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Rémy Mauduit, editor, *Air and Space Power Journal–Africa and Francophonie*, and Lt Gen Guillaume Gelée, commander, French Air Forces Command, at a presentation by Mr. Mauduit to the Air Forces staff on 14 October 2011 at Metz, France. His topic was "Similarities between the Algerian War and the Recent Insurgencies: Vision, Doctrine, Strategy—Lessons Learned and Implications for Asymmetric Conflicts."

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Growing Pains

This year marks the sixth anniversary of the founding of the French version of *Air and Space Power Journal*. During the first four years of its existence as *Air and Space Power Journal–French*, the *Journal* was read in French-speaking countries only. However, with the inaugural issue (Winter 2009) of *Air and Space Power Journal–Africa and Francophonie* (*ASPJ–A&F*), which features articles in both French and English, the *Journal* increased its readership significantly. The new version enjoyed immediate success, more than tripling the number of subscribers, expanding its coverage to over 50 countries, and attracting contributors worldwide who write on a wide range of topics.

Unfortunately, *ASPJ–A&F* has become a victim of its own achievements. Specifically, our annual budget did not keep pace with the rapid growth of the *Journal*. For that reason, I can no longer increase the number of printed copies on demand and must therefore stop accepting new subscriptions. Moreover, although I hope that our fortunes will improve in fiscal year 2013, I can now send no more than one copy to each subscriber, including institutions such as research centers, think tanks, institutes and universities, libraries, military schools and institutions, government agencies, and so forth.

Consequently, I urge you to subscribe to the electronic version of the *Journal*, either through the *ASPJ–A&F* website at http://www.airpower.au.af.mil/apjinternational/aspj_a_f.asp or by e-mail at aspfrench@maxwell.au.af.mil. We will safeguard your e-mail address and send you quarterly messages informing you of the posting of the *Journal* online.

Rest assured that *ASPJ–A&F* will retain both its founding editor and its original principles, which embody the spirit of democratic ideals; intellectual rigor; critical analysis; vigorous, scholarly research; proven methodologies; and the primacy of clarity and quality in its articles. Thus *ASPJ–A&F* continues the Air Force tradition of ensuring the intellectual and editorial independence of its publications.

Rémy M. Mauduit, Editor
Air and Space Power Journal—Africa and Francophonie
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Historical Tensions for Airpower Leaders

Col Anthony C. Cain, PhD, US Air Force, Retired*

How nations define and solve the strategic problems they face determines their future security. Notably, military leaders and the institutions they serve drift toward solving immediate problems with perhaps too little concern for long-term consequences. They are at their best when confronted with cleanly bounded issues and a known end state or precise objective. Legitimate concerns about the most appropriate way to defeat the enemy, win battles, and secure the foundations for political victory come to dominate thinking among military personnel because success in these endeavors secures the nation's freedom of action, protects sovereignty, and enhances the reputation of leaders, their units, and, by extension, their services. Thinking about how best to prepare to meet societal expectations, to confront long-term strategic challenges, and to remain efficient and effective during extended periods of peace, even those punctuated by conflict, requires a different mind-set—a different approach. If defense professionals wish to remain credible partners in the nation's strategic dialogue, they must contemplate the foundations of their service to the

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This article is adapted from the author's presentation at a conference on *Relire la puissance aérienne: rencontre avec les écrivans de l'air* (Reread airpower: Meeting with the writers on airpower) sponsored by the French Air Force's Centre d'Etudes Stratégiques Aérospatiales (CESA) (Center for Strategic Air and Space Studies) as part of *Rencontres air et espace du CESA* (CESA's air and space meetings) in Paris on 17 October 2011.

nation and society as well as the most productive means of attending to these relationships.

The complexity of the strategic environment we face demands that airmen in particular must present coherent options. Since 1989 (especially since 1991), in addition to state-centric conflicts, security challenges have included a mix of scenarios involving counterinsurgency, counterterrorism, counter drug trafficking, counterproliferation, nation building, humanitarian assistance, state failure, and civil wars. Pundits call these kinds of conflicts "wicked problems" because of the absence of a readily discernable solution (in fact, no solution may exist) and because no problem-solving methods offer insight into potential answers. This environment has placed political and military leaders in an intellectually defensive crouch. No one wants to take blame for a defeat, yet no one has a clear plan for "victory." Airmen in particular, though recognizing the cost, in terms of both dollars and human lives, of the current conflicts, intuitively understand that more dangerous and more capable threats hover on the near horizon. Yet, making a compelling case for airpower in conflicts that do not necessarily lend themselves to applying airpower in traditional ways is becoming increasingly difficult.

In the past 20 years, the types of conflicts and challenges that have confronted state leaders have also prompted discussions, on the one hand, about employing forces designed for a particular strategic context outside that context and, on the other hand, about replenishing and modernizing those forces for potential conflicts that lie ahead. In other words, in the absence of a clearly defined existential threat to the state, efforts to maintain credible force structures designed to strike at the heart of an adversary's power run headlong into arguments about current priorities.

If the strategic context were not daunting enough, airmen find themselves confronting a historical tension between fielding strategic or tactical capabilities. Nearly every modern air force has dealt with this tension, which derives from the earliest theories of the most effective means of employing airpower. From the dawn of powered flight, aviation enthusiasts have written about and argued for an independent, war-winning role for air forces.

Additionally, to combat very different kinds of threats, airmen have used weapon systems designed with an eye toward deterring state competitors. Those same airmen have argued that although they have adapted their systems, procedures, and tactics intended to meet a "most dangerous" threat on the

horizon to the needs of the current fight, they may respond better in the future with systems designed for the "most likely" threats represented in current conflicts. Clear evidence indicates that this historical tension between fielding strategic and tactical systems, which has existed since at least the end of the First World War, continues to frame the debate about the air capabilities required by our nations.

Obviously, the answer to this dilemma entails forging effective air forces by making sound strategic choices. As the current strategic environment evolves, less powerful adversaries will find incentives to adopt indirect strategies to attain their goals—an approach described by Gen Sir Rupert Smith as a permanent change in warfare. Adversaries will use what he called "war amongst the people" to cripple forces that rely on sophisticated technologies, hierarchical organizations, and centralized command and control. According to Smith, firepower is a liability because adversaries will embed themselves in the very populations that conventional forces seek to protect.[1] Certainly, we have observed this tactic in much (not "all," but much) of today's combat. But should it really be the sole foundation that drives the strategic choices nations will make for tomorrow's airpower? Given budget pressures, can they prepare for more than one future?

These trends have occurred at the fringes of conflicts for more than half a century; nevertheless, traditional militaries have persisted in seeing them as anomalies, preferring to preserve capabilities to deal with the "most dangerous" threats. They have resisted any adaptations of organizations, training, and equipment that would improve their capacity to counter enemies who have become more networked than hierarchical, more flexible than rigid, and more resilient than brittle. In short, military institutions do not have a long track record of recognizing and adapting to trends that may indicate shifts in the character of threats to national security.

The question then becomes, how should they prepare themselves to do so, given the constraints imposed on their knowledge and understanding of adversaries who do not feel compelled to play by the same rules? Unfortunately, this question represents one of the most wicked problems that strategists face—one for which the answer consistently may be the unsatisfying "It depends." It depends on local political, social, cultural, environmental, economic, and military contexts. Consequently, at the strategic level, military institutions face the unenviable task of having to prepare for every contingency while lacking the cer-

tainty that those preparations will best match the character of conflict when the time comes. To solve this dilemma of fighting current conflicts yet at the same time preparing for a wide range of future threats, the military must develop flexibility as the key to strategic effectiveness.

Making Strategy in Uncertain Times

A review of recent literature that attempts to define emerging threats to national security reveals a consensus that myriad challenges encourage a near-term focus. A team from the US National Defense University reflected this accord, noting that

> the global security environment for the next two decades will feature accelerating, and possibly momentous, changes in the international system. The large-scale trends most often cited are increasing globalization (with both beneficial and disruptive side effects); the continued rise of China and India; the quickening pace of technological innovation; the accelerating proliferation of mass disruption/destruction technologies; the growing power/capacity of nonstate actors relative to nation-states; the persistence of corrosive regional, ethnic, and religious conflicts; and increasing resource scarcity.[2]

The complexity of this environment raises the stakes for strategic clarity and coherence, but leaders must contend with the paradox that the crises produced by this environment amplify the difficulty of devising coherent strategies.

Perhaps more than any other factor, the proliferation of communication capabilities that accompany globalization has pressured leaders to move reactively from crisis to crisis. The ubiquitous news cycle, accompanied by unfiltered imagery and often equally unfiltered commentary, focuses attention on evolving tactical crises. Leaders find their ability to devise and implement strategic programs stifled by the pressure of immediately compelling events.

The media's competition for the public's attention has further diluted strategic thought. Complex issues that cannot be condensed into easily communicated sound bytes rarely attract the interest of popular media venues. Military leaders and their staffs are also drawn into this emphasis on the present, especially when called on to carry out national policies. Legitimate concerns over limiting collateral damage, civilian casualties, and the destructive effects of war have become commonplace influences on the design of strategic and operational campaigns.

Added to this crisis-focused perspective is the realization that the military is just one of many strategic priorities that concern leaders. If the

strategic environment were characterized by existential threats or the potential for major combat operations, the national will would quickly mobilize and lend priority to robust defense investments. However, the well-publicized economic and social stresses that command attention overshadow concerns about long-range strategy in the absence of overt threats. In the event we consider this situation unique to our times, we should recall US senator James Wadsworth's comment on proposals to modernize the Army Air Service's equipment during the 1920s: "The designers are registering tremendous improvements in every way and therefore we should hesitate before we purchase a large number of planes in any one year, lest we find that we have committed ourselves to the extent of our financial abilities to a type doomed to be outclassed."[3]

Immediately following the First World War, the British government adopted what became known as the Ten-Year Rule, which remained in effect from 1919 to 1932 and assumed that Britain would not engage in major wars for 10 years. Conditions in Europe supported the logic behind the policy, but military leaders bemoaned the erosion of operational capabilities and warned of the increased cost of rejuvenating forces should war occur.[4] As an aside, the Ten-Year Rule proved accurate in terms of its prediction of the strategic threat. After 1932 (especially after 1933), the series of crises in Europe raised the strategic stakes for Britain. Unfortunately, the effects of the global economic crisis combined with the deterioration of operational and tactical capabilities to constrain Britain's ability to rebuild its forces in time for war.

The United States and Britain were not alone in their zeal for economizing during the interwar years; France also restricted military spending to turn limited resources toward recovering materially and socially from the devastation of the war. For example, France's Ministry of Defence adopted a prototype policy for procuring aircraft throughout the 1920s. Rather than investing in new series or types of aircraft, the government funded prototype development but stopped short of placing orders for fleets of aircraft. Its refusal to follow through with significant purchases drove several aircraft companies out of business. By 1933, even when faced with a clear threat from a revanchist Germany, fiscal pressures forced the newly created independent Armée de l'Air to procure a multipurpose, multiplace hybrid aircraft—the BCR (bombardment-combat-reconnaissance). As Patrick

Facon, Thierry Vivier, and others have shown, a revolution in wing and engine design that appeared shortly after the government had committed to the BCR program outclassed this aircraft series. If France had enjoyed the luxury of delaying the war until late 1941 or 1942 or if it had postponed the modernization decision until 1937–38, its Armée de l'Air possibly would have had more competitive airframes.

More recently, US Defense Department officials have struggled to reconcile the cost of modernizing systems for all the services with the absence of a clear threat that matches the sophisticated capabilities of new weapons. At a time when domestic policy makers seek to rein in mounting debt and trade imbalances, spending vast sums on war-fighting systems without an apparent adversary is difficult to justify.

Air Forces as a Special Case in Force Development

The evolution of aviation differs from that of other military forces. In addition to the tactical role envisioned for each airplane, one must take into account its technical requirements regarding range, speed, payload, command and control, sustainment, and countering threats. Thus, air forces tend to evolve as systems rather than as weapons. In 1926 Maj William C. Sherman, US Army, wrote that "the airplane is not, for example, merely a special variety of motor-propelled vehicle, comparable in general to other means of transportation; nor is it simply another form of artillery. It is a thing *sui generis*, and its full significance can be understood only after a thorough study of the intrinsic qualities of the air force itself."[5] Foreseeing this essential difference between air forces and other military forces nearly 20 years earlier, Clément Ader outlined specialized functions for military aviation.[6] This fundamental characteristic of air forces means that after the determination of viable design requirements, modifications have significant consequences in terms of procurement time and costs. Moreover, the public debate over the cost of airpower systems tends to force air services to point out the most dangerous consequences of deferring modernization decisions. Air leaders find themselves painting bleak scenarios to convince political leaders of the necessity of procuring new systems, only to be called back to testify when the procurement system does not function perfectly. Consequently, when air services incur criticism for the costs of and delays accom-

panying their sought-after systems, they have great difficulty delivering satisfactory explanations to a cost-conscious public.

Because of this systems characteristic of air forces, air capabilities tend to be specialized and therefore require greater investments to preserve them. The legacy of the Second World War—at least in the consciousness of US Airmen—emphasizes that the time necessary to mobilize industry; produce the planes, associated spare parts, and maintenance capabilities; train the crews; and get the forces into the fight could jeopardize a future war's outcome. This point became especially salient during the Cold War when the US Air Force, operating two-thirds of the nuclear triad, had responsibility for both deterring and fighting a nuclear war that would have been over long before any mobilization schemes could take effect.

Since the end of the Cold War, US Airmen more often than not have led the way on deployments as the first forces in-theater. If the first combat forces do not come from the US Air Force, then its mobility forces transport the first ground forces and their initial support capabilities. National leaders have come to rely on flexible, "on call" strategic airpower capabilities rather than run the risk of creating such forces when trouble arises. These capabilities, however, demand continuing investments to remain ahead of technological trends. Nevertheless, the trend is set. Despite demands for economy in defense spending, our nation will continue to call on its air forces as a first option in dealing with crises for the foreseeable future.

Implications for the Future

For nations with global strategic interests, airpower is an essential asset, and government, military, and industry leaders must arrive at coherent strategic approaches that ensure the availability of properly configured airpower when those countries need it. This is not to say that we should shortchange other military capabilities in favor of airpower. Rather, we must cultivate a clear understanding of the capabilities and limitations—in strategic terms—that our force structures possess. Much as operational war fighters try to define end states and campaign objectives at the outset of military action, a comprehensive strategic assessment must occur that results in an understanding among all participants of the long-term implications of decisions about force structure.

Airmen must develop a comprehensive awareness of the strategic context that confronts their nations. It is no longer sufficient (and perhaps never was) to ask national political leaders to deliver clear and unequivocal strategic guidance to the military so that the latter can "do its job and hand off to some civilian authority." Because of the flexibility that air systems afford those leaders, airmen in particular must become competent at and comfortable with advising officials at all levels of the decision-making process.

