. To the authors of the Report, therefore, military intervention by Member States in Iraq without Security Council authorization must be rejected. Yet the authors expressly approve of interventions in cases such as Kosovo, even though the Security Council did not authorize that intervention. Indeed, when the Council fails to act in a conflict where intervention appears desirable to the authors, and where Member States act notwithstanding a lack of Security Council authorization, the Report does not criticize the intervention, but rather criticizes the Security Council. The effect of doing so, of course, is to undercut the Report's argument that the Council is the only authority which can legitimize military intervention, as they clearly find unilateral NATO action in the former Yugoslavia legitimate.

¶3 *Second*, the authors condemn the use of force in Iraq in strident terms, though they rarely mention Iraq by name. The report, however, sets forth criteria requiring intervention where governments abuse the human rights of their citizens, engage in mass-killings or genocide, fail to protect the welfare of their citizens, or are in danger of causing their respective States to fail. A rigorous application of these considerations militates in favor of the intervention to remove the prior regime in Iraq. The report is thus inconsistent by failing to criticize the Security Council for not acting in that case, as in Rwanda, Bosnia-Herzegovina and Kosovo.

¶4 *Third* – and this is not so much an inconsistency as an error – the Report suggests that the legal justification the Bush Administration gave for going to war was the doctrine of preventive, as opposed to pre-emptive or anticipatory, self-defense. The Report rejects this doctrine under the existing international law of war. Yet that was not the justification upon which the Bush Administration relied for intervening in Iraq. Rather, the Administration argued that it had a right and an obligation to intervene because of Iraq's failure to abide by U.N. Security Council resolutions passed under Chapter VII of the Charter.

¶5 To begin with, the Report notes the effect which the September 11 attacks on New York and Washington, D.C., had in unifying world resolve to combat terrorism. France, the Report pauses to emphasize, introduced the Security Council resolution condemning the attacks, – the General Assembly followed suit – opening the way for "United States-

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brought to the fore deep divergences of opinion on the range and nature of the challenges we face and are likely to face in the future.

2. The aim of the High-Level Panel on Threats, Challenges and Change is to recommend clear and practical measures for ensuring effective collective action, based upon a rigorous analysis of future threats to peace and security, an appraisal of the contribution collective action can make and a thorough assessment of existing approaches, instruments and mechanisms, including the principal organs of the United Nations.

* * *

4. Specifically, the Panel will:

* * *

(b) Identify clearly the contribution that collective action can make in addressing these challenges;

(c) Recommend the changes necessary to ensure effective collective action, including but not limited to a review of the principal organs of the United Nations.

led military action . . . in self-defense."[5] "This 'spirit of international purpose lasted only months'[,however,] and was "eroded by divisions over the United States-led war in Iraq . . . ."[6] Thus world harmony was destroyed by American adventurism, acting as the U.S. did without world sanction. The naïve reader of the Report might accordingly be forgiven for his naiveté if he concluded that the Report's underlying message is a simple one: Collective action authorized by the Security Council under Chapter VII of the U.N. Charter is good, but States taking matters into their own hands without such authorization is bad.

¶6 But that is not quite the full picture. It is true that the Report is relentless in its critique of the intervention in Iraq because it was not authorized by the Security Council,[7] and therefore, not within the ambit of collective security under the Charter. But where the authors' predilections militate in favor of intervention, the Report is stinging in its criticism not of States who intervene, but of the Security Council for failing to authorize such intervention. The Report, for instance, is scathing in its assessment of the failure to intervene in Rwanda, naming those responsible for the failure:

> The biggest failures of the United Nations in civil violence have been in halting ethnic cleansing and genocide. In Rwanda, Secretariat officials failed to provide the Security Council with early warning of extremist plans to kill thousands of Tutsis and moderate Hutus. When the genocide started, troop contributors withdrew peacekeepers, and the Security Council, bowing to United States pressure, failed to respond.[8]

¶7 In a similar vein, the Report criticizes the failure of the United Nations to intervene in Bosnia-Herzegovina and Kosovo (in Kosovo, it was NATO which intervened). Again, the naïve reader, expecting consistency, will quite naturally expect the same scathing criticism of NATO as one finds of the Iraq coalition for "erod[ing]" the "spirit of international purpose" by intervening in Iraq. Again, the reader will be disappointed. Continuing the passage quoted above, the report states:

> In Bosnia and Herzegovina, United Nations peacekeeping and the protection of humanitarian aid became a substitute for political and military action to stop ethnic cleansing and genocide. In Kosovo, paralysis in the Security Council led the North Atlantic Treaty Organization (NATO) to bypass the United Nations.[9]

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[5] Report, *supra* note 2, at 13, ¶14.

[6] *Id*. at 13, ¶15.

[7] Some of the criticisms are chiding. "No State," the United States is lectured, "no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats. Every State requires the cooperation of other States to make itself secure." Report, *supra* note 2, at 16, ¶ 24. The language of the Report on this point is virtually a verbatim quote from the Secretary-General's speech opening the Fifty-seventh Session of the General Assembly. *See* note 1, *supra*. It should be noted that, though it clearly refers frequently to the allied intervention in Iraq, the Report only rarely mentions the Iraq intervention by name.

[8] Report, *supra* note 2, at 34, ¶ 87.

[9] *Id*. The Report's catalogue of failures by the Security Council to prevent or intervene in places where genocide and mass-killing was underway does not, it is worthy of note, include Iraq and its former

¶8 It is, parenthetically, curious that the Report eschews diplomatic niceties with respect to failures of the international system which it believes are caused by the United States. While Russia threatened a Security Council veto to prevent U.N. action in Kosovo,[10] the authors are very careful not to hint who the "culprit" might be. Instead, more passive descriptions are used, such as phrases adverting to "substitutes" for military action, or "paralysis in the Security Council" "leading" the NATO alliance to "bypass" the U.N.

¶9 The Report criticizes the UN for its docility elsewhere. The large-scale killing underway in Darfur is another example. As the Report sees it, the world body has acted with "glacial speed" there.[11] Indeed, the Report accuses the United Nations and its Members of having "discriminated" all "[t]oo often" in their response to threats to global peace and security, contrasting the swiftness of the response to the September 11 attacks with the non-response in Rwanda.[12] While an implication arises that the nature of the discrimination might be racial, the Report seemingly softens that suggestion by noting that Rwanda has one thirty-sixth the population of the U.S., suggesting that it is not a great enough power to raise the attention of the world.[13] As the Report sees it, attention is paid only to the problems of great powers, and this infects and reduces the credibility of the world system.

¶10 According to the Report, in the immediate aftermath of the Cold War, there had been a brief, hopeful moment as the Security Council authorized the use of force to repel aggression in Kuwait[14] and as a humanitarian intervention in Somalia.[15] That moment was short-lived, however. "Indifference" by the great powers to the problems of the citizens of smaller States set in, and other Member States exhibited "complacency" to such problems.[16] To be credible, collective security needed to depend on universal application, without regard to the "nature of would-be beneficiaries, their location, resources or relationship to great Powers."[17] Yet the Report is hard-pressed to document application of these principles universally. Instead, it must concede in exasperation that, over the previous decade-and-a-half, the world body has only acted in East Timor in concert with national governments and regional organizations to prevent mass-killings.[18]

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government. Indeed not one word is contained in the Report about Saddam Hussein's genocidal campaigns against the Kurds, or the mass graves in Southern Iraq or the wars launched by him against neighbouring States. This fact is regrettable at the very least from the perspective of consistency.

[10] Michael J. Jordan, *A History of Skirting the UN: Britain Offers to Extend March 17 Deadline to Win Support for a UN Vote Thursday on Disarming Iraq*, CHRISTIAN SCIENCE MONITOR (on-line edition) (Mar. 13, 2003), http://www.csmonitor.com/2003/0313/p07s01-woiq.html (last visited Nov. 25, 2005).

[11] Report, *supra* note 2, at 19, ¶42:

> Similarly, throughout the deliberation of the High-level Panel on Threats, Challenges and Change, we have been struck once again by the glacial speed at which our institutions have responded to massive human rights violations in Darfur, Sudan.

[12] *Id.* at 19, ¶41.

[13] *Id.*

[14] *Id.* at 12-13, ¶12; S.C. Res. 678, U.N. Doc. S/RES/0678(Nov. 29, 1990).

[15] Report, *supra* note 2 at 12-13, ¶12; S.C. Res. 733, U.N. Doc. S/RES/0733(Jan. 23, 1992).

[16] *Id.* at 13, ¶13.

[17] *Id.* at 19, ¶40. The charge of racialism is again implied by the phrase "nature of would-be beneficiaries."

[18] *Id.* at 34, ¶87. To salvage their *Weltanschauung*, the most the authors of the Report are able to adduce is that "[c]ollectively authorized use of force may not be the rule today, but it is no longer an exception." *Id.* at 32, ¶81.

Too often, collective security institutions have displayed an "unwillingness to get serious about preventing deadly violence."[19]

¶11 Of course, in advocating interventions in places such as Rwanda, Bosnia-Herzegovina and Kosovo, the authors are well aware that they are derogating centuries' worth of international law on State sovereignty. Indeed, it is a hallowed, foundational principle of the United Nations itself.[20] To avoid the problem inherent in this position, the Report asserts that Member States yield a sufficient quantum of their sovereignty to the United Nations upon signing the Charter to allow that body to assess their internal actions to determine whether to intervene under collective security.[21] Governments, therefore, individually, owe the larger world order a duty of protecting their citizens' welfare; however, significantly, the authors of the Report fail to cite *any* authority to document their assertion that a modern, post-Charter theory of State sovereignty includes such a duty that is enforceable by the international community.[22] Further, according to the Report, the United Nations has a corresponding "responsibility" and "right" (duty?) to intervene to protect the citizens of States which abuse human rights.[23] Again, there is no citation to any authority establishing that such a right to intervene exists.[24]

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[19] *Id*. at 18-19 ¶39.

[20] U.N. CHARTER art. 2, para. 4:

> 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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

[21] Report, *supra* note 2, at 17, ¶29:

> In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty *but also accept its responsibilities.* Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, *today it clearly carries with it the obligation of a State to protect the* ***welfare*** *of its own peoples and meet its obligations to the wider international community.* But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, *to meet its responsibilities to protect its own people* and avoid harming its neighbours. And in those circumstances, *the principles of collective security mean that some portion of those responsibilities should be taken up by the international community,* acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or *supply the necessary protection,* as the case may be.