Finally, airmen must communicate clearly to decision makers the capabilities and limitations of their forces, including potential consequences for the life cycles of weapon systems if leaders decide to use airpower to address contemporary exigencies. Often this news will not endear airmen to their political leaders, but their duty compels them to make the case for preserving the continuing relevance of one of the nation's most important strategic capabilities.

The historical tension between investing in strategic air capabilities and those that appear more suited to current conflicts will likely persist. To paraphrase Sir Michael Howard, I am convinced that whatever capability airmen develop, it will be wrong. More important than fielding perfect systems, we must remain flexible enough to get them right and do so more quickly than our enemies can.[7] Not only do airmen have a duty to prepare themselves to respond to the most likely near-term security threats, but also they have an equal duty to prepare forces for the most dangerous scenarios in the long term. In both instances, they must "get it right quickly" when the nation calls.

Notes

1. Gen Sir Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Vintage Books, 2008). See, for example, p. 5 for his concept of "war amongst the people." Martin van Creveld offered a similar argument more than a decade earlier. See his book *The Transformation of War: The Most Radical Reinterpretation of Armed Conflict since Clausewitz* (New York: Free Press, 1991).

2. Stephen J. Flannagan and James A. Schear, eds., *Strategic Challenges: America's Global Security Agenda* (Washington, DC: Potomac Books, 2008), 1.

3. Randolph Perkins, "America Needs Aircraft," *Aero Digest*, June 1926, 329.

4. See Brian Bond, *British Military Policy between the Two World Wars* (New York: Oxford University Press, 1980).

5. William C. Sherman, *Air Warfare* (1926; repr., Maxwell AFB, AL: Air University Press, 2002), 8.

6. Clément Ader, *Military Aviation*, ed. and trans. Lee Kennett (Maxwell AFB, AL: Air University Press, 2003).

7. In 1974 Sir Michael Howard wrote, "I am tempted indeed to declare dogmatically that whatever doctrine the Armed Forces are working on now, they have got it wrong. I am also tempted to declare that it does not matter that they have got it wrong. What does matter is their capacity to get it right quickly when the moment arrives." Michael Howard, "Military Science in an Age of Peace," *RUSI: Journal of the Royal United Services Institute for Defence Studies* 119 (March 1974): 7.

The Nonmilitary Air Threat

A Challenge for the International Community

Maj Anne de Luca, PhD, French Air Force*

> *The only route that offers any hope of a better future for all humanity is that of cooperation and partnership.*
>
> —Kofi Annan, 24 September 2001

The airspace, through which runs a constant flow of aircraft, looks like a highway traveled by both passengers and freight. For example, almost 15,000 planes and more than 200,000 passengers fly every day over French territory. Having evolved into intertwined trade routes with an ever-growing number of users, the sky is one of globalization's major symbols. However, by opening itself to increasingly heavy international traffic, the airspace has also evolved into an infiltration path for threats of a new type and has thus become vulnerable. In this respect, 11 September 2001 (9/11) represents the dawn of a new age. From now on, the threat that uses the third dimension can serve a terrorist action. The international community has become aware that the air environment has become a space where the people's safety is at stake. French prime minister François Fillon stated that "the safety of our air space is not an ancillary concern; it is a crucial requirement."[1] Provisions for safety must include any type of threat—not just a military attack by another state. Consequently, the joint concept of general safety recommends that any surveillance and detection plan take into account threats not directly military.[2]

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This article is adapted from the proceedings of a seminar conducted by the author on the nonmilitary air threat. The study group included Maj Yann Saroch, Maj Alexandre Delpire, Maj Christophe Hindermann, Maj Olivier Le Bot, and Maj Eric Herbaut.

Since the attacks on the World Trade Center, the nonmilitary air threat has become a top security issue because of its potential for destruction. In addition to the trauma it generated, the disaster caused by the hijacked airplanes of 9/11 had tragic economic consequences. Insurance companies, for example, faced an unprecedented situation in terms of compensation for damages from these attacks.[3]

Faced with this form of threat specifically linked to the third dimension, one may wonder which legal instruments the international community has at its disposal to counter it. A legal framework dedicated to the nonmilitary air threat may seem difficult to identify since that threat can take many different forms. Terrorism may represent its most violent expression, but it is not the only possible scenario. Therefore, a typology better delineates this threat, thereby allowing an understanding of the current legal system that deals with these issues.

The Nonmilitary Air Threat: Definition and Typology

The fact that the nonmilitary air threat may relate to very different circumstances makes defining the concept rather tricky. Within a general definition, the variety of scenarios comprising the threat makes a classification effort essential.

Defining the Nonmilitary Air Threat

Generally speaking, one can define the threat as an entity intent on and capable of exploiting a vulnerability. Thus, according to the *Glossaire inter-armées de terminologie opérationnelle* (Joint glossary of operational terminology), the threat resembles a "possible aggression directed at the interests of a State that materializes as an ability and a will to harm."[4] That will to harm can belong to a state, an organization, or individuals. The threat must in essence include a deliberate component rather than constitute a risk, the meaning of which is much broader and more diffuse. That term refers either to a danger likely to be damaging to people, property, or the nation's interests, or to the possible occurrence of a sudden event, disastrous and irreversible, originating in the unleashing of natural elements or a malfunctioning normal activity.[5] The *Livre blanc sur la défense et la sécurité nationale* (White paper on defense and national security) introduces a distinction

between intentional aggressions and unintentional risks. The former include "acts of terrorism, large-scale cyberattacks, the threat of strikes using new weapons, ballistic in particular, and the various types of possible bypassing of our defenses." Unintentional risks resemble high-lethality health emergencies and natural or technological disasters.[6] Thus we find again the idea according to which the threat implies hostile intent. Therefore, the nonmilitary air threat must include an intentional component, as confirmed by various air safety agreements. For example, the one signed by France and Switzerland defines the nonmilitary air threat as "the aircraft victim of a hostile takeover or a civilian aircraft used for hostile purposes."[7] The same if true of the agreement signed by France and Italy.[8] More generally, one may define the nonmilitary air threat as any unlawful act that uses a civilian aircraft in the third dimension for hostile purposes. One must note that the civilian aircraft can be remotely piloted (i.e., a drone), which must be used in situations that do not endanger other aircraft.[9]

The nonmilitary air threat threatens the safety of property and people using the third dimension, as does violating the airspace by failing to respect overflight regulations. If international conventions mention only air security, then community and national documents will introduce the concept of air safety.[10] The fact that armed forces use a different approach to security and safety leads us to consider distinctions between them. On the one hand, air security originates in all the steps taken to limit risks that use of an aircraft may entail. These norms deal with weather hazards such as lightning and icing as well as bird strikes. Moreover, air security includes technical problems such as maintenance and failures, together with malfunctions linked to human factors such as erroneous assessments, medical problems, and so forth. On the other hand, air safety encompasses all the steps taken to counteract unlawful acts and enforce sovereignty of the national airspace.[11] Based on this distinction, one may think that the nonmilitary air threat comes under air safety since it represents a violation of airspace, the regulations of which it defies. Let us specify that the unlawful act causing the violation must be intentional if we are referring to a threat.

Typology of Nonmilitary Air Threats

The unlawful act that represents the nonmilitary air threat can take three different forms.

Violation of overflight regulations. Failure to follow flight rules set by the state over which the aircraft flies represents a violation that undermines air safety. Thus, flying over French territory is regulated by the *Code of Civil Aviation* as well as by the *Criminal Code*. Flying over certain so-called sensitive areas such as nuclear power plants may be prohibited. In that context, entry into the restricted area or violation of current overflight procedures set by the state constitutes an offense. Such a scenario occurred in September 2008, when a stray Cessna entered the Villacoublay approach area without authorization, forcing the prime minister's Falcon 900 to execute an avoidance maneuver. The pilot of the aircraft, which was flying too high in a controlled area without radio contact, admitted responsibility in court and incurred a penalty.[12] In this case, one should emphasize the lack of any intent to harm. The situation involved more of a risk than a threat. However, an intentional offense constitutes a full-fledged air threat—witness the case of entry into sanctuary airspace by an ultralight aircraft pulling a banner that displayed a protest message during a G8 summit meeting. Failure to follow a state's overflight rules equates to violating the very principle of its air sovereignty and thus represents a threat.

Unlawful acts directed against civil aviation security and unlawful seizure of aircraft. Does the nonmilitary air threat have something in common with piracy? The air counterpart of maritime piracy does not really exist, at least in the law. Oddly enough, one must look to the Montego Bay convention on the law of the sea for a definition. Indeed, the rules that currently apply to maritime piracy can be adapted to air piracy, yielding the following definition: any illegal act of violence or detention, or any act of depredation committed for private ends by the crew(s) of a private aircraft and directed against another aircraft or against persons or property on board such aircraft.[13] The offense of piracy becomes clear only if all conditions are met; yet, this determination does not apply in practice because of the difficulty of meeting those conditions. That is, acts of piracy must be committed over international space such as the high seas or in an area where the state has no jurisdiction. However, air piracy may start in a state's airspace—for instance, on a runway. Additionally, according to the Montego Bay convention, the perpetrators must be on board another ship or aircraft, but in the standard scenario of air piracy, the pirate is already on board as a passenger of the aircraft he or she intends to hijack. Clearly, this definition of air

piracy is not intended to apply to many situations because of its restrictive nature. Therefore, it serves as only a very limited palliative.

Since it could not use the term *piracy*, the International Civil Aviation Organization (ICAO) dealt with the problem created by this legal vacuum by suggesting the two following terms: unlawful acts directed against civil aviation security (sabotage, attacks on the ground, false bomb threats, etc.) and unlawful seizure of aircraft. Three international conventions that specifically address violations of air security—the Tokyo (1963), Hague (1970), and Montreal (1971) conventions—mention those offenses.[14]

Firstly, as regards unlawful acts committed against the safety of civil aviation, the Tokyo convention targets all offenses against criminal law committed on board an aircraft in flight as well as acts that may or do jeopardize safety, good order, and discipline on board. The Montreal convention concerns unlawful acts directed against international civil aviation security, aimed at the sabotage or destruction of an aircraft. Thus, it condemns the act of placing on board an airplane any device or substance likely to render it incapable of flight, or the act of going after air navigation facilities or services for the purpose of endangering the security of the aircraft and its passengers. Generally speaking, the convention deems a criminal offense any violent act likely to jeopardize the safety of the aircraft as well as complicity in the commission of such an act.

Secondly, both the Tokyo and Hague conventions condemn the unlawful seizure or hijacking of an aircraft, the former convention considering that unlawful seizure of aircraft occurs "when a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight."[15] The Hague convention deems unlawful seizure of an aircraft any act committed by "any person who on board an aircraft in flight: unlawfully, by force or threat thereof, . . . seizes, or exercises control of, that aircraft, or attempts to perform any such act, or is an accomplice of a person who performs or attempts to perform any such act."[16] That convention is important inasmuch as it considers collusion just as significant as an attempt. The hijacking by the Popular Front for the Liberation of Palestine (PFLP) of several airliners on 6 September 1970 involved a hostage taking for political purposes. In order to obtain the release of political prisoners held in Israel, the PFLP members simultaneously hijacked four airplanes, some

of which ended up landing in the Jordanian desert on makeshift runways. They then blew up the airplanes after evacuating the hostages. Between 1968 and 1970, the PFLP directed the world's attention toward the Palestinian cause by claiming responsibility for no fewer than 110 aircraft hijackings and hostage takings, thus serving a terrorist action.[17]

The world has witnessed a trend toward stepped-up terrorist actions of that nature, which now unhesitatingly destroy airplanes with their passengers on board. The destruction of a Boeing 747 flying over Lockerbie, Scotland, on 21 December 1988 (270 killed) or of a UTA DC-10 over Niger on 19 September 1989 (171 killed) offers good examples of the radicalization of terrorism. This hardening of the modus operandi goes hand in hand with another major change: those acts are now committed not only by isolated groups but also by rogue states. Today the nature of the modus operandi is changing. It no longer seeks to exchange hostages but to strike brutally as a means of shaping public opinion worldwide.

An aircraft as a weapon by purpose. The radicalization of terrorism is reflected in the growing destructive potential of the terrorist threat. Terrorism has evolved into an increasingly deadly phenomenon. Access to modern means of transportation and the availability of powerful explosive substances have marked the change to massacres on an enormous scale. Thus with 9/11, terrorism took on a new dimension, greatly exceeding the 1,000-victim threshold: "We entered the age of what we will call world terrorism."[18] We also use the term *hyperterrorism* to describe an attack on this scale.[19] Halfway between terrorism and an act of war, it has such psychological, political, and economic consequences that it constitutes an attack on the state's vital interests. In its resolution of 28 September 2001, following the attacks of 9/11, the United Nations (UN) Security Council likened international terrorism to a threat to international peace and security. A terrorist aircraft thus represents a very specific threat within the typology developed in this article. The aircraft becomes a weapon by purpose, losing its capacity as a means of transportation. Faced with increasingly deadly terrorist acts, we must prepare for scenarios involving nuclear, radiological, biological, or chemical attack, which an enemy could carry out by air. Indeed, coalition operations in Afghanistan determined that prior to 2001, al-Qaeda had conducted fairly advanced biological and chemical research.

The typology of nonmilitary air threats thus encompasses a wide range of hypotheses. From a simple offense to a violation of overflight rules to the use of aircraft as a terrorist weapon, nonmilitary air threats can assume varied forms. Furthermore, because the threat can change, one should not consider this typology static.[20] Long before 9/11 brought to light the problems of air safety, international law included a number of measures intended to fight nonmilitary air threats.

The Legal System against the Nonmilitary Air Threat

The legal system designed to fight the nonmilitary air threat rests first upon the actors in charge of air safety. At the international level, in this respect the UN plays a central role through the ICAO and its 190 member states. Since 1947 the ICAO has been involved in the development of a safer airspace by encouraging member states to pass legislation aimed at achieving that goal.[21] As a true world forum of civil aviation, the ICAO has formalized its aim through strategic objectives, among which air safety is a priority.[22] At the regional level, European air safety is organized under the aegis of the European Civil Aviation Conference (Conférence européenne de l'aviation civile), which seeks to harmonize policies and practices pertaining to civil aviation in order to promote a safer, more efficient, and lasting European air transportation system. Another European participant, EUROCONTROL, is tasked with harmonizing and integrating air navigation services in Europe for the purpose of eventually creating a unified European airspace. Furthermore, the European Commission plays a role through the European Aviation Safety Agency (Agence européenne de la sécurité aérienne).[23] That organization is involved in the gradual development of a common air safety policy, which is increasingly becoming a requirement for the European Union (EU).[24] At the national level, the state remains central to air security. In France the prime minister is in charge of air defense. In case of an air emergency, that individual has full operational control of actions taken by the government in close contact with the High Air Defense Authority (Haute autorité de défense aérienne) and the affected departments: the Defense and National Security Secretariat (Secrétariat général de la défense et de la sécurité nationale) and the Interdepartmental Air Safety Commission (Commission interministérielle de la sûreté aérienne). Air safety is thus an interdepartmental issue. Depending

on the threat level, these various organizations make possible an assessment of the appropriateness of triggering prevention or intervention schemes such as Vigipirate (for its air component), Piratair, and Intrusair.[25] These different levels of participants are essential to fighting nonmilitary air threats, but such a setup would not be complete without a judicial arsenal.