(emphasis added).

[22] Report, *supra* note 2, at 18, ¶ 34.

[23] Report, *supra* note 2, at 18, ¶¶ 34, 36:

> 34. States are still the front-line responders to today's threats. Successful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials all require capable, responsible States as partners. It follows that greater effort must be made to enhance the capacity of States to exercise their sovereignty responsibly. *For all those in a position to help others build that capacity, it should be part of their responsibility to do so.*
>
> 36. Collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of State and *international responsibility to protect civilians from the effects of* war and *human rights abuses* has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene. It is also an operational challenge: the challenge *of stopping a Government from killing its own civilians* requires considerable military deployment capacity.

(emphasis added).

[24] Report, *supra* note 2, at 18, ¶ 36.

¶12 To further these contentions, the Report adduces an interesting statistic relating the number of inter-State wars to the number of civil wars from 1946 to 2002. Over that half-century, the number of inter-State wars hovers steadily, well below ten per year, while the number of civil wars markedly increases.[25] Indeed, in 1994, when the number of inter-State wars approaches zero, the number of civil wars reaches its maximum at fifty-five.[26] Thus the report concludes that intra-State instability and civil war are threats to international peace and security.

¶13 Civil wars and the existence of poverty are discussed in a section entitled "The case for comprehensive collective security" in which the subheading is "Threats without boundaries."[27] The duty of States to protect their citizens is set forth under the same heading, with the subheading "Sovereignty and responsibility"[28] and "Elements of a credible collective security system."[29] The right and responsibility of the U.N to intervene in cases where Governments fail in their duties is also discussed under this last subheading. The clear implication is that unstable regimes and those which routinely abuse the rights of their citizens and fail to protect their welfare constitute a common threat to peace and security, requiring a collective *security* response. Thus, in the Report's view, such failures by Governments *must*, by definition, constitute a threat to international peace and security, for it is only in that context that the Charter implicates the right of collective self-defense.[30] Failed or failing States also constitute a threat to peace and security.[31]

¶14 One the one hand, the Report's view of the threshold for intervention seems very straightforward. Such a reading is underscored when the Report declares:

> The large loss of life in such wars and outbreaks of mass violence obliges the international community to be more vigilant in preventing them. When

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[25] Report, *supra* note 2, at 11, Figure I.

[26] *Id*. Citing research conducted by an academician, the Report correlates poverty and the probability of civil war. When per capita GDP approaches $100, the predicted probability of civil war within five years approaches 0.12, while as income rises to $5000, the probability decreases by 75% to below 0.03. *Id*. at 15, Figure II.

[27] Report, *supra* note 2, at 14-16.

[28] *Id*. at 17.

[29] *Id*. at 17-18.

[30] "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 in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

[31] Report, *supra* note 2, at 16,¶ 27:

> The most robust defence against the possible terrorist use of nuclear, chemical or biological weapons would seek to control dangerous materials, deter and capture terrorists, and address the broader threats that increase the risk of terrorist action. *Civil war, disease and poverty increase the likelihood of State collapse* and facilitate the spread of organized crime, *thus also increasing the risk of terrorism and proliferation due to weak States and weak collective capacity to exercise the rule of law. Preventing mass-casualty terrorism requires a deep engagement to strengthen collective security systems, ameliorate poverty, combat extremism, end the grievances that flow from war, tackle the spread of infectious disease and fight organized crime.*

(emphasis added).

> prevention fails, there is urgent need to stop the killing and prevent any further return to war.[32]

But, as noted above, the standards become fuzzier when other portions of the report are considered. If poverty is a threat to international peace and security, *per se* and as a source of destabilization leading to civil war and failing states, may (or must) the international community intervene where a State fails adequately to deal with poverty within its boundaries? Does that right include the right of collective self-defense under Chapter VII to remove such a regime? Is the same true under the more amorphous duty States have to the international community to "protect the welfare" of their citizens? Given the broad language used by the High-level Panel in the Report, it is at least as legitimate to answer the foregoing questions in the affirmative as in the negative.[33]

¶15 In this context, it is curious that the Report asserts that, in refusing to authorize the use of force in Iraq in 2003, the Security Council "provided a clear and principled standard with which to assess the decision to go to war."[34] The authors fail to elucidate precisely what this "clear and principled standard" is. The suggestion appears to be that, where the Council authorizes war, war is *ipso facto* legitimate; where the Council does not, it is not. But if that is the gold standard, then the intervention in Kosovo by NATO was as unlawful as the Report asserts the Iraq intervention was, as neither had the sanction of the Security Council.[35] Underscoring that, the Report continues to be of two minds – on the one hand advocating for collective action, on the other aware that collective action may be rare and result in catastrophic failures such as Bosnia-Herzegovina, Rwanda and Darfur – the Report returns to the theme that every State has the duty to prevent harm.[36] Yet again and again the Report insists that only collective action authorized by the Security Council should be taken. Given the history of Security Council inaction, the Report provides at worst nothing more than a recipe for continuing paralysis, and at best an amorphous, shifting standard of what constitutes legitimate

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[32] *Id*. at 34, ¶ 88.

[33] To be sure, in yet another instance of self-contradiction, the Report attempts to back off such a broad interpretation of its advocacy for intervention. *Id*. at 66, ¶203:

> *We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.*

Thus, it is only if the Security Council authorizes such action that action becomes legitimate. But it is impossible to square that position with the Panel's overt approval of NATO's Kosovo operation.

[34] *Id*. at 32-33, ¶ 83.

[35] *Cf. id*. at 32, ¶ 82, which states in part:

> That all States should seek Security Council authorization to use force is not a time-honoured principle; if this were the case, our faith in it would be much stronger. Our analysis suggests quite the opposite – that what is at stake is a relatively new emerging norm, one that is precious but not yet deep-rooted.

Indeed, given the paucity of evidence that there is such a norm, as even the Report concedes, it appears that the norm is more "precious" to the authors than it is "emerging" in the praxis of States.

[36] *Id*. at 65, ¶ 201 states in relevant part:

> There is a growing recognition that the issue is not the "right to intervene" of any State, but the "responsibility to protect" of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease.

intervention. It certainly provides no principled legal standards for assessing the legality of armed interventions.

¶16 One general observation is worth making before assessing why, despite the Report's statements, its *rationale* supports intervention in Iraq: a weakness of the Report is that it treats the Council as though it were composed of wise and learned judges and scholars applying the norms of international law impartially when it is no such thing.[37] The Council consists of fifteen Member States of disparate power, each attempting to vindicate often irreconcilable agendas; politics is far more often the motivating factor for Council Members than is law.[38]

¶17 Many Council Members play a zero-sum power game.[39] It is not an accident that the common denominator in the Security Council's failure to authorize the use of force in Bosnia-Herzegovina, Kosovo and Iraq was the Russian Federation; though in the case of Iraq Russia was joined by France.[40] What prevented Security Council action in the former Yugoslavia was the politics involved: Russia was unwilling to countenance the use of force directed against a client State.[41] The failure of the Security Council to act in regard to Iraq was also the result of politics and not reasoned legal debate. It seems impossible to extract a "clear, principled standard" from such assertions, given that the French president announced that France would veto a resolution on Iraq "no matter what the circumstances."[42]

¶18 In any event, applying the Report's criteria for intervention, it seems evident that Iraq was one of the "failures" for which the Security Council should have been criticized

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[37] The Report acknowledges as much in one telling paragraph. *Id.* at 64, ¶ 197:

> One of the reasons why States may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it, including in the ways we propose in the present report.

Yet it appears that, by failing to act in the former Yugoslavia, in Rwanda and in Iraq to prevent grave violations of the human rights of the citizens of those countries, it is the Security Council itself—acting through it Members—which has made itself impotent and irrelevant to the lives and problems of tens of millions of suffering peoples worldwide. To address this situation, the Report repeats the mantra of "reforming the Security Council." *Id.* at 64-65, ¶¶ 197-198. But, in this context, the only meaningful reform would be the elimination of the veto of the five Permanent Members, thereby preventing the ability of these Members to protect client States. Whatever the objective merits of that suggestion, it is a non-starter. None of the Permanent Members will agree to forego the right of the veto.

[38] A legal advisor to one of the delegations on the Security Council once told the author that the Council is fundamentally a lawless place, meaning that its considerations are guided not by law, but by politics and practical, *Realpolitik* considerations.

[39] This statement is the result of the direct observations of this author, who has been intimately involved in negotiating S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005), S.C. Res. 1619, U.N. Doc. S/RES/1619 (Aug. 11, 2005), S.C. Res. 1618, U.N. Doc. S/RES/1618 (Aug. 4, 2005) and S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

[40] Jordan, *supra* note 10.

[41] *Id.*

[42] President Jacques Chirac, quoted in *France, Russia threaten war veto*, CNN.COM, Mar. 10, 2003, http://www.cnn.com/2003/WORLD/europe/03/10/sprj.irq.france.chirac/. (last visited Nov. 25, 2005). Chirac apparently had a plan for re-habilitating the Iraqi despot, in which Saddam Hussein would remain president, but appoint a few new names to high office (including his second son, Qussai, as prime minister), thus constituting "regime change" without war. Amir Taheri, *The Chirac Doctrine: France's Iraq-War Plan*, NAT'L REV. ONLINE, November 4, 2002, http://www.nationalreview.com/comment/comment-taheri110402.asp (last visited Nov. 25, 2005).

rather than praised. The Report, after all, expressly endorses the use of force to relieve humanitarian suffering brought about by regimes which slaughter their own populations, subjecting them to grave abuses of human rights. Few regimes, since the death of Stalin, could surpass the Baathist regime for the sheer scale of death and misery wreaked on its own population. If the comparatively mild sin of omission of "failing to protect the welfare of its citizens" could implicate the doctrine of collective self-defense,[43] then surely it was long overdue for the world community to take on Saddam Hussein and his cronies.

¶19 The major crimes against humanity committed by the regime against the people of Iraq are well known, and do not need elucidation in the limited space available in this paper. There is thus no need to mention the genocide of the Kurds,[44] the mass-killings of the Marsh Arabs[45] or the humanitarian, cultural and environmental catastrophes caused by the draining of the Iraqi marshes in reprisal for the *intifadha* of 1991. Indeed, shortly after the cease-fire resolution[46] in 1991, the Security Council passed a resolution condemning the human rights abuses of the Baathist regime as a threat to international peace and security in the region, demanding that the regime cease such violations in order to relieve this threat.[47] Yet throughout the 1990's, the regime continued to do the opposite.