The Importance of International Cooperation in the Fight against the Nonmilitary Air Threat

International law includes a number of norms that define a framework for the fight against the nonmilitary air threat. One will find in those provisions less a "catalog" of repressive measures than an incentive to manage the threat collectively. Above all else, air safety rests on a policy of international cooperation aimed at setting a general framework through measures common to all affected countries. This is the only coherent response to such an insidious cross-border threat. Air safety agreements fully lie within this logic of cooperation and thus complement the international legal system.

International legal instruments. International law has gradually taken into account problems associated with the nonmilitary air threat. In 1944 the Convention on International Civil Aviation (Chicago convention) set out the principle of a state's sovereignty over its own airspace.[26] That founding charter of international civil aviation condemns any use of an aircraft that conflicts with the ultimate purpose of civil aviation. Upon closer review, one sees that it also includes a provision likely to apply to a nonmilitary air threat. The decree of 10 October 1975 tasks the air force, as a main link in the air safety chain, with "enforcing the integrity and sovereignty of the national air space and of its approaches."[27] As such, in case of intercepting a suspect aircraft, the air force must respect the interception conditions set forth by Article 3a of the Chicago convention, which prohibits the use of armed force against a civil aircraft. Resolution 1067 of the UN Security Council, which condemns the use of weapons against civil aircraft, confirms this prohibition.[28] Nevertheless, if the offending aircraft clearly displays aggressive behavior and constitutes a threat to the state over which it flies, the immunity provided for by Article 3a disappears, and Article 51 of the UN Charter becomes applicable, asserting the right of self-defense. One can then use armed force and even shoot down the aircraft.

More than anything else, the Tokyo, Hague, and Montreal conventions constitute the international legal foundation of the fight against the nonmilitary air threat. They thus define states' penal jurisdiction to take legal action against perpetrators. In addition to the conditions for suppression, the international conventions seek to ensure better care of passengers, crew, and cargo subjected to an unlawful act.[29] This international legal framework is effective only if backed up by the laws of each state and depends closely on the specific willingness of a state by virtue of its sovereignty, on the financial resources that it intends to devote to that policy, and on the obligations that it expects to impose on airlines.

Besides those documents relating to air safety, the provisions dealing specifically with terrorism can complete the legal system used to fight the nonmilitary air threat. On this subject, the UN has undertaken an important standardization work, first embodied in the conclusion of international conventions against terrorism.[30] Unfortunately, those conventions are only partially implemented in the absence of signature or ratification. The UN also acts against terrorism through resolutions.[31] In several of them, the UN Security Council calls international terrorism a "threat to international peace and security," thus authorizing an action based on chapter 7 of the Charter.[32] In addition, a Committee to Combat Terrorism was created to examine the soundness of the legal regimes against terrorism established by the member states and to help them with the implementation of their obligations. In its Resolution 635 of 14 June 1989, the UN Security Council condemned all unlawful activities directed against the safety of civil aviation and asked states to cooperate in developing measures aimed at preventing all terrorist acts. The EU also undertook a number of actions related to air safety. The attacks that took place in 2001 drove the international community to adopt a clearer legal framework. Indeed, in 2002 the European Parliament and Council adopted Regulation no. 2320/2002, which establishes common rules in the field of civil aviation to prevent unlawful acts that would likely endanger air safety.[33] All of these actions tended toward putting safety measures in place, and the attacks that took place in Madrid on 11 March 2004 greatly accelerated this cooperative process when the EU in June of that year set up a global action plan to combat terrorism with seven strategic objectives. Finally, one should also note that

Europe was among the first to set up a convention on the suppression of terrorism, doing so on 27 January 1977.

Air safety agreements. In 2001 the transposition of suicide aircraft's routes on a European scale clearly demonstrated the need to control the airspace over an extended area because aggression moves quickly from one territory to another. Cross-border by nature, nonmilitary air threats forced states to adopt a policy of cooperation on an international scale. According to the *Livre blanc du Gouvernement sur la sécurité intérieure face au terrorisme* (Government white paper on internal security in the face of terrorism), only though international cooperation can countries effectively fight international terrorism.[34] Because global terrorism has no borders, the fight against that phenomenon must be organized on the same model. If homeland protection falls within the states' jurisdiction, then the increase in financial, economic, and human exchanges makes international cooperation absolutely essential. It must ensure not only a more successful interception and neutralization of the threat but also (and above all) its anticipation through shared intelligence. Accordingly, states have successfully concluded cross-border bilateral agreements to fight the nonmilitary air threat.[35] Those agreements are similar to a transfer of command and control, both operational and tactical, of a military aircraft and thus consist of a partial delegation of the right to exercise sovereignty. They may include surveillance of the mutual interest zone's air approaches, threat assessment, and transmission to political authorities of pieces of information that a decision requires. Certain agreements, following the example of the Franco-Swiss agreement ratified on 26 November 2004, authorize direct implementation of air safety measures as necessary. Those measures range from the simple recognition of a suspicious civil aircraft to the right of cross-border hot pursuit with warning shots followed by boarding. Several agreements with Spain, Switzerland, Belgium, the United Kingdom, Italy, Germany, and so forth, were ratified.

Taking the reality of air threats into account imposes a broader international approach beyond cooperation between bordering countries. Considering the speed of aircraft, anticipation and prevention are essential to ward off a stealthy threat. Such a threat against French territory can originate in a distant country following a failure of the screening system (a luggage or passenger check) or faulty communication between countries

(a suspicious yet unreported route). This policy of cross-border cooperation must therefore extend to more distant countries such as the Mediterranean nations. With that objective in mind, a partnership known as the "5+5 Defense Initiative" began in 2004, bringing together 10 countries of the Mediterranean basin and making possible meetings of military authorities as well as exchanges of information through a specific network or air safety exercises.[36] The last session, held in Portugal in November 2009, simulated an air threat intercepted by a Mediterranean country and the transfer of responsibility to the bordering country.

Relevance of the Judicial Arsenal

Although international conventions have the virtue of describing the various offenses likely to compromise air safety, they do not really offer preventive measures, remaining rather general on the subject. That is, the Hague convention makes clear that "for the purpose of deterring such acts [unlawful acts of seizure or exercise of control of aircraft], there is an urgent need to provide appropriate measures."[37] Similarly, the Montreal convention invites states to take "reasonable measures" to prevent unlawful acts committed on board aircraft.[38]

Without a doubt, the Tokyo, Hague, and Montreal conventions represent a major improvement, but they remain too consensual and therefore limited in scope. Without repressive measures against states that fail to enforce them, they remain rather symbolic. The main weakness of the legal system used to fight the nonmilitary air threat comes from the lack of jurisdictional competence of the state where the aircraft lands (whose criminal law most of the time does not apply to an offense committed in foreign countries) or even from the latter's refusal to accept jurisdiction. The state's competence to institute proceedings is subjected to so many precautions that they become difficult to implement. The Tokyo convention establishes two categories of competences: those of the contracting states and those of the aircraft captains. Similarly, according to Article 4, paragraph 2, of the Hague convention, any contracting state shall "take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory." Thus it must submit the case to its authorities in charge of criminal prosecutions.[39] Should the state reject its jurisdiction, then it must extradite the offender. In such an event,

the Hague convention lists multiple cases of jurisdictional competences in order to provide, as much as possible, repressive actions with a legal framework: the state where the aircraft involved is registered and/or operated, where it landed at the time of the offense, or where it was welcomed in case of escape. However, the effectiveness of this criminal framework depends upon the extradition measures in force, usually bilateral. *Ipso jure* extradition can be invoked only if an extradition treaty exists between the states involved. In that case, the unlawful hijacking of an aircraft is to be systematically understood as an extradition case provided for by the treaty.

The extradition clause, as provided for by the Hague and Montreal conventions, tends to promote a collective suppression management, but the lack of compulsory measures unquestionably limits their scope. Consequently, it is impossible to give a predefined collective response to the nonmilitary air threat. Effectiveness would demand establishment of an extradition obligation to make prosecution more effective. To date, unfortunately, the states parties to the various international conventions dealing with air safety have chosen intentionally not to make them extradition treaties.

The repressive component is hardly more compulsory. The Tokyo convention provides for no repressive measures. The Hague convention calls the unlawful seizure of aircraft a criminal offense; however, it only invites states to make such an offense punishable by severe penalties or to take all appropriate measures.[40] Similarly, the Montreal convention suggests punishment by severe penalties.[41] In effect, this lack of precision translates into an inconsistency and incoherence of the states' criminal law responses. Furthermore, no provision was made for sanctions against contracting states that would not crack down on the unlawful seizure of aircraft.[42] To this lack of precision in terms of sanctions, one may add a difficult applicability of the conventions that further weakens the repressive system. Specifically, the conditions listed by the Hague convention may leave certain situations outside its scope; thus, a hijacking carried out by a person on the ground is not considered an unlawful seizure of aircraft. Similarly, within the scope of the unlawful seizure of aircraft, an accomplice is punishable only if he too is on board the aircraft in flight. Another restriction limits even more the applicability of the Hague convention. It applies only if the unlawful seizure occurred during a flight between two points located in two separate states.

The foundation of international relations resides in state sovereignty, which numerous states refuse to relinquish.[43] Consequently, sovereignty constitutes a sizeable obstacle to the implementation of a common policy of preventing and suppressing nonmilitary air threats. Prosecution and sentencing of the perpetrator excessively depend upon states' willingness to do so. According to the principle of subsidiarity, each state would be responsible for taking any additional measures needed by the international legal foundation to become fully operational. However, one notices that the legal system deployed to counter terrorism and unlawful acts committed against civil aviation is porous. Relying on their political will, it can only encourage the states that signed the international conventions to contribute to a better suppression of those acts. An international consensus remains unlikely in the light of the disparities that exist in the exercise of sovereignty by the various member states. Similarly, the EU must favor a community response—one hindered by the many legal disparities that exist within the union (e.g., civil aircraft appropriated by terrorists are not treated the same way from one country to another). Unlike France, Germany refuses to fire at a civil airplane hijacked for terrorist purposes. The Karlsruhe Constitutional Court's decision of 15 February 2006 prohibits the engagement of the armed forces in internal security missions and reinforces the notion of respect for human dignity. Thus, the lack of collective response remains the main factor limiting the effectiveness of repressive measures that address the nonmilitary air threat. The UN could play a role in this matter, giving the international conventions on air safety a more compulsory scope. It did just that following acts of sabotage in 1988 and 1989, when the Security Council considered in its Resolution 748 of 31 March 1992 that Libya's actions to obstruct the investigation of those acts represented a threat to international peace and security.

Conclusion

The effectiveness of the system used to fight the nonmilitary air threat depends upon a declared political will; unfortunately, the reluctance of states to more strongly commit themselves forced the Tokyo, Hague, and Montreal conventions to remain relatively vague regarding the implementation of repressive measures and the terms of international cooperation.

The lack of harmonization and international will prevents a credible political and legal response to ever-growing threats. However, internationalized suppression is essential to deal with the nonmilitary air threat, which is cross-border by nature. Some military responses exist through the implementation of bilateral cross-border agreements, particularly with regard to active measures taken beyond territorial boundaries. Nevertheless, international cooperation must make a significant push in the field of suppression under criminal law.

Notes

1. Prime Minister François Fillon (address, Centre National des Opérations Aériennes, Lyon Mont Verdun, 27 February 2008).

2. *La sauvegarde générale* [The general homeland and population security], CIA-0.7, no. 163/DEF /CICDE/NP, 11 May 2007.

3. On this subject, see Loïc Grard, *Le droit de l'aviation civile après le 11 septembre 2001: Quelles mesures face à l' "hyper terrorisme"?,* Etudes à la mémoire de Christian Lapoyade-Deschamps [Civil aviation law after 11 September 2001: Which steps to take when faced with "hyper-terrorism"?, Studies dedicated to the memory of Christian Lapoyade-Deschamps] (Pessac: Centre d'études et de recherches en droit des affaires et des contrats, Presses Universitaires de Bordeaux, 2003), 590–600.

4. *Glossaire interarmées de terminologie opérationnelle* [Joint glossary of operational terminology], PIA no. 0.5.5.2, no. 414/DEF/EMA/EMP.1/NP, 8 March 2007.

5. Ibid.

6. *Livre blanc sur la défense et la sécurité nationale* [White paper on defense and national security] (Paris: Odile Jacob/La Documentation Française, 2008), 1: 70.

7. Decree no. 2005-1104 of 5 September 2005, ordering publication of the Franco-Swiss cooperation agreement on air safety against nonmilitary air threats, signed in Bern on 26 November 2004.

8. Decree no. 2007-1536 of 26 October 2007 ordering publication of the Franco-Italian cooperation agreement on air safety against nonmilitary air threats, signed in Paris on 4 October 2005.

9. "No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft." *Convention on International Civil Aviation, Signed at Chicago, on 7 December 1944 (Chicago Convention)* [hereafter referred to as Chicago Convention], Article 8, http://www.mcgill.ca/files/iasl/chicago1944a.pdf.

10. For example, the Fédération nationale de l'aviation marchande (FNAM) [National Federation of Commercial Air Transportation] distinguishes clearly between air safety (i.e., "the fight against malicious acts committed against aircraft or passengers") and air security, "which relates to the rules of aircraft manufacturing and operation." See the FNAM website at http://www.fnam.fr.

11. Air safety is similar to "the combination of measures as well as of human and material resources aimed at protecting civil aviation against unlawful interference." Article 2.3, Regulation (CE) no. 2320/2002, enacted by the European Parliament and Council on 16 December 2002, relating to the establishment of common rules regarding civil aviation.

12. The pilot of the Cessna was prosecuted on the following count: "Exposure of others to a direct risk of death or injury" and "flying over a restricted area, Class A controlled air space." The court suspended his pilot's

license for 18 months and fined him 1,000 euros. Thierry Vigoureux, "France: l'avion du Premier ministre évite une collision" [France: The prime minister's airplane avoids a collision], *Le Figaro.fr*, 29 September 2008.

13. *United Nations Convention on the Law of the Sea, Signed in Montego Bay on 10 December 1982*, Article 101, http://jurisplaisance.free.fr/normes_internationales/Montego_Bay/Convention_Montego_Bay_droit_de_la_mer.pdf.

14. *Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)*, [14 September 1963] [hereafter referred to as Tokyo Convention], http://cns.miis.edu/inventory/pdfs/airterr.pdf; *Convention for the Suppression of Unlawful Seizure of Aircraft, Signed at the Hague, on 16 December 1970 (The Hague Convention)* [hereafter referred to as Hague Convention], http://www.oas.org/juridico/MLA/en/Treaties/en_Conve_Suppre_Unlaw_Seiz_Aircr_Sig_The_Hague_1970.pdf; and *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation . . . Concluded at Montreal on 23 September 1971* [hereafter referred to as Montreal Convention], http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf.