¶20 Over that time, the Iraqi Government invented an ever-growing number of punishments for crimes such as theft, desertion and the like. These included amputations of limbs, branding, and, in the case of women, State-sanctioned rape.[48] Since the liberation of Iraq, the remains of some 400,000 people have been found in a reported 270 mass graves.[49] These were not only the remains of the hapless victims of the regime dating from the 1980's or the 1991 rebellions, as some of the mass graves, such as one found in Basrah, date from the late 1990's.[50] At least one mass grave near Baghdad contained the remains of political prisoners from Abu Ghrayb Prison shot dead in early April 2003, around the time of the fall of the previous regime.[51] Thus Iraq was in

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[43] *See supra* discussion accompanying note 23.

[44] A devastating account of the use by the previous regime of poison gas and its continuing effects in Northern Iraq (along with world-wide indifference to the fact) is contained in SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 171-245 (Perennial, 2003).

[45] *See* KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 318 (U. Cal. Press, 1998) (1989).

[46] S.C. Res. 686, ¶ 3, U.N. Doc. S/RES/0686 (1991) (Mar. 2, 1991).

[47] S.C. Res. 688, ¶¶ 1-2, U.N. Doc. S/RES/0688 (1991) (Apr. 5, 1991), in which the Security Council noted that it:

> 1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
>
> 2. *Demands* that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected . . . .

[48] MAKIYA, *supra* note 45, at xxii-xxvi.

[49] *Iraq's Legacy of Terror: Mass Graves*, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, http://www.usaid.gov/iraq/legacyofterror.html (last visited Nov. 1, 2005).

[50] *Mass Grave Discovered in Iraq's Holy Shiite City*, ASSOCIATED PRESS, May 16, 2003, *available at* http://www.iraqfoundation.org/news/2003/emay/16_massgrave.html (last visited Nov. 25, 2005).

[51] *New Mass Grave Found in Iraq*, BBC.CO.UK, June 7, 2003,

continuous, open violation of a Security Council resolution that found the conduct of Iraq to be a threat to peace and security. This situation persisted until the liberation of Iraq in 2003.

¶21 Further, had the coalition failed to act, Iraq would be well on the way towards failing as a State, creating the kind of chaos in the region which the Report believes the world order, acting through collective self-defense, must prevent. The Kurds in Northern Iraq would still have *de facto* independence, and the two poles, Baghdad and Erbil-Suleimania, would be continually moving farther apart.[52] That of course would have resulted in the increased apprehension of States in the region with significant Kurdish populations: Turkey, Iran and Syria. Furthermore, Iraqis would still be living under a brutal regime of sanctions which eviscerated its middle and intellectual classes and engendered, in what could have been a wealthy country, the type of enforced poverty against which the Report repeatedly warns.[53] Rather than in jail awaiting trial, Saddam would still be free to terrorize twenty-seven million souls, treating Iraq like a Mafia territory, except that Mafia dons do not have the capacity to exterminate hundreds of thousands of people on a whim.

¶22 It is beyond the ability of this author to understand the logic that excludes the intervention in Iraq from considerations which, in the minds of the authors of the Report, militate in favor of intervention in the former Yugoslavia. In both cases, mass killing was ongoing and the populations of both nations were continuously subjected to ongoing horrific treatment. Fascist regimes were in power in both places, and both were bent on ethnic/sectarian cleansing. The former Yugoslavia and Iraq had both been the subject of U.N. Security Council resolutions demanding compliance with international human rights standards, and both target Governments were in grave breaches of those obligations. The Security Council found both situations to constitute a threat to international peace and security and in both places the humanitarian nightmare was ongoing in the face of cold indifference from the world order.

¶23 Admittedly neither the United States nor the United Kingdom argued the case for humanitarian intervention in Iraq prospectively.[54] The Report should have considered this as a possibility, and also considered why the Security Council refused to act. In the case of Yugoslavia, for political reasons, one member of the Security Council refused to allow intervention, threatening a veto. In the case of Iraq, it was two such members. In the meantime, the killing in Iraq continued for decades under the watch of "indifferent great powers." One can easily imagine a different, perhaps more consistent, set of

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http://news.bbs.co.uk/1/hi/world/middle_east/2971464.stm (last visited Nov. 25, 2005).

[52] DAVID L. PHILLIPS, LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO 4-5 (Westview Press, 2005). "A perverse paradox came to pass. Saddam had become the guarantor of Kurdish autonomy. As long as he remained in power, the U.S. and Britain would protect the Kurds."

[53] The Report, *supra* note 2, at 32, ¶¶ 79-80, makes the point that "sanctions fatigue" was brought about by concerns about the humanitarian effects of such a comprehensive regime of sanctions as was imposed on Iraq, and that the Security Council had understood that sanctions must be much more narrowly tailored in the future. That, of course, was small consolation to the Iraqi populace, since no effort to lift or modify sanctions so as to narrow their scope was ever launched.

[54] In a private conversation in Baghdad on Dec. 31, 2003, Sir Jeremy Greenstock, a former permanent representative of a Security Council Permanent Member at the relevant time, told the author that he believed that arguments for humanitarian intervention had "run their course" at the Security Council long before 2003.

authors concluding that it was this paralysis on the Council which compelled the coalition to intervene in Iraq, thus "bypassing" the U.N.

¶24 In a further effort seemingly to de-legitimize the liberation of Iraq, the Report turns its attention to questions relating to the legality of the use of force. It acquiesces to the fact that, though Article 51[55] of the U.N. Charter does not enshrine the doctrine of pre-emptive or anticipatory self-defense, customary international law recognizes the existence of the doctrine. The Report emphasizes the three elements of the doctrine: The attack must be imminent; the defending State must have no other means to deflect the attack; and its response must be proportionate.[56] To the authors of the Report, no further discussion of so well-settled a doctrine is needed.

¶25 The more *a propos* question posed in the Report is whether a State has the inherent right to defend against a non-imminent or non-proximate threat, in what it called *preventive* self-defense.[57] Here the authors of the Report conclude that only the Security Council, under collective self-defense, has the right to engage in preventive war. States with a case to be made for prevention must present it to the Security Council. If the Council refuses to authorize action, the defending State must defer action.[58] Curiously, whereas earlier the Report derogated the principle of non-interference by advocating intervention where a State fails to protect the welfare of its own citizens, in this context, the authors enshrine non-interference and the potential for paralysis:

> For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non- intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from

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[55] U.N. Charter art. 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The article deals only with the situation where an actual armed attack has in fact occurred.

[56] Report, *supra* note 2, at 63, ¶ 188.

[57] The U.S. Administration asserted that it was not presenting a radically new doctrine. Instead, using the language of anticipatory self-defense and pre-emption, the Administration stated that it was merely "adapt[ing]" the imminence standard long-recognized in anticipatory self-defense to the threats faced after 11 September. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Nov. 25, 2005). On this issue, *see infra* note 64.

[58] Report, *supra* note 2, at 63, ¶ 190:

> The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option.

> collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[59]

Given that each of the 191 Member States lacks the legal right to wage preventive war, it is curious that an aggregation of fifteen States on the Security Council should have the right. Yet that is precisely what the Report argues: Only the Security Council may authorize preventive war, thanks to Chapter VII.[60]

¶26 As the Report itself indicates, the United Nations and the Security Council, particularly, were sharply divided over the Iraq campaign.[61] Much, though perhaps not all, of the discussion on prevention, therefore, seems likely to have been motivated by the coalition's use of force in liberating Iraq from its previous rulers. If that premise is correct, it seems equally likely that the Panel might have believed that the coalition relied on the doctrine of preventive force against a non-imminent threat in the case of Iraq. While it is true that the U.S. Administration may have given a variety of justifications for using force in Iraq, preventive use of force was not one of them.[62]

¶27 Instead, President Bush argued that Iraq's violation of a large number of Security Council resolutions passed under Chapter VII was a sufficient justification for the United States and its partners to act to enforce those resolutions. In his speech at the General Debate on September 12, 2002, President Bush stated:

> The conduct of the Iraqi regime is a threat to the authority of the United Nations and a threat to peace. *Iraq has answered a decade of United Nations demands with a decade of defiance.* All the world now faces a test and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?
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> * * *
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> My nation will work with the Security Council to meet our common challenge. If Iraq's regime defies us again, the world must move deliberately and decisively to hold Iraq to account. We will work with the Security Council for the necessary resolutions. But the purposes of the

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[59] *Id*. at 63, ¶ 191.

[60] *Id*. at 64, ¶ 194. The Report's premise is that, since the Security Council may take any action, including military action, to maintain or restore international peace and security, the Council may authorize military action against a State regardless of whether the threat is imminent or not. *Id*. at 63-64, ¶ 193.

[61] *See* Report, *supra* note 2, at 13, ¶ 15.

[62] "[T]he U.S.-led intervention against and deposition of the Hussein regime in Iraq in March and April 2003 was predicated not upon an argument in favor of preventive war, but upon far less controversial legal justifications . . . ." William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1367 (2004)(footnotes deleted). *But cf.* Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-defense*, 31 DENV. J. INT'L L. & POL'Y 43, 43 (2002) (The doctrine of prevention means "the United States may invade Iraq and remove Iraq's leader, Saddam Hussein, because he poses an indefinite future threat, the type of threat a superpower need not live with, though all other states must."). O'Connell wrote this article prior to the commencement of hostilities.

> United States should not be doubted. *The Security Council resolutions will be enforced*, and the just demands of peace and security will be met, or action will be unavoidable, and a regime that has lost its legitimacy will also lose its power.[63]

Certainly a strong thread running through the President's speech was that the international will, expressed in many Chapter VII resolutions, ought to be enforced.