15. Tokyo Convention, Article 11.

16. Hague Convention, Article 1.

17. As defined by the United Nations General Assembly Resolution of 9 December 1994, terrorism means "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes." Measures to Eliminate International Terrorism, A/RES/49/60, 9 December 1994, http://www.un.org/documents/ga/res/49/a49r060.htm.

18. *La France face au terrorisme, Livre blanc du gouvernement sur la sécurité intérieure face au terrorisme* [France against terrorism: Government white paper on internal security in the face of terrorism] (Paris: La documentation française, 2006), 10.

19. François Heisbourg, *Hyperterrorisme: La nouvelle guerre* [Hyperterrorism: The new war) (Paris: Odile Jacob, 2003).

20. On the subject of the evolving nonmilitary air threat, see Michel Dupont-Elleray, "Géopolitique du terrorisme aérien: De l'évolution de la menace à la diversité de la riposte" [The geopolitics of air terrorism: From the evolving threat to the diversified counterattack], Institut de Stratégie et des Conflits—Commission Française d'Histoire Militaire, http://www.stratisc.org.

21. Among other things, the ICAO added Appendix no. 17 to the Chicago Convention on 22 March 1974. That document defines international standards and recommended practices for air safety.

22. Strategic objectives for 2005–10, approved by the ICAO Council on 17 December 2004.

23. Regulation (CE) no. 1592/2002 of 15 July 2002.

24. The report of 24 April 2006 by the European Parliament Standing Committee brings up "the need to strengthen air safety in Europe," particularly through the requirement for unified European regulations.

25. Vigipirate is a security monitoring scheme; Piratair is implemented when an aircraft is hijacked; and hostile intrusion of French airspace triggers Intrusair.

26. The Chicago Convention was signed in 1944 by 52 countries and established the ICAO in 1947. Today that organization has 190 member states. It set the main rules of civil aviation (aircraft registration, security, rights, and obligations of member countries as regards air law).

27. Decree no. 75-930 of 10 October 1975, relating to air defense, modified by Decree no. 77-882 of 26 July 1977 and Decree no. 89-141 of 1 March 1989.

28. Security Council, Resolution S/RES/1067, 26 July 1996, http://www.undemocracy.com/S-RES-1067(1996).pdf.

29. Article 14 of the Tokyo Convention provides that neither the disembarking, handing over, detention in a foreign country of a passenger disembarked under orders of the captain, nor his return is considered as admission to a contracting state's territory for the purposes of the application of that state's laws.

30. Those that can more specifically apply to the nonmilitary air threat include the following: Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); International Convention against Hostage Taking (1979); International Convention for the Suppression of Terrorist Bombings (1997); and International Convention for the Suppression of Nuclear Terrorist Acts (2005).

31. UN General Assembly, Measures to Eliminate International Terrorism, A/RES/49/60, 9 December 1994; and UN General Assembly, Measures to Eliminate International Terrorism, A/RES/51/210, 17 December 1996.

32. UN Security Council, Threats to International Peace and Security Caused by Terrorist Acts, S/RES/1368, 12 September 2001; and UN Security Council, Threats to International Peace and Security Caused by Terrorist Acts, S/RES/1373, 28 September 2001.

33. "The main objective of this Regulation is to establish and implement appropriate community measures, in order to prevent acts of unlawful interference against civil aviation." Article 1.

34. *La France face au terrorisme*. (See note 18.)

35. Loïc Simonet, "La pratique des accords de sûreté aérienne dans l'après 11 septembre" [Air safety agreement practices after 11 September], *Juris Info Défense*, March/April 2006.

36. The partnership includes five Arab Maghreb Union countries (Algeria, Libya, Morocco, Mauritania, and Tunisia) and five EU countries (Spain, France, Italy, Malta, and Portugal). Exercises included Air 07 and Renegade 2009.

37. Hague Convention, preamble.

38. Montreal Convention, Article 10.

39. Hague Convention, Article 7.

40. Ibid., Article 2, Article 9.

41. Montreal Convention, Article 3.

42. A few attempts were made in that direction. See René Mankiewicz, "La problématique de la 'piraterie aérienne'" [The "air piracy" problems), *Etudes internationales* 8, no. 1 (1977): 100–112.

43. The state's sovereignty over its territorial, maritime, and air space is supported by several provisions: Article 2 of the United Nations Charter; Article 2 of the Montego Bay Convention on the Law of the Sea; Article 1 of the Chicago Convention; and International Court of Justice decision of 27 June 1986, United States v. Nicaragua.

Legal Responses to the Use of Force by Nonstate Entities

I. M. Lobo de Souza, PhD*

Nonstate entities are nowadays recognized as one of the main sources of threats to international peace, security, and stability. *The National Security Strategy of the United Kingdom* (2008) lists the "prominence of non-state entities" as one of the "common strands running through the threats [to national and international security]."[1] Security threats posed by nonstate entities are also mentioned six times in the US *National Security Strategy* (2006) and eight times in the US *National Defense Strategy* (2008).[2] The latter characterizes nonstate entities as "potential adversaries" of the United States in the contemporary strategic environment that could "use nuclear, conventional, or unconventional weapons" and "exploit terrorism, electronic, cyber and other forms of warfare."[3]

Nonstate entities have been a source of threat to peace and stability for a long time, but their role has increased dramatically with the end of the Cold War. A position paper presented by the secretary-general of the United Nations (UN) in 1995 notes that important changes took place since 1990, mentioning that "of the five peace-keeping operations that existed in early 1988, four related to inter-state wars and only one . . . to an intra-state conflict," whereas "of the 11 operations established since January 1992 all but 2 (82 per cent) relate to intra-state conflicts." It goes on to describe the peculiar features of those intrastate conflicts, which are fought "not only by regular armies but also by *militias and armed civilians*" (emphasis added) had no clear front lines, inflicted great civilian casualties, and caused humanitarian catastrophes.[4]

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The report produced by the High-Level Panel on Threats, Challenges and Change in 2004 points out that the biggest security threats facing the world today are "from non-State actors as well as States," and in the discussion of the threats and the policies needed to address them, the panel cites nonstate entities 13 times.[5] In a 2005 report to the World Summit, the UN secretary-general acknowledged the vulnerability of even the most powerful states to "small networks of non-State actors."[6]

This general perception of nonstate entities as a grave threat to peace and security is not the product of imagination: the use of force by nonstate entities has been associated with war crimes, genocide, crimes against humanity, terrorism, gross violations of human rights, piracy, and proliferation of weapons of mass destruction, not to mention wider repercussions to the state and society in or against which they act, such as political instability and the destruction of infrastructure.[7] In 2009 the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* observed that the proliferation and fragmentation of nonstate armed groups, combined with the asymmetric nature of conflicts, have led them to try to overcome their military inferiority by using strategies that "flagrantly violate international law, including attacks against civilians and the use of civilians to shield military objectives."[8]

In considering ways and means to regulate the armed conduct of nonstate entities, states and international organizations have come to the realization that the limits and regulations on the use of force put in place by the international legal system were not fully designed to address nonstate entities, since it focused mostly on the conduct of states through their officials and organs. This was a grave shortcoming, against which Hedley Bull warned in his study of the role of war in international order:

> In the post-1945 period international society has had a certain success in confining interstate war within limits consistent with the survival of the states system. . . . But as this has happened, war waged by political units other than states has expanded in scope. Civil factions have emerged as violent world actors, challenging the monopoly of international violence which sovereign states have long claimed for themselves, and escaping the restraints and rules by which sovereign states are bound. . . . International society will not be able to afford to allow these new forms of war to lie permanently beyond the compass of its rules.[9]

It is therefore relevant to study what legal responses the international society has devised over the last decades to regulate the use of force on the part of nonstate entities, in particular to hold them directly accountable for

their conduct in armed conflict. The accountability of nonstate entities relates directly to the effectiveness of some of the most relevant sections of international law: the principles of nonuse of force and nonintervention, international human rights law, international humanitarian law, and international criminal law. International norms are supposed to be enforced against violators, even if they are nonstate entities, when mechanisms of enforcement are available; otherwise, they will lack deterrence and will not effectively prevent, contain, and/or suppress the threat posed by those entities. Noticeable developments and trends in recent years reflect the effort of states and international agencies to close the normative and accountability gaps. This article seeks to describe and appraise those developments.

A diverse array of nonstate entities may take part in armed conflicts, such as private security companies, international organizations, armed opposition groups, and self-proclaimed national liberation movements, but this article concerns itself specifically with the last two. This choice is justified not only for delimitation purposes, so as to enable coverage of the issues involved with sufficient depth, but also by the fact that they have been the predominant type of nonstate entity engaged in armed conflicts and that they seem to share some common attributes and to fall (at least partially) under some common set of international regulations. Although the difference between an armed opposition group and a national liberation movement will be recognized when appropriate, it is a fact that many armed opposition groups claim to be national liberation movements, as their names seem to reflect, regardless of whether their real agenda is the promotion of self-determination of the people or group they claim to represent.

Ascertaining the Evolving Normative Framework

There is no question about the applicability of treaty-based international humanitarian law to the conduct of armed groups in situations of armed conflict. Article 3 common to the Geneva Conventions of 1949 expressly enunciates humanitarian rules applicable to *each party* to noninternational armed conflicts, the most frequent type of conflict in which armed groups are involved.[10] The Additional Protocol II (1977), designed to develop and supplement the protections offered by common Article 3 in cases of armed conflict not of an international character, explicitly applies to "dissident armed forces or other organized armed groups." As to armed groups

engaged in an armed conflict for self-determination, Additional Protocol I (1977) is applicable in the circumstances and conditions defined in Articles 1 and 96; moreover, common Article 2, paragraph 3, of the 1949 Geneva Conventions offers them the option to consider themselves bound by the conventions.[11] The Institut de Droit International stated in its Berlin Resolution that when an internal armed conflict occurs between a government's armed forces and those of one or several nonstate entities, or between several nonstate entities, all parties "including non-State entities have the obligation to respect international humanitarian law."[12] In 2004 the Sierra Leone Special Court also had the opportunity to state the same position emphatically: "It is well-settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may be bound by international treaties."[13]

Over the years, state practice has set in motion a progressive expansion of the normative framework applicable to the conduct of armed groups, in a process that is being recognized by law-ascertaining agencies. It does not seem to be in dispute today that *customary humanitarian law* applicable to internal armed conflicts is recognized as encompassing the protections afforded by conventional rules such as common Article 3 of the Geneva Conventions and at least some parts of Protocols I and II. The provisions of Article 3 common to the Geneva Conventions were acknowledged by the International Court of Justice as declaratory of existing principles of customary law.[14] This finding was substantiated by the International Criminal Tribunal for the Former Yugoslavia (ICTY, Trial Chamber) in the *Celebici* case.[15] The same recognition was given to the "core" of Protocol II and Article 75 of Protocol I by the ICTY (Appeals Chamber) in the *Tadic* and *Celebici* cases.[16] But this is only one aspect of the normative development.

Customary processes are also deemed to have led to the creation or crystallization of new customary rules that incorporate *other* conventional provisions of international humanitarian law and are applicable to internal armed conflicts. In this same *Tadic* case, the Appeals Chamber, after a careful examination of state practice as well as the practice of the International Committee of the Red Cross (ICRC) and of international organizations, arrived at the conclusion that "a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts"—more specifically, rules referring to the protection of civilians

and civilian objects, protection of all those who do not (or no longer) take active part in hostilities, and prohibition concerning means and methods of warfare.[17] A recent report produced by the United Nations Fact-Finding Mission on the Gaza Conflict (2009) has endorsed this position: "The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging."[18]

A more comprehensive study on customary international humanitarian law, sponsored by the ICRC and published in 2005, confirms that many of the customary rules applicable in internal armed conflicts are the same as those applicable in international armed conflicts. In identifying each customary rule, the study summarizes its conclusions by affirming that "the State practice establishes this rule as a norm of customary international law *applicable in both international and non-international armed conflicts*" (emphasis added). The list of customary rules ascertained is very extensive, but in a concise form it can be said to include the principle of distinction (comprising distinction between civilians and combatants and between civilian objects and military objectives, as well as proportionality of and precautions in attacks); rules that afford special protections to certain persons (medical and religious personnel, humanitarian relief personnel, personnel involved in a peacekeeping mission, and journalists), objects (medical and religious objects, humanitarian objects), zones (hospital and safety zones, demilitarized zones), cultural property, and the natural environment; rules that impose prohibitions regarding specific methods of warfare (denial of quarter, starvation and access to humanitarian relief, and deception) and the use of certain weapons (weapons of a nature to cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate); and rules that demand humane and nondiscriminatory treatment of civilians and persons hors de combat.[19]

This last normative development is very significant. International humanitarian law in the Geneva Conventions embraces a division between international and noninternational armed conflicts that determines a different—in the sense of wider—set of rules for the former. This division is prescribed in other normative instruments, such as the Rome Statute of the International Criminal Court (Article 8).[20] As a result of this division, the conduct of

armed groups in internal armed conflicts would be under less stringent normative limitations than that of states, even if these groups were the protagonists and the principal source of serious violations of international humanitarian law. This normative aberration in humanitarian treaty law has been uncovered by the International Court of Justice—somewhat for different reasons—when it pointed out in the *Nicaragua* case that the rules defined in common Article 3 constitute a "minimum yardstick" in the event of international armed conflicts, in addition to the other more elaborate rules, and that the application of these minimum rules in the case under review would render the categorization of the conflict senseless.[21] But such realization could have prompted the question of why nonstate entities should be subjected to the *minimum* rules only, while states are governed by the *maximum* rules.

The law-creating, customary processes that brought some rules applicable in international conflicts to the realm of internal conflicts constitute a much-needed development if armed groups are to be held accountable for all their practices during armed conflict. The ICRC has indeed stated—on the basis of its study of customary international humanitarian law—that the distinction between international and internal armed conflicts would have no practical consequence so far as the application of customary international humanitarian law is concerned.[22] This conclusion differs from the International Court of Justice's pronouncement previously cited because the ICRC expressly acknowledges that by virtue of state practice, the "normative framework for non-international armed conflicts is thus more extensive than that contained in treaty law."[23] Thus the provision in Article 3 common to the Geneva Conventions that allows armed groups to conclude special agreements or issue declarations to bring into force all or part of other provisions of the Geneva Conventions has become, due to normative developments, a potentially undesirable drawback because those agreements may cover a restricted set of rules only, falling short of the existing larger framework of already applicable customary and conventional obligations. Even assuming, for the sake of argument, that regardless of any special agreements, all customary rules continue to apply, an armed group's signing of a declaration or agreement more limited in scope may have the adverse effect of misleading it into believing that its conduct is regulated by a less rigorous set of rules.[24]

The normative confluence between rules applicable in international armed conflicts and internal armed conflicts is also salutary because the reality on the ground of armed conflicts does not reflect this clear-cut dichotomy. As the Pre-Trial Chamber I of the International Criminal Court has recently pointed out in the case *Dyilo* (2007), at times it is difficult to draw any sure distinction between international and internal armed conflicts. Citing with approval a statement of the Appeals Chamber of the ICTY on the *Tadic* case, it reaffirmed the complex nature of armed conflicts: "An internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."[25]

As a matter of fact, the case under consideration seemed to prove the point. Considering the facts of the case, and bearing in mind the relevant geographical area and period, the Pre-Trial Chamber found that from July 2002 to June 2003 there was an armed conflict of an international character, and from June 2003 to December 2003, a noninternational armed conflict. Accordingly, the Pre-Trial Chamber came to the conclusion that sufficient evidence existed to establish the responsibility of the accused for charges of commission of the same war crime as defined in the statute in situations of both international and internal armed conflicts.[26]

In addition to the political and military characteristics of contemporary armed conflicts, a more fundamental reason supports the case for the end of this distinction. In the *Tadic* case, the Appeals Chamber of the ICTY argued cogently that international law has responded to developments in internal armed conflicts (in terms of frequency, level of cruelty, and foreign intervention) in line with the emerging international human rights regime, abandoning the "State-sovereignty-oriented approach" in humanitarian law in favor of a "human-being-oriented approach." It then proceeded to contend that from the perspective of humanitarian protection, this dichotomy is untenable:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted

> "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[27]

Theodor Meron argues that the different thresholds of applicability of international humanitarian law are indeed becoming blurred. He offers as evidence an ICRC study, the fact that "most military manuals do not explicitly distinguish between rules applicable in noninternational conflicts and in international conflicts" and, finally, the lack of any such distinction in the UN regulations on observance by UN forces of international humanitarian law.[28] Subscribing to the foregoing considerations and developments, the Institut de Droit International in its 1999 Berlin Resolution welcomed and encouraged "the progressive adaptation of the principles and rules relating to internal armed conflicts to the principles and rules applicable in international armed conflicts," and advocated the adoption of a convention that would "regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character."[29] A renewed codification of customary humanitarian law that incorporates this normative convergence and at the same time eliminates the typology of armed conflicts may indeed enhance the protection of all persons in all situations of conflict. Should this exercise of codification include elements of "progressive development," the convention itself could be a source of new customary, law-creating processes.

International human rights law represents the second relevant set of international norms applicable to the conduct of armed groups in armed conflict. The gradual recognition of the extension of human rights law to the field of armed conflicts has raised new issues regarding its interplay with humanitarian law. The Human Rights Committee's General Comment no. 5 on Article 4 of the International Covenant on Civil and Political Rights, issued in 1981, neither referred to international or internal armed conflict nor tried to define what constituted a "public emergency which threatens the life of a nation." After 20 years, the committee could no longer maintain a general comment that did not reflect the evolving interaction between international human rights law and humanitarian law in situations of armed conflict and its own practice (comments/concluding observations in response to states' reports). Accordingly, in 2001 the committee adopted

General Comment no. 29 on "States of Emergency" (Article 4), meant to replace the previous one (no. 5).[30]

In this new comment, the committee considers international and non-international armed conflicts as situations that qualify as a "public emergency which threatens the life of a nation," in which case rules of international humanitarian law become applicable "in addition to" the provisions in Articles 4 and 5 of the Covenant. In other words, the Covenant would continue to be applicable even in situations of armed conflict. The committee also conveyed its understanding as to which rights are protected by the Covenant in those situations and thus are, according to Article 4, paragraph 2, nonderogable (albeit susceptible of being subjected to justified restrictions, in conformity with requirements specified in Article 18, paragraph 3).[31] In the committee's interpretation of Article 4, no measure derogating from the provisions of the Covenant may be inconsistent with the rules of international humanitarian law, and no state party may invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law (which include some fundamental human rights).[32]

The interpretation given by the committee in General Comment 29 was subsequently endorsed in General Comment 31, which asserts even more directly that the Covenant "applies also in situations of armed conflict to which the rules of international humanitarian law are applicable."[33] One important comment added was that both spheres of law were "complementary, not mutually exclusive" and that covenant rights could be interpreted by reference to the more specific rules of international humanitarian law.

The Human Rights Committee's position in General Comments 29 and 31 was congruent with the developing jurisprudence of the International Court of Justice. The court had already stated in 1996 that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[34] In 2004, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court elaborated further on its earlier position (which was cited), saying that "*more generally*, the Court considers that the protection offered by *human rights conventions* does not cease in case of *armed conflict*, save through the effect of provisions for

derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights" (emphasis added).[35] Here the court refines its previous statement in two ways: it deems *all* human rights conventions applicable and extends their field of application to cover not only situations of war (in the strict, legal sense) but also situations of armed conflict. Furthermore, because the court makes no distinction between international and noninternational armed conflicts (which might not have been an easy task in the case under review anyway), it is reasonable to assume that its view encompasses any type of armed conflict.

In 2004 the Inter-American Court of Human Rights rendered a judgment on preliminary objections in the case *Serrano-Cruz Sisters v. El Salvador* that covered the relationship between human rights law and humanitarian law thoroughly. The respondent state challenged the jurisdiction *rationae materiae* of the court on the ground that the facts of the case occurred in the context of a noninternational armed conflict that called for the application of international humanitarian law as *lex specialis*, whereas the court had jurisdiction to interpret and apply human rights treaties only. El Salvador also stressed the distinction between both branches of law in terms of provisions and instruments, and noted that they "have developed independently" so that while humanitarian law applied in situations of emergency and national disorder, human rights law applied in times of peace. The Inter-American Court rejected this objection, stating unequivocally that "international human rights law is fully in force during internal or international armed conflicts." It also highlighted the convergence and complementarity of international human rights law and international humanitarian law in protecting all persons during internal or international armed conflict. Those conclusions were supported, in the court's view, by Article 27 of the American Convention on Human Rights, which sets forth its application even "in time of war, public danger, or other emergency that threatens the independence or security of a State Party," subject to certain limited and justified derogations; Article 3 common to the Geneva Conventions, which establishes the obligation to provide "humane treatment"; Additional Protocol II, when it states that "international instruments relating to human rights offer a basic protection to the human person" and refers, in its Article 4, to "fundamental guarantees"; and Additional Protocol I, when again article 75 protects "fundamental guarantees." In the court's reasoning, the allusion to

"fundamental guarantees" would indicate entitlement to such guarantees originating from international human rights as well.[36]

Recognition of the application of international human rights law in situations of armed conflict—internal or international—has been granted in other venues as well. The 1999 Berlin Resolution of the Institut de Droit International concluded that nonstate parties to armed conflicts have the obligation to respect "international humanitarian law as well as fundamental human rights," defining the latter as "the principles and rules of international law guaranteeing fundamental human rights."[37] In the same vein, the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (2009) conveys an unambiguous position on the normative framework applicable to the conduct of armed groups: "Armed groups are bound by international humanitarian law and must refrain from committing acts that would impair the enjoyment of human rights."[38] But surely an important manifestation of *opinio juris generalis* is found in the Vienna Declaration and Programme of Action, adopted by acclamation by representatives of 173 states in the 1993 World Conference on Human Rights. This declaration called upon states and *all parties* to armed conflicts "strictly to observe international humanitarian law . . . as well as minimum standards for protection of human rights, as laid down in international conventions."[39] If any doubt existed about the type of armed conflict this statement alluded to, in the same declaration the conference recommends that the United Nations "assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in *all situations of armed conflict*" (emphasis added).[40]

The applicability of both international human rights law and international humanitarian law to armed conflicts may give rise to questions regarding the possibility of conflict between their norms and their mechanisms of control and accountability. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court suggested tentatively the relationship between both spheres of law: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[41]

When the last scenario is verified, as it was in the situation submitted to its consideration, the court thought that it should take into account both branches of international law while treating international humanitarian law as *lex specialis*.[42] This approach has been endorsed by the UN special rapporteur in extrajudicial, summary, or arbitrary executions and by a joint report submitted by holders of five mandates of special procedures of the Commission on Human Rights in 2006.[43]

A growing understanding of the convergence and complementarity of international human rights law and international humanitarian law could potentially improve the level of protection because they would apply to *all* persons involved in situations of armed conflict, international or internal, and attract the joint operation of organs and mechanisms of protection from both branches. The relationship between both branches of international law rests on and is informed by a common foundation. The International Criminal Court (Appeals Chamber) in the *Celebici* case has correctly pointed out that both branches of law share the same focus (respect for human values and the dignity of the human person) and "a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted," the object of which is the protection of the human person.[44]

Furthermore, as the Inter-American Court of Human Rights has observed, an undeniable normative convergence exists between a number of conventional and customary rules of humanitarian law and the equivalent rules of human rights law (e.g., the minimum protections of common Article 3 of the Geneva Conventions would be analogous in content with some of the fundamental guarantees of the human person found in international human rights instruments, such as the International Covenant on Civil and Political Rights). The Vienna Declaration and Programme of Action (1993) has in fact singled out some common protections, such as freedom from torture, which are reaffirmed by the signatories as a right "under human rights law and international humanitarian law" that must be protected "in times of internal or international disturbance or armed conflicts."[45] Jean Pictet went beyond the contents of particular rules and elaborated a list of *principles* common to what he calls the Law of Geneva and the Law of Human Rights. Those principles, which cover several specific

rules, include the principles of inviolability, nondiscrimination, and security of the person.[46]

Cançado Trindade has long advocated that the convergence between international human rights law, international humanitarian law, and international refugee law is expressed not only at the normative level but also at the hermeneutic and operational levels, and that many human rights and humanitarian norms belong to the domain of *jus cogens* and impose corresponding obligations *erga omnes* of protection.[47] The concept of *erga omnes* obligations finds endorsement in the jurisprudence of the International Court of Justice.[48] Although much discussed in doctrine, it carries a practical implication to the extent that, as the court has explained, the *erga omnes* nature of obligations means that they are the concern of all states and that all states have a *legal interest* in their protection.[49]

Given the inexorable normative expansion of the *corpus* of humanitarian rules that govern the conduct of armed groups in armed conflicts, and the growing interaction, complementarity, and convergence between human rights law and humanitarian law, one might be excused to think that these developments alone would necessarily enhance compliance with those rules and promote a higher degree of protection for civilians. However, one must address practical and legal issues. For instance, Andrew Clapham draws attention to the difficulty governments have in recognizing the existence of a situation of internal armed conflict or in accepting that an armed group may have territorial control and exercise authority, and ultimately in conceding the application of humanitarian law. From the legal perspective, as the ICTY has pointed out, the parties' acknowledgement of the reality of an armed conflict is not a legal prerequisite for its existence and the resulting incidence of international humanitarian law.[50] But Clapham is right in underscoring the significance of the *attitude* of governments because the expectation of reciprocity of treatment often determines the level of compliance by the armed group with humanitarian and human rights norms.[51] The other major issue concerns the effectiveness of international norms, which depends to a large extent on the successful operation of procedures and mechanisms designed to promote and monitor compliance—and in case of violation, to enforce those rules. In this field, some remarkable developments have taken place.

Accountability of Armed Groups

In the past, the procedures and mechanisms for control and monitoring of compliance with human rights and humanitarian law obligations had been entirely state-focused and largely dissociated from each other in their operation. The international human rights system is backed by a complex of treaty-based organs (including judicial organs at the regional level); nongovernmental organizations; international organizations; and the procedures of individual or group petition, interstate communication, universal periodic review, and periodic reports. The humanitarian law system presents a less developed support structure, with the institution of protecting powers and the actions undertaken by the ICRC. One significant shift perceived in recent years is the mounting interaction between both support structures and a realignment of focus to include nonstate entities. Fundamentally, the activities of human rights bodies are progressively compensating for the deficiencies in the apparatus of the humanitarian law regime related to accountability.[52]

In response to periodic reports submitted by states embroiled in internal armed conflict, the Human Rights Committee has made recommendations that touch upon matters of both human rights law and humanitarian law. For instance, the concluding observations of the committee on the third periodic report of the Democratic Republic of the Congo (DRC) (2006) recommended that that country take "all necessary steps to strengthen its capacity to protect civilians in the zones of armed conflict, especially women and children," and pursue its efforts to eradicate "forced recruitment of children into armed militias." With regard to forced disappearances or summary and/or arbitrary executions committed by armed groups, the committee recommended that the DRC "open inquiries," "appropriately prosecute and punish the perpetrators of such acts," and grant reparations to victims or their families.[53]

At the regional level, the Inter-American Court of Human Rights has extensive case law that deals with situations of internal armed conflicts and the interaction between human rights law and humanitarian law.[54] In those cases, it explicitly acknowledges that it may rely on humanitarian law to interpret the provisions of the American Convention (i.e., to determine the content and scope of those provisions as they are applied). In some of those cases, even though a state is the sole defendant in the procedure, the court

found it necessary to draw attention to the possibility of individual criminal responsibility for the members of nonstate entities arising out of breaches of humanitarian law and human rights obligations.

In the *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), the International Court of Justice found both human rights law and international humanitarian law applicable to the armed conflict in the territory of the DRC, holding that Uganda had violated its obligations under international human rights law and international humanitarian law. The interesting part of the judgement was the finding that Uganda had violated human rights and humanitarian obligations because it failed, as an occupying power, "to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district."[55] The facts of the case show that Uganda failed to avoid, control, or suppress activities by ethnic militias and armed groups in that district.[56]

The examples given above not only indicate a trend but also reveal the limitations of human rights organs and procedures, and of the International Court of Justice, in dealing *directly* with armed groups when they disrespect human rights and humanitarian laws. The powers, competences, and mandates established by their constituent instruments or by decisions of organs to which they are subordinate ultimately restrict their actions (decisions and/or recommendations) to states. Be that as it may, the 2004 report submitted to the Commission on Human Rights by the special rapporteur on extrajudicial, summary, or arbitrary executions advanced an extraordinary proposal that tried to address this limitation to a specific mandate. The rapporteur first reaffirmed that his mandate included humanitarian law, and for that reason violations of the right to life could be and had been dealt with in the context of international and noninternational armed conflicts. The report then proposed that armed opposition groups become the object of the rapporteur's mandate, especially if the group exercises "significant control over territory and population" and possesses an "identifiable political structure." In such a situation, the report suggested, the rapporteur could address complaints about executions directly to the armed group concerned, and that group could be called to respect human rights norms; moreover, should the rapporteur conclude that those rules were violated, the armed group could become the object of condemnation. The urgency

underlying the commission's acceptance of the proposed changes in the mandate was justified on the following ground: "In an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner."[57] Regrettably, the Human Rights Commission took no concrete action on this proposal. Although this attempt ultimately proved unsuccessful, human rights organs have devised different ways to circumvent mandate limitations in order to make armed groups' conduct the object of express considerations.

In the aftermath of the armed conflict that affected Lebanon and Israel in 2006, four human rights mandate holders visited Lebanon at the invitation of the two governments. Their final report states that they undertook their mission in accordance with their respective mandates and "on their own initiative in response to a suggestion by the President of the Human Rights Council." One of the mission's main objectives involved "assess[ing], from the perspective of international human rights and humanitarian law as covered by their respective mandates, the impact on the civilian populations of the armed conflict." The report conceded that Hezbollah was a nonstate actor and thus could not be a party to human rights treaties. However, it then stated that Hezbollah was "subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights" and that this was particularly so because it exercised significant control over territory and population and had an identifiable political structure. In a footnote, the report also added that Hezbollah could be deemed a de facto authority and an organ of the Lebanese state, subject to the international obligations assumed by Lebanon. With regard to Hezbollah's actions, the report concluded that "in many instances, Hezbollah violated the applicable principles of humanitarian law" and recommended that the Human Rights Council investigate some actions which constituted a clear violation of humanitarian law and could also amount to war crimes. Furthermore, the report addressed some recommendations to Hezbollah, requiring it, inter alia, to "publicly affirm that it is bound by international humanitarian law" and train its fighters on international humanitarian law standards, informing them "of the possibility of criminal prosecution for serious violations thereof."[58]

This joint report managed to evade traditional limitations inserted on mandates due to political reasons. The Commission of Inquiry on Lebanon

established by the Human Rights Council to investigate the same conflict, by contrast, had a mandate that prevented it from examining and assessing the actions of Hezbollah. Paragraph 7 of the Human Rights Council resolution S-2/1 and the respective Terms of Reference clearly limited the mandate of the commission to assess Israel's conduct, with no mention of either Hezbollah or Lebanon; indeed, the report focused almost entirely on Israel's actions. Yet, the Report of the Commission included a general recommendation that the council "promote and monitor the obligation to 'respect and ensure respect' of the international humanitarian law by all parties in a conflict, *including non-State actors*" (emphasis added).[59]

More recently (2009), based on HRC Resolution S/9-1, the president of the Human Rights Council established a United Nations Fact-Finding Mission on the Gaza Conflict, which set the following terms of reference for the mandate: "To investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip."[60] However "unbalanced" the legal basis of the mandate, the commission decided to go further and beyond, making some very interesting findings. In defining the applicable law, the final report observed the existence of an ongoing *convergence* between human rights protections and humanitarian law protections, and the fact that the relationship between those two branches in regard to nonstate entities' obligations is evolving in order to enhance the protection and enjoyment of human rights in all circumstances. The report also stated the commission's view that "non-State actors that exercise government-like functions over a territory have a duty to respect human rights." With regard to the specific nature of armed groups that constitute national liberation movements and/or resistance movements (the situation under consideration), the commission expressed the view that any "action of resistance pursuant to the right to self-determination should be exercised with full respect of other human rights and IHL [international humanitarian law]."[61] Armed with those assumptions, the report found that Palestinian armed groups committed acts contrary to international humanitarian law, some of which constituted war crimes and could amount to crimes against humanity. The report also concluded that Palestinian armed groups and security services—some of them associated with Gaza or Palestine authorities—violated human rights pro-

tections. In the end, the report called for investigation and full accountability.[62] As a matter of follow-up, the UN General Assembly in Resolution 64/10 urged the Palestinian side to undertake investigations "in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice."[63]

It is remarkable that the pursuit of enjoyment of the right to self-determination by nonstate entities through armed struggle was seen in the preceding cases as subject to limitations imposed by human rights law and international humanitarian law. Admittedly, Protocol I to the Geneva Conventions was designed to provide humanitarian protections in this type of armed conflict, and some of its provisions are considered part of customary law. But the problem is that a substantial number of states have shown great reluctance to include in the definition of terrorism, acts performed by armed groups in their struggle for liberation and self-determination in situations of foreign occupation, subjugation, and colonial domination.[64] The exclusion of armed actions taken by armed groups in situations of national liberation from the definition of terrorism might have given rise to the misconception that those groups are allowed to cause death or serious bodily harm to civilians or noncombatants in order to achieve their ends. Recognition of the application of human rights law and international humanitarian law even in situations of armed struggle for self-determination and liberation draws the legal line between legality and illegality and enhances the protection of civilians and noncombatants who otherwise might have been affected by the unending discussion about the definition of terrorism.

A 2009 report produced by the Human Rights Unit of the United Nations Assistance Mission to Afghanistan also made a negative assessment of the belligerent conduct of armed groups within Afghanistan. After reviewing the tactics employed by armed opposition groups in the conflict (including the Taliban) and the number of civilian casualties, it came to the conclusion that they were disrespecting the principles of distinction and proportionality when conducting their operations by disregarding civilians and using indiscriminate tactics. The report concluded by recalling that "all persons engaged with the armed opposition have an obligation to comply with the requirements of international humanitarian law."[65]

Organs and procedures originating from the international human rights system are but some of the several sources of pressure being placed against armed groups to make them conform their behavior to human rights law and humanitarian law. The political organs of the UN, in particular the Security Council, have played a pivotal role in the effort to restrain armed groups and hold them accountable for violations of humanitarian law and human rights law.

The Security Council deals with armed groups from a distinct, wider perspective generated by its position as the organ within the UN system that holds primary responsibility for the maintenance of international peace and security. Therefore, the council has dealt with armed groups in the context of a threat to or breach of international peace and security, with the general goal of removing the threat and maintaining or restoring international (or regional) peace and security.

In the discharge of its functions according to the charter, the council sometimes has to engage armed groups involved in an internal conflict in order to initiate or support a political process that might lead to reconciliation, demobilization, disarmament, and reintegration of the members of those groups into society. But the political obstacles in the way are usually challenging. Andres Franco's study identifies a number of them, starting with the necessary consensus that has to emerge between the permanent members regarding their perceptions of the role of the armed group(s) and the measures that need to be taken in order to address the conflict. The author also notes the disparate reality between, on the one hand, the powers of the Security Council and its global role and, on the other hand, the decentralized, local nature of military, political, and economic support to those armed groups. This last obstacle, in particular, might entail the need for the Security Council to utilize regional organizations as a medium of communications between the council and the armed groups or as the leading agent of the council for an enforcement action or peacekeeping operation.[66]

One concedes that the political goals and limitations that guide and sometimes determine the Security Council's decisions and measures or, at times, inaction are responsible for some striking failures to properly address a humanitarian crisis resulting from armed conflicts, especially in the post–Cold War years and in situations of intrastate conflicts. The tragedies in Rwanda and Darfur offer vivid testimony to the limitations of the Security

Council.[67] Notwithstanding its political limitations, the cumulative practice of the council has produced some positive effects on the promotion of respect for human rights and humanitarian norms in armed conflicts and the accountability of armed groups for violations of those norms. The actions undertaken by the council on this field have been reinforced by a reinterpretation of its functions conveyed in the *2005 World Summit Outcome*. This document states that UN members are prepared to take collective action "through the Security Council, in accordance with the Charter, including Chapter VII . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[68] Applied to the traditional mandate of the Security Council, this statement would imply a shift of focus on the part of the council's activities, which would now concentrate on the protection of civilians in armed conflicts; at the same time, it would mean that the legality of any humanitarian intervention is clearly contingent upon its being undertaken within the framework of the UN collective security system.[69] In Resolution 1674 (2006), the council reaffirmed this new interpretation of its mandate.

The protection of civilians in armed conflict has indeed been on the Security Council agenda for the past 10 years, and in the consideration of this topic, the council has adopted 11 resolutions to date.[70] A recent resolution on this matter (1894 [2009]) reveals the culmination of a gradual evolution in the council's policy options to deal with intrastate conflicts and armed groups. The resolution firstly expresses a general demand that parties to armed conflict "comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law." An inquiry into the practice of the Security Council shows that on many situations, the council has demanded that the parties to the conflict respect humanitarian and human rights norms, and has called for the cessation of and has condemned any violation thereof.[71]

The second important point in Resolution 1894 is that the council declares its readiness to respond to systematic, flagrant, and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict that may constitute a threat to international peace and security. The practice of the Security Council confirms this policy. The majority of armed conflicts since the end of the Cold War, particularly

those in Africa, has given rise to humanitarian disasters, and the Security Council has reacted by making the determination, regarding many of those situations, that they constitute a threat to or breach of international or regional peace and security. This determination, of course, is a preliminary step to allow the council to resort to the powers granted under chapter 7 of the charter. Subsequent to this determination, and having regard to the failure of states and armed groups to respond to the peacemaking initiatives endorsed by it or to comply with its resolutions, the council has been prepared to make use of the full range of tools and powers available to it under the charter.

In some cases, the Security Council has adopted decisions and provisional measures under Article 40 of the UN Charter. In Resolution 1464 (2003), for instance, the council determined that threats to stability in Côte d'Ivoire constituted "a threat to international peace and security in the region" and then called upon all states neighboring Côte d'Ivoire to "support the peace process by preventing any action that might undermine the security and territorial integrity of Côte d'Ivoire, *particularly the movement of armed groups and mercenaries across their borders* and illicit trafficking and proliferation of arms in the region" (emphasis added).[72] Addressing the situation in Sierra Leone in 2003, the Security Council demanded that the armed forces of Liberia and "any armed groups" refrain from illegal incursions into its territory.[73] Two years earlier, the Security Council had expressed its continued deep concern at the reports of human rights abuses and attacks committed by the Revolutionary United Front (RUF), "the Civil Defence Forces (CDF) and other armed groups and individuals" against the civilian population in Sierra Leone, and demanded that these acts cease immediately.[74] More generally, the Security Council considered the situation in West Africa in 2001, demanding that all states in the region take action to prevent "armed individuals and groups" from using their territory to prepare and commit attacks on neighboring countries and refrain from any action that might contribute to further destabilization of the situation on the borders between Guinea, Liberia, and Sierra Leone.[75]

The Security Council has also gone beyond provisional measures and imposed *sanctions* under chapter 7 against nonstate entities and their leadership. Targeted sanctions, for instance, have been imposed against the National Union for the Total Independence of Angola (UNITA) (resolutions 864

[1993], 1127 [1997], and 1173 [1998]); the Taliban and al-Qaeda (resolutions 1267 [1999], 1333 [2000], 1390 [2002], 1455 [2003], 1526 [2004], 1617 [2005], 1735 [2006], and 1822 [2008]); the RUF in Sierra Leone (resolutions 1132 [2007] and 1171 [1998]); the Democratic Forces for the Liberation of Rwanda (FDLR), ex-Armed Forces of Rwanda (FAR)/ Interahamwe, and other Rwandan armed groups operating in the eastern part of the DRC (resolutions 1804 and 1807 [2008]); and armed groups operating in Somalia (resolution 1844 [2008]).

In some situations of internal conflict, the Security Council has authorized peacekeeping forces and states to *use force* for the purposes specified in its resolution or to implement a peacekeeping mandate. In 2003 the council estimated that the internal conflict in Côte d'Ivoire required it to authorize, in accordance with chapter 8, the Economic Community of West African States and French forces to "take the necessary steps to guarantee the security and freedom of movement of their personnel and to ensure, without prejudice to the responsibilities of the Government of National Reconciliation, the protection of civilians immediately threatened with physical violence within their zones of operation." For that purpose, the council noted that they could use "the means available to them."[76] It issued similar authorization in the situation of the DRC: since 2000 the Security Council has been renewing a mandate to the peacekeeping operation in place (UN Organization Mission in the Democratic Republic of the Congo [MONUC]), which contains a chapter 7 authorization to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence. Resolution 1794 (2007), for instance, reaffirms MONUC's mandate to "use all necessary means" to that end.[77] Other cases include Somalia and Afghanistan.[78] In this last one, since 2001 the Security Council has endowed the International Security Assistance Force (ISAF) with a chapter 7 mandate to assist the Afghan government in the maintenance of security, and has expressly authorized ISAF's members "to take all necessary measures to fulfill its mandate."[79] One might ask against whom the Security Council has authorized ISAF to use force. Resolutions 1707 (2006) and 1833 (2008), for example, afford an indication of the addressees by referring to entities deemed to be affecting the security situation in Afghanistan: Taliban, al-Qaeda, illegally armed groups or other extremist groups, and those involved in the narcotics trade. The foregoing instances show a consolidated practice of the

Security Council. It comes as no surprise, then, that in Resolution 1894 the Security Council reaffirmed "its practice of ensuring that mandates of UN peacekeeping and other relevant missions include, where appropriate and on a case-by-case basis, provisions regarding the protection of civilians."[80]

All those measures originating from the Security Council have served to put the actions of armed groups under restraint and—perhaps to a lesser degree—compel them to observe the requirements of humanitarian law and human rights law. But they do not exhaust the array of powers of the Security Council, which has resorted to the application of justice mechanisms to ensure the accountability of armed groups and the prevention or containment of further violations of humanitarian and human rights rules.

Resolution 1894 affirms the council's strong opposition to impunity for serious violations of international humanitarian law and human rights law and its role in ending impunity. It then refers to the existing full range of justice and reconciliation mechanisms, which includes national, international, and "mixed" criminal courts and tribunals; truth and reconciliation commissions; and national reparation programs for victims and institutional reforms. The Security Council recognizes the principle of complementarity and emphasizes the importance of accountability through national mechanisms, yet it still sees the need for international cooperation and its active engagement in the creation and operation of some justice mechanisms.

With regard to several situations, the council brought to light its assessment of violations and demanded justice, at times making reference to a specific means. For instance, in resolution 1633 (2005), the council reiterated its "serious concern at all violations of human rights and international humanitarian law" in Côte d'Ivoire, urging the Ivorian authorities to "investigate these violations without delay in order to put an end to impunity." In resolution 1736 (2006), the council deplored the "persistence of violations of human rights and international humanitarian law" carried out by militias and foreign armed groups in the DRC and stressed the "urgent need for those responsible for these crimes to be brought to justice."[81]

In the situation concerning the armed conflict within Sierra Leone, the Security Council originated the creation of a mixed tribunal, eventually set up by the 2002 agreement between the UN and the Government of Sierra Leone. The Special Court resulted from Resolution 1315, which had requested that the secretary-general negotiate an agreement with the

Government of Sierra Leone to create an independent special court with jurisdiction over crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. Thus far the court has tried (or is trying) leaders of the three major armed groups that participated in the Sierra Leonean conflict: the Armed Forces Revolutionary Council, CDF, and RUF. Notably, in its most recent annual report (2009), the court refers to the cases not by the names of the accused but by the names of the armed groups they represent.[82]

Establishment of the ad hoc International Criminal Tribunal for the ICTY in 1993, by resolution 827, and of the ad hoc International Criminal Tribunal for Rwanda (ICTR), by resolution 955 (1994), represented a milestone in the activities of the Security Council. Both tribunals were endowed with power to exercise jurisdiction over persons responsible for genocide and other serious violations of international humanitarian law. The ICTR, in particular, has had the opportunity to try individuals associated with armed groups or militias for the commission of those violations.[83] Their creation and operation were a vital phase of the process that started with the Nuremberg Tribunal and ended with the establishment of the International Criminal Court (ICC), which is currently trying several individuals for various counts of war crimes and/or crimes against humanity. The significance of these trials is that those individuals allegedly held positions of leadership in 11 major armed groups operating in at least four different countries, some of which undertook transborder armed actions.[84] All of those cases were referred to the ICC by African countries who fell victim to the actions of those armed groups, with the exception of Sudan, referred by the Security Council (Resolution 1593 [2005]). Looking at the wider picture, one has to agree with Kenneth Anderson when he says that, in a sense, "the tribunals of international criminal law represent simply a new branch of collective security itself through the UN, a means of pursuing peace and justice."[85]

In the *Genocide* case, the International Court of Justice stated that the Genocide Convention (1948) did not provide for the criminal responsibility of states as distinct from the international responsibility of states, following a general line of reasoning first advanced in the Nuremberg Judgment and later endorsed by the International Law Commission's Articles on the

Responsibility of States for Internationally Wrongful Acts.[86] Similar grounds may be invoked to justify the conclusion that armed groups cannot be criminally liable internationally for their violations of international humanitarian law, while their international responsibility for their own wrongful conduct could be invoked.[87] However, there seems to be no doubt about the international criminal responsibility of their members arising out of their violations of humanitarian protections, even in the context of internal conflicts. In the *Celebici* case, the Appeals Chamber of the ICC noted that violations of international humanitarian law applicable to internal conflicts could be "criminally enforced at the international level," a view fully endorsed by the UN secretary-general's report on the establishment of a Special Court for Sierra Leone.[88]

Some may think that international law should develop norms and mechanisms that would allow armed groups to be criminally responsible as an entity for the commission of crimes under international law. Whatever future course the international legal system takes, one may contend that when an international tribunal tries individuals, it is trying them for their responsibility as perpetrators or coperpetrators of acts while they were members of that given group. In this sense, the trial of leaders of armed groups makes those entities also sit on trial, and as a result, their legitimacy and political clout—in particular if they claim to be taking part in a struggle for self-determination—can be seriously undermined. Besides, the possibility always exists that armed groups are judged as criminal organizations, or are held criminally liable, by the domestic legal system of the state(s) in which they operate.

Hopefully, the work of national courts, international tribunals, and mixed courts in bringing to justice members of armed groups responsible for violations of humanitarian law and human rights law is sending a deterrent message to all existing and future armed groups and ultimately putting an end to a horrible cycle of impunity. In particular the fact that all cases tried by the ICC thus far originate from Africa—and count on the support of the respective governments, with the exception of Sudan—is a good development in the road to rid this continent of the criminal armed groups that have plagued it for so long. But the jurisprudence of those courts has also offered a contribution to the enhancement of accountability of armed groups by developing international criminal law. Richard Goldstone, for

instance, recalls how the work of international courts has led to the recognition of gender-related offenses as a war crime.[89]

States other than the host state represent a last line of defense against armed groups that commit serious violations of international humanitarian law and human rights law. It has been noted that many of those rights have the character of *jus cogens* and give rise to obligations *erga omnes*. From the accountability point of view, in the view of the Institut de Droit International, the special nature of the obligations entails that not only "every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances," but also that all states are "legally entitled to demand respect for this body of law."[90] In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice shared its view that Article 1 of the Fourth Geneva Convention—identical in content to Article 1 of the other three conventions—imposed on every state party to the convention, "whether or not it is a party to a specific conflict," the obligation "to ensure that the requirements of the instruments in question are complied with."[91] How can states parties to the Geneva Conventions discharge their obligation to ensure that armed groups within other states comply with international humanitarian law as embodied in the conventions? One resource is furnished by a common provision found in the four Geneva Conventions (Articles 49 [I], 50 [II], 129 [III], and 146 [IV]), which establishes the universal jurisdiction mechanism applicable to grave breaches of international humanitarian law. On account of that common provision, for serious violations of those norms, the *erga omnes* nature of the corresponding obligations authorizes the application of the principle of universal jurisdiction. Therefore, if, for instance, an individual who is a member or former member of an armed group accused of grave breaches of international humanitarian law is found in the territory of a state of which he is not a national, that state's courts could arguably hear national criminal law procedures instituted with a view to prosecuting that individual for war crimes.

An insightful study by Roger O'Keefe on the application of the universal jurisdiction mechanism, however, reveals that it is hardly applied and is subject to limitations and criticisms. One such problem, according to

O'Keefe, is the ambiguous wording of the said provision, which does not expressly attribute the jurisdictional base(s) upon which state courts may be authorized to exercise jurisdiction, leaving open issues such as the legality of trial in absentia. O'Keefe also identifies the problem of the relatively small number of cases of due incorporation of the mechanism into the domestic legal order, in particular with regard to civil law countries.[92] Finally, states rarely show the necessary political will to have this mechanism in place, which can be costly; represent an undesirable intervention in the domestic affairs of another country, which could establish a bad precedent against them; and give rise to a diplomatic dispute.

Concluding Remarks

The international legal system has responded to the challenges posed by nonstate entities—in particular, armed groups—with normative, institutional, and procedural developments designed to regulate and attach legal consequences to their conduct and, further still, make them and their members accountable. Nevertheless, admittedly, a long and arduous road lies ahead. The expectation is that, given any necessary adaptation, nonstate entities will eventually be subjected to at least the same legal constraints and level of accountability as the states themselves in the use of armed force—thus constituting a response to Hedley Bull's warning, mentioned above. Other vital issues need further development and clarification, such as the attribution of state responsibility in cases of association between states and nonstate entities. Yet the developments mentioned in this article reveal that the process of humanization of *jus in bello* is inexorable and makes international humanitarian law and human rights law bound to become a necessary consideration in the decision of armed groups to resort to armed force and the way it is used.

Notes

1. Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Norwich, United Kingdom: Stationery Office, March 2008), 22, http://interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf.

2. White House, *The National Security Strategy of the United States of America* (Washington, DC: White House, March 2006); and Department of Defense, *National Defense Strategy* (Washington, DC: Department

of Defense, June 2008). In 2009 the national intelligence strategy divulged that "non-state and sub-state actors increasingly impact" the US national security. Office of the Director of National Intelligence, *The National Intelligence Strategy of the United States of America* (Washington, DC: Office of the Director of National Intelligence, August 2009), 3.

3. Department of Defense, *National Defense Strategy*, 11.

4. See *Supplement to an Agenda for Peace*, UN Doc. A/50/60, S/1995/1, 3 January 1995, 3–7.

5. United Nations, High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations Department of Public Information, 2004), 1, 9.

6. *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, par. 8.

7. The sheer number and variety of terms and expressions utilized to name nonstate entities that engage in armed activities do not add much clarity to their understanding, particularly when the lack of consensual definition or categorization follows suit. Since this inquiry is not concerned with the study of the legal typology of nonstate entities, general expressions such as "armed groups" and "nonstate entities" will be used as good alternatives to describe the same subjects.

8. See *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2009/277, 29 May 2009, par. 24.

9. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002), 192–93.

10. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. The International Committee of the Red Cross (ICRC) Commentary explains that the expression includes nonsignatory parties that may not yet be in existence and that are "not even required to represent a legal entity capable of undertaking international obligations," using the term *insurgents* to name them (p. 36).

11. See Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), 1091, par. 3771.

12. See "Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which Non-State Entities Are Parties" (Session of Berlin, 1999), par. II.

13. Prosecutor against Sam Hinga Norman, Defence Preliminary Motion Based on Lack of Jurisdiction, Appeals Chamber, Case SCSL-2004-14-AR72(E), par. 22.

14. In the Nicaragua case, the court stated that the rules of Article 3 of the Geneva Conventions are "rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, International Court of Justice (I.C.J.) Reports 1949, p. 22)." Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, par. 218. Later on, in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the court reaffirmed the same view: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, par. 79.

15. This is the relevant passage: "While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law." International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Zejnil Delalic et al., Trial Judgement, Case no. IT-96-21-T, 16 November 1998, par. 301. See also International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Zejnil Delalic et al., Judgement, Case no. IT-96-21-A (Celebici case), 20 February 2001, par. 148.

16. With regard to Protocol II, the Appeals Chamber stated that "many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles." Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor v. Dusko Tadic a/k/a "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 117. As to Protocol I, the Trial Chamber in the Celibici case added, "Nor is it necessary for the Trial Chamber to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts. These provisions are clearly based upon the prohibitions contained in common article 3 and may also constitute customary international law." International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Zejnil Delalic et al., Trial Judgement, Case no. IT-96-21-T, 16 November 1998, par. 314.

17. "Appeals Chamber" (note 16), par. 127.

18. UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza conflict*, A/HRC/12/48, 25 September 2009, par. 281.

19. See Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge, United Kingdom: Cambridge University Press, 2005), 3–494.

20. Although in this case it should be understood from the perspective of international criminal law (i.e., the application of an enforcement regime).

21. According to the court, "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts. . . . Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict." See Nicaragua case (note 14), pars. 215, 219.

22. *Study on Customary International Humanitarian Law*, Doc. 30IC/07/8.3 Geneva, October 2007, 3.

23. Ibid.

24. By contrast the *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (2009) seems to approve the conclusion of such agreements since it would send "a clear signal" to the groups' members which might "lead to the establishment of appropriate internal disciplinary measures" and "provide an important basis for follow-up interventions" (par. 42).

25. International Criminal Court, Pre-Trial Chamber I, Prosecutor v. Dyilo (2007), Decision on the Confirmation of Charges, ICC-01/04-01/06, par. 209.

26. Ibid., pars. 268–85.

27. See Tadic case (note 16), pars. 96–97.

28. Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94, no. 2 (April 2000): 261–62.

29. See "Resolution" (note 12), par. XI.

30. Human Rights Committee, General Comment no. 29 (2001), CCPR/C/21/Rev.1/Add.11.

31. According to the committee, the following rights are nonderogable even in situations of armed conflict (irrespective of whether it is international or noninternational): Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman, or degrading punishment, or of medical or scientific experimentation without consent), Article 8, pars. 1 and 2 (prohibition of slavery, slave trade, and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality in the field of criminal law—that is, the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience, and religion).

32. The examples given by the committee include the taking of hostages, the imposition of collective punishments, and arbitrary deprivations of liberty or deviation from fundamental principles of fair trial, including the presumption of innocence.

33. General Comment no. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13, par. 11.

34. See *Legality of the Threat or Use of Nuclear Weapons* (note 14), par. 25.

35. I.C.J. Reports 2004, par. 106. This position is going to be reiterated by the court in the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, I.C.J. Reports 2005, par. 216.

36. Inter-American Court of Human Rights, Judgment of November 23, 2004 (Preliminary Objections), pars. 107–19. Although this is a case in which the court has had to deal with this contention explicitly by reason of the objection, there were other cases of internal armed conflict where the court deemed applicable the American Convention on Human Rights (see, e.g., Inter-American Court of Human Rights, Case of Bámaca-Velásquez v. Guatemala, Judgment of November 25, 2000 [Merits], pars. 143, 174, 207–8).

37. See "Resolution" (note 12), pars. II, IV.

38. *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, par. 39.

39. In the 1968 International Conference on Human Rights in Teheran, the parties adopted Resolution XXIII, which urged all states members of the UN to ensure that "in all armed conflicts the inhabitants and belligerents are protected" in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience."

40. *Vienna Declaration and Programme of Action*, UN General Assembly Doc. A/CONF.157/23, 12 July 1993, pars. 29, 96.

41. See I.C.J. Reports 2004, par. 106.

42. Ibid.

43. See *Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2005/7, 2004, par. 50; and *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the Independence of Judges and Lawyers; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on Freedom of Religion or Belief; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, E/CN.4/2006/120, 2006, par. 19.

44. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Zejnil Delalic et al., Judgement, Case no. IT-96-21-A, 20 February 2001, par. 149.

45. See *Vienna* (note 40), par. 56.

46. Jean Pictet, *Development and Principles of International Humanitarian Law* (Netherlands: Martinus Nijhoff, 1985), 63–67.

47. Inter-American Court of Human Rights, Case of Las Palmeras v. Colombia, Judgment of February 4, 2000 (Preliminary Objections), Separate Opinion of Judge Trindade, pars. 7–12; and A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Santiago: Ed. Juridica, 2001), 183–261.

48. Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, pars. 33–34; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, par. 29; Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, I.C.J. Reports 2007, pars. 147, 185; and Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, par. 64.

49. See, inter alia, Michael Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules," *Nordic Journal of International Law* 66 (1997): 211–39; and Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, United Kingdom: Cambridge University Press,

2005), 2–424. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, par. 155. In this case, the court stated that the *erga omnes* obligations recognized as applying in the situation placed "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem" (par. 159).

50. International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Milan Milutinović et al., Judgement, Case no. IT-05-87-T, 26 February 2009, par. 125.

51. Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross* 88, no. 863 (September 2006): 510.

52. This article does not intend to address the issue of whether or when an armed group is or becomes a subject of international law capable of being held accountable. For a discussion of this matter, see Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, United Kingdom: Cambridge University Press, 2002), 133–52. Zegveld argues that the legal personality of armed groups is imparted by international treaties (e.g., Geneva Conventions) on the objective ground that they are parties to a recognized internal armed conflict. See Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law* 98, no. 1 (2004): 22–24. Watkin supports the application of human rights accountability mechanisms in situations of armed conflict but notes that consideration must be taken of the nature of warfare and the "unique aspects of international humanitarian law."

53. *Concluding Observations of the Human Rights Committee: Democratic Republic of the Congo*, CCPR/C/COD/CO/3, 2006, pars. 13, 15, 18.

54. See Case of Bámaca Velásquez, Judgment of November 25, 2000, Series C, no. 70, pars. 143, 174, 207, 213, 214; Case of Bámaca Velásquez, Reparations (Article 63[1] American Convention on Human Rights), Judgment of February 22, 2002, Series C, no. 91, par. 85; Case of Molina Theissen, Reparations (Art 63[1] American Convention on Human Rights), Judgment of July 3, 2004, Series C, no. 108, par. 41; Case of Molina Theissen, Judgment of May 4, 2004, Series C, no. 106, pars. 40 and 47(3,4); and Case of the Serrano-Cruz Sisters v. El Salvador, Judgment of November 23, 2004 (Preliminary Objections), pars. 107–19.

55. See I.C.J. Reports 2005 (note 35), pars. 209, 216–20, and 345, item 3.

56. In the Genocide case, the court reached the conclusion that acts of genocide had been committed at Srebrenica, and, in the consideration of the facts of the case, the involvement of paramilitary militias was acknowledged. The core issue, however, was whether those acts could be attributed to Serbia and thus capable of engaging its international responsibility. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (note 48), pp. 385–414.

57. See *Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2005/7, 2004, par. 76.

58. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, A/HRC/2/7, 2 October 2006, pars. 1–3, 19, 100, 105–6.

59. *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, A/HRC/3/2, 23 November 2006, par. 349(g).

60. *The Grave Violations of Human Rights in the Occupied Territory Particularly Due to the Recent Israeli Military Attack against the Occupied Gaza Strip*, A/HRC/S-9/L.1, 12 January 2009, par. 14.

61. *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009, pars. 284, 305, 308.

62. Ibid., pars. 1911, 1950–65; and *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48 (ADVANCE 1), 23 September 2009, pars. 78–80, 97–102, 108–9.

63. *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/RES/64/10, 1 December 2009, par. 4.

64. See Article 2(a) of the Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice (1998); Resolution 53/25-P, par. 1, and Resolution 54/25-P, par. 5, adopted by the Twenty-Fifth Session of the Islamic Conference of Foreign Ministers; Article 2(a) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999); and Article 3(1) of the Organization of African Unity's Convention on the Prevention and Combating of Terrorism (1999).

65. United Nations Assistance Mission to Afghanistan, *Mid Year Bulletin on Protection of Civilians in Armed Conflict*, 2009, par. 31.

66. Andres Franco, "Armed Non-State Actors," in *The UN Security Council: From the Cold War to the 21st Century,* ed. David M. Malone (Boulder, CO: Lynne Rienner, 2004), 120–29.

67. See *Report of the International Commission of Inquiry on Darfur*, UN Doc. S/2005/60, 1 February 2005; and *Report of the Independent Commission of Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257, 16 December 1999.

68. *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 2005, par. 139.

69. By contrast, Stahn observes that the possibility of unilateral humanitarian intervention was not "categorically" rejected in the outcome document; hence the concept of responsibility to protect arguably was not meant to preclude such action but to "make clear that the collective security system shall remain the primary forum for military action." See Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?," *American Journal of International Law* 101 (2007): 119–20.

70. Resolutions S/RES/1265 (1999), S/RES/1296 (2000), S/RES/1325 (2000), S/RES/1612 (2005), S/RES/1674 (2006), S/RES/1738 (2006), S/RES/1820 (2008), S/RES/1882 (2009), S/RES/1888 (2009), S/RES/1889 (2009), and S/RES/1894 (2009).

71. S/RES/1894 (2009). See also, for example, S/RES/1493 (2003), par. 8; S/RES/1464 (2003), par. 7; S/RES/1828 (2008), par. 11; S/RES/1574 (2003), par. 11; and S/RES/1814 (2008), par. 17.

72. S/RES/1464 (2003).

73. S/RES/1470 (2003).

74. S/RES/1497 (2003).

75. S/RES/1343 (2001).

76. S/RES/1464 (2003).

77. S/RES/1794 (2007).

78. By Resolution 794 (1992), the Security Council, acting under chapter 7, authorized the secretary-general and member states cooperating to "use all necessary means" to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.

79. See S/RES/1386 (2001), S/RES/1413 (2002), S/RES/1444 (2002), S/RES/1510 (2003), S/RES/1563 (2004), S/RES/1623 (2005), S/RES/1707 (2006), S/RES/1776 (2007), S/RES/1833 (2008), and S/RES/1890 (2009).

80. S/RES/1894 (2009).

81. S/RES/1633 (2005); and S/RES/1736 (2006).

82. See *Sixth Annual Report of the Special Court for Sierra Leone of the President of the Special Court for Sierra Leone*, June 2008 to May 2009, 32–33, http://www.sc-sl.org/LinkClick.aspx?fileticket=%2FuI3lqaO5D0%3D&tabid=53.

83. See, inter alia, the cases Prosecutor v. Yusuf Munyakazi, ICTR-97-36, in which he allegedly participated in a National Republican Movement for Democracy and Development (MRND) militia; and Prosecutor v. Jean Baptiste Gatete (ICTR-2000-61-I), regarding the Interahamwe militia.

84. The list of armed groups includes *Uganda*: the Lord's Resistance Army; *Democratic Republic of the Congo*: Union des Patriotes Congolais (UPC), Forces patriotiques pour la libération du Congo (FPLC), Force de résistance patriotique en Ituri (FRPI), Front des nationalistes et intégrationnistes (FNI), and Congrès national pour la défense du people (CNDP); *Central African Republic*: Mouvement de libération du Congo (Movement for the Liberation of Congo [MLC]); and *Sudan*: Militia/Janjaweed, United Resistance Front, and Popular Defence Force (PDF).

85. See Kenneth Anderson, "The Rise of International Criminal Law: Intended and Unintended Consequences," *European Journal of International Law* 20, no. 2 (2009): 353–54.

86. See Genocide case (note 48), pars. 167, 170, 178.

87. The International Law Commission seems to have admitted this possibility in its commentary on Article 10 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts: "A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces." See UN International Law Commission, *Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)*, 52, http://untreaty.un.org/ilc/reports/2001/2001report.htm.

88. See Celebici case (note 15), par. 171. *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, par. 14, reads as follows: "Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused."

89. See Richard Goldstone, "Assessing the Work of the United Nations War Crimes Tribunal," *Stanford Journal of International Law* 33, no. 1 (Winter 1997): 6.

90. See "Resolution" (note 12), par. V.

91. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, par. 158.

92. See Roger O'Keefe, "The Grave Breaches Regime and Universal Jurisdiction," *Journal of International Criminal Justice* 7, no. 4 (2009): 830–31. On this possibility, see also the *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, A/HRC/10/20, 11 February 2009, par. 38, which suggests that some national courts could prosecute war crimes allegedly committed in the Gaza conflict.

Constructivism, Strategic Culture, and the Iraq War

Toby Lauterbach*

According to constructivists, the United States went to war in Iraq because the dominant strategic cultural norm, that of seeking geopolitical stability through multilateral deterrence, appeared bankrupt to the Bush administration after the terrorist attacks of 11 September 2001 (9/11). This led elites in the administration to view democratic regime change in Iraq as imposing an international norm of hegemonic global policing through unilateral preventive war. Given shortcomings in the existing literature, this article makes the constructivist case for explaining the Iraq War. For constructivists, a proposed normative shift in American strategic cultural ideas played a causal role in the US invasion of Iraq. For those constructivists who take an ambitious perspective, the attempt to shift the norms of America's strategic culture—and thus its national security policy—precipitated that invasion. A more cautious analyst would contend that the normative shift advocated by the Bush administration worked in tandem with interest-based calculations, such as geopolitical logic, in leading to that military action. The Iraq War was supposed to prove the viability of a new norm—unilateral preventive war—advocated by neoconservative norm entrepreneurs and traditional conservative converts as well as sympathizers in the Bush administration. This was part of a larger strategic cultural vision advocating the hegemonic promotion of democracy through force. Advocates intended that a new perspective on war, the hege-

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monic paradigm, would replace the Cold War–era paradigm which encompassed strategies of multilateral containment and maintenance of the geopolitical status quo. In its place, they put forth a revolutionary strategy stressing preventive war as part of a larger strategic cultural vision advocating the hegemonic promotion of democracy through force. Thus, the newly proposed norm of preventive hegemonic war and forceful democratization sought to alter American national security policy making by replacing the dominant Cold War normative paradigm. This endeavor appears to have failed.

Definition of Strategic Culture

To develop a working definition of strategic culture appropriate to this article, one must begin with defining its parent terms: *culture* and *political culture*. Doing so allows for identifying what strategic culture means to constructivists, a necessary step in understanding their explanations of its role as a cause of the Iraq War. In the broadest sense, one may think of culture as "an interdependent collection of symbols, values, attitudes, beliefs, habits, and customs that a self-identifying group develops over time and shares through a common and evolving interpretation of its own historical experience . . . [which] they use to rank alternative outcomes" and make choices.[1] The subset of political culture notes "the embedding of political systems in sets of meanings and purposes, specifically in symbols, myths, beliefs, and values."[2] Definitions of strategic culture build on preceding definitions but narrow the subject matter to strategic choices.[3] Scholars generally agree that strategic culture is concerned with the role of cultural influences, influences on how political entities judge the proper time to employ force, ways of using force during a conflict, and ways of determining the best time to terminate conflict.[4] Constructivists narrow down to sets of norms the influences that stem from ideational values and habits of practice identified by definitions of culture and political culture. For constructivists, cultural influences that constitute strategic culture are thus a set of norms.

Kerry Longhurst's definition of strategic culture is of great utility to constructivists in particular: "a distinctive body of beliefs, attitudes and practices regarding the use of force, held by a collective [usually a nation] and arising gradually over time through a unique protracted historical process."[5] Thus, for Longhurst strategic culture consists of norms that both

influence and guide elites as well as policy makers with a "collective"; it also reflects the actions of norm entrepreneurs who modify, reshape, replace, reject, and create new and existing norms on the basis of past experiences with norms and normative structures.[6] For constructivists, his definition identifies the relationship in strategic culture between the key actor of norm entrepreneurs and the sets of norms that constitute strategic culture. Moreover, Longhurst believes that strategic culture "is not permanent or static," and even though the norms of strategic culture have inertial force and can create continuity in foreign policy behavior through rule making, these norms and the strategic culture that they compose are malleable and quite open to change over time in the face of traumatic catalytic events.[7] He thereby opens the door to the means by which normative strategic cultural ideas ensure both continuity in and define attempts to change national security policies, as with the effort to replace the Cold War paradigm with the messianic Wilsonian option offered by neoconservatives in the run-up to the Iraq War.

Constructivism and Strategic Culture

The Constructivist Approach to Strategic Culture

The first central proposition of the constructivist vision of strategic culture is that, contrary to materialist analyses of international security, ideals in the form of norms like those that constitute strategic culture create and define interests. That is, norm entrepreneurs build a coalition of support that advocates the diffusion of new proposed norms.[8] For constructivists, their study of international relations and foreign policy concentrates on both "international normative structures and their effects" and the "interaction between international structures and local agents of change" in regard to the formulative "origins and dynamics of these norms."[9] For these scholars, "ideational, rather than material factors, explain particular national security policies."[10] Specifically, "security interests are defined by actors who respond to cultural factors."[11] This is because interest formation stems from a "logic of appropriateness" as opposed to "logic of consequences"; before people can maximize benefits and minimize costs, they must first know either what they want or what they believe they should do.[12] Norms and sets of norms

that compose social structures determine the proper means for pursuing interests and defining what should constitute ends.[13] Consequently, independent variables associated with interests, such as the neorealist conception of anarchy, are actually dependent variables that can be created, modified, and replaced by variables representing the rise of new strategic cultural norms.[14] The ideas of strategic culture expressed in norms play a central role in national security outcomes for constructivists, a factor they view as neglected by interest-based analyses like those of the neorealists.

Furthermore, the norms that make up strategic culture are dynamic and malleable, making them responsive to catalytic or traumatic changes in the larger normative social structures that make up international society. Diffusion of fresh normative suggestions is made possible by "ecological processes result[ing] from the patterned interaction of actors and their environment," and "social process arguments [where] norm building take[s] the form of generalizations about the way [actors] interact," like "social diffusion."[15] Diffusion of proposed norms is also possible through catalytic events that discredit old social systems and allow for the rise of new ones sponsored by norm entrepreneurs.[16] Which proposed norms succeed and which fail depend upon "norm prominence" like sponsorship by powerful states, "how well [the prospective norm] interacts with other prevailing norms [in the] 'normative environment' and . . . what external environmental conditions confront [it]."[17] A potential international norm becomes a norm at the state or unit level when the "negotiated reality" among elites and important groups leads to its acceptance via persuasive discourse.[18] International pressure in support of the proposed international norm then builds over time as state and nonstate actors who support the prospective norm try to convince other states to follow the new norm, leading to a "norm cascade" in which "norm internalization occurs" in international society.[19] For constructivists, attempts to change the norms that compose strategic culture are not just an evolutionary process. A rapid normative shift in the strategic cultural paradigm is also possible if international conditions lead to powerful actors becoming receptive to radical paradigm shifts in national security policies, such as may have been the case among senior policy makers in the Bush administration after 9/11.

Constructivism and the Iraq War: A Starting Point for Analysis

Prior constructivist work explains the causes of the Iraq War in terms of the role played by neoconservatives as policy entrepreneurs after 9/11. Andrew Flibbert concentrated on the role played by norm entrepreneurs, specifically neoconservatives, and how they persuaded the administration to accept their normative vision in the wake of the 9/11 attacks.[20] The neoconservatives that populated the lower ranks of the Bush administration offered a plan of action that conservative policy makers accepted, one that overthrew traditional multilateral and geopolitical calculations.[21] In their place, the administration favored the vision of a self-evidently benevolent America defeating the great ideological threat and disease of irrational militant Islamic fundamentalism via the forceful expansion of the antibiotic of democracy to the virus of autocratic regimes.[22]

However, this account is problematic. Since neoconservatives populated the lower ranks of the Bush administration, decisions were ultimately made by higher-level officials such as George Bush, Donald Rumsfeld, Dick Cheney, and Condoleezza Rice.[23] Flibbert's approach neglects their role as individual actors, appearing to assume the wholesale conversion of senior Bush policy makers to the neoconservative argument for invading Iraq.[24] Despite the sympathy that some senior Bush policy makers may have had with neoconservative ideals, Flibbert does not demonstrate that the former, such as true foreign policy heavyweights like Rumsfeld and Cheney, became devoted converts to the norms proposed by neoconservatives.[25] They may have agreed with or even accepted the neoconservative normative vision, but strong evidence exists that they did so only or at least partially by relying on a calculus based on material geopolitical interests—one that happened to find common cause with, and was thus not subordinate to, ideational aspirations such as a benevolent American hegemon expanding a theoretical zone of democratic peace.[26] Flibbert's work is flawed because it largely assumes that only neoconservatives were intellectually proactive in thinking up a response to 9/11 that included invading Iraq.

One finds an excellent example of Flibbert's problem in Cheney and the defensive and offensive geopolitical logic that appeared to govern his views. These views first included the "one percent doctrine," whereby even a 1 percent chance of Iraq's possessing and using nuclear weapons in light of 9/11, even if only to deter American freedom of action, would make such a

situation unacceptable.[27] Second, according to the compellent logic of the "demonstration effect," the invasion of Iraq would intimidate rogue states and even future peer competitors such as Iran, North Korea, and China into acquiescence and policies of accommodation, as opposed to developing weapons of mass destruction (WMD) that could counter the influence of the hegemon in strategic areas like the Persian Gulf.[28] This element of Cheney's logic, whereby the motivations for some senior policy makers involve geopolitical interests that may or may not work in conjunction with an acceptance of the normative vision of the neoconservatives, demonstrates that Flibbert presents an incomplete picture. We need a more nuanced and diversified approach to outlining the constructivist explanations of the workings of American strategic culture that led to the invasion of Iraq.

The Ambitious Constructivist Argument: Norms Defining Interests

An ambitious constructivist approach would contend that the Bush administration went to war in Iraq to establish the de facto utility of a proposed norm of preventive war—part of a new vision of a larger social structure of hegemonic