¶28 An article co-authored by the Legal Advisor and one of the Deputy Legal Advisors to the U.S. Department of State may well have contributed to the Report's confusion surrounding the precise legal justification relied upon by the U.S. in initiating its intervention in Iraq. Yet, even in that article, the authors argued that the coalition's use of force in Iraq in 2003 was a lawful use of preemptive, not preventive, force.[64] They maintained that the lawfulness of the use of preemptive force was grounded in the fact that it represented "an episode in an ongoing broader conflict initiated – without question – by the opponent", i.e., Iraq's original invasion of Kuwait, and in that it was "consistent with the resolutions of the Security Council."[65] In any event, the justification formally advanced by the United States to the United Nations did not rely on pre-emption; instead, it relied entirely on the enforcement of existing Security Council resolutions.[66]

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[63] U.N. GAOR, 57th Sess., 2nd plen. mtg. at 8-9, U.N. Doc. A/57/PV.2 (Sept. 12, 2002) (emphasis added). The President continued:

> The United States helped found the United Nations. We want the United Nations to be effective and respected and successful. We want the resolutions of the world's most important multilateral body to be enforced, and right now those resolutions are being unilaterally subverted by the Iraqi regime. Our partnership of nations can meet the test before us by making clear what we now expect of the Iraqi regime.
>
> If the Iraqi regime wishes peace, it will immediately and unconditionally forswear, disclose and remove or destroy all weapons of mass destruction, long-range missiles and all related material.
>
> If the Iraqi regime wishes peace, it will immediately end all support for terrorism and act to suppress it, as all States are required to do by Security Council resolutions.
>
> If the Iraqi regime wishes peace, it will cease persecution of its civilian population, including Shia, Sunnis, Kurds, Turkomans and others — again, as required by Security Council resolutions.
>
> If the Iraqi regime wishes peace, it will release or account for all Gulf war personnel whose fate is still unknown. It will return the remains of any who are deceased, return stolen property, accept liability for losses resulting from the invasion of Kuwait and fully cooperate with international efforts to resolve those issues, as required by Security Council resolutions.

Id. at 8.

[64] The 2002 National Security Strategy, *supra* note 57, did not actually contain the term "preventive use of force." Instead, in an apparent attempt to make the doctrine fit within accepted norms, it spoke in terms of preemptive force where the threat may not be imminent. In derogation of the strict imminence requirement of anticipatory self-defense, it stated:

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

Id. at 15.

[65] William H. Taft IV, Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003).

[66] Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L. L. 337, 376 (2005). The former general counsel at the

¶29 An entirely different question might well arise about whether a Member State may unilaterally decide to enforce Security Council resolutions and scholarly opinion is divided on the topic. While some scholars argue that only the Security Council is seized with authority to permit actions to enforce its resolutions, others argue the opposite.[67] Whatever view scholars may take, there can be no doubt that the events of September 11 informed the willingness of the U.S. Government to tolerate Saddam Hussein and his flouting of obligations imposed by the Security Council regarding weapons programs.[68] But the U.S. position was that the original resolution[69] authorizing the use of force in Iraq remained in effect until the Security Council rescinded it. Any material breach of resolutions stemming from that original resolution could, therefore, justify a Member State's use of force,[70] and the Security Council itself found in late 2002 that Iraq was in material breach of a laundry-list of such resolutions.[71] It seems that the United States and its allies anticipated an admonition which would appear in the Report: "referral to the Security Council that results in no action is worse than no referral."[72] In that sense, the election of these States to intervene to enforce Security Council resolutions can well be seen as preventing yet another failure of the international system.

¶30 Still, the debate rages in the scholarly community as to whether Security Council authority is necessary prior to undertaking military action in the absence of an armed attack occurring. The notion that a State must obtain such Council approval prior to action has been resuscitated in the post-Cold War world, particularly amongst legal scholars. Indeed, the position of the U.S. Administration that the use of force in the case of Iraq was lawful because of prior Security Council resolutions buttresses the view that Security Council authority is required in the absence of an armed attack having occurred.[73] Yet even the Report[74] acquiesces to the right of States to engage in military action without such prior approval, at least in the case of pre-emption, and it is thus not clear that international law actually requires prior approval in other cases.

¶31 Some scholars, such as Thomas Frack, read the Charter's requirement for Council approval in light of other provisions dealing with the use of force. For instance, Article 43 of the U.N. Charter requires Member States to enter into agreements with the Security Council to make available "armed forces, assistance, and facilities, including rights of passage" to maintain international peace and security. None of these provisions has in

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U.S. Mission to the United Nations claims that the Taft and Buchwald article, *supra* note 65, constitutes the "authoritative" U.S. analysis of the legality of the intervention in Iraq. Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign against Iraq*, 34 ISRAEL YEAR BOOK ON HUMAN RIGHTS 15, 16-17, NOTE 7 (2004). There is room for doubt on that score, to the extent that the argument was not formally presented as a justification for the intervention. It may also be pointed out that Rostow's own analysis is far more comprehensive, thorough and convincing.

[67] Rostow, *supra* note 66.

[68] *Id*. at 17.

[69] S.C. Res. 678 (Nov. 29, 1990), *supra* note 14, para. 1-2 authorized Member States to use "all necessary means" to implement S.C. Res. 660, ¶ 2, S/RES/660 (Aug. 2, 1990) (demanding Iraq's withdrawal from Kuwait) "*and all subsequent relevant resolutions and to restore peace and security to the area*" (emphasis added).

[70] Rostow, *supra* note 66, at 23-24.

[71] S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (the Security Council "*Decides* that Iraq has been and remains in material breach of its obligations under relevant resolutions . . . .").

[72] Report, *supra* note 2, at 46, ¶ 139.

[73] *See* U.N. CHARTER art. 51, *supra* note 55.

[74] *See* U.N. CHARTER art. 51, *supra* note 55 *and* Report, *supra* note 2, at 63, ¶ 188.

fact been put into practice up to the present, leading Professor Franck to observe that the "noble plan for replacing state self-help with collective security" has failed.[75] Instead, the international system has repeatedly responded "benevolently" – either by "specific consent or silent acquiescence" – to unilateral or unauthorized interventions by Member States.[76] In this view, it appears that such interventions are not merely a fact of life but desirable, given the absence of the architecture envisioned by Article 43.

¶32 On the other hand, other scholars such as Mary Ellen O'Connell, take what might be termed a strict-constructionist view of the role granted to the Council by Article 51. In this view, the only circumstance allowing a Member State to implicate the inherent right of self-defense to act unilaterally is when an armed attack actually "occurs."[77] For Professor O'Connell, there is no exception for unilateralism in Article 51, and thus presumably no customary law on preemption.[78] She does not dispute the legality of engaging in unilateral armed conflict in preemptive self-defense. For O'Connell and scholars who share her views, the imminence requirement inherent in preemption is not doctrinally distinct from, and is not an exception to, Article 51's strictures; rather, it is definitional as to what constitutes an attack having occurred under the Article. In this view, the right of self-defense attached because the armed attack has occurred, even though it has not yet arrived at its target destination.[79]

¶33 It is not entirely clear on which side of this debate the Panel falls. As noted above, the Report excoriates the United States, the United Kingdom and their allies for liberating Iraq, and it argues strenuously that only Security Council authorization legitimates military action. On the other hand, there is strong approval of the NATO action in

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[75] Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?* 5 WASH. U. J.L. & POL'Y 51, 51-52 (2001).

[76] *Id.* at 64-65.

[77] O'Connell, *supra* note 62, at 44-45.

[78] "Article 51 sets out the one clear exception to the general prohibition on the unilateral use of force. States may use force in self-defense against an armed attack." Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE ON TERRORISM at 5 (2002) *available at* http://www.asil.org/taskforce/oconnell.pdf (last visited Oct. 13, 2005).

[79] Professor O'Connell expressly accepts that States may engage in anticipatory self-defense:

> But based on the practice of states and perhaps on general principles of law, as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming. This is the standard in most domestic legal systems as well.
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> Thus, to a limited degree a state may "anticipate" self-defense in the sense described by Sir Humphrey Waldock: "where there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to have begun to occur, though it has not passed the frontier." Professor Dinstein prefers to label defense in these circumstances as "incipient self-defense," rather than anticipatory. Professor Dinstein argues, for example, that the United States could clearly have attacked the Japanese fleet during World War II while the Japanese were *en route* to Pearl Harbor. His case is persuasive, if the further requirement is added that the United States had clear and convincing intelligence that the Japanese fleet was under orders to attack. Commentators have defended Israel's attack on Egypt in 1967 on the same logic. Israel stated that it had convincing intelligence that Egypt would attack and that Egyptian preparations were underway. We now know that the Israel [sic] acted on less than convincing evidence. Thus, the 1967 Arab-Israeli war does not provide an actual example of lawful anticipatory self-defense.

Id. at 8-9 (footnotes omitted). O'Connell uses "preemptive" and "preventive" synonymously. *Id.* at 2, note 10. This paper uses the nomenclature of the Report, which treats preemption and anticipatory self-defense as identical, in contradistinction to prevention, which lacks the imminence requirement of preemption.

Kosovo, and scathing criticism of the Security Council for failing to act there and elsewhere. One possible loophole left for unilateral (i.e., non-authorized) military action occurs in the Report in paragraph 190.[80] The Report asserts that Member States must allow the Security Council to pass on the issue of use of force. If the Council refuses to act, then other means, including deterrence and containment, should be tried, but after the passage of time, it will be possible "to visit again the military option." Curiously, the Report does not specify *who* should "visit again the military option" – the Security Council or the Member State. If it is the former, then the Report endorses the strict construction O'Connell places on the use of force. But if it is the Member State, then the Report endorses Franck's "benevolent consent" view of unauthorized interventions. Given its treatment of NATO intervention in Kosovo, this latter view is a fair reading, in which case the Report fails to advance by any measurable quantum a principled analysis of lawful versus unlawful interventions. Good interventions are good, and bad ones are bad, and beauty is in the eye of the beholder.

¶34 For all the criticisms – most of them implicit rather than express – which the Report levels at the United States and its allies for removing the previous regime in Iraq, one fact remains: a brutal dictator who had terrorized a population for thirty-five years, massacring them by the hundreds of thousands; a thug who had threatened his neighbors and launched two invasions against two U.N. Member States in eight years; a sociopath who had defied the will of the Security Council for a decade by refusing to observe even minimal human rights standards was removed from power and is now awaiting trial. Along with NATO intervention in Kosovo, coalition action in Iraq sent a clear message to all tyrants throughout the globe: their barbarity would no longer be tolerated by a civilized world. That fact surely accrues to the benefit of mankind, far exceeding the harm done to a world order which has too often tolerated despots.

[80] *See* Report, *supra* note 2, at 63, ¶ 190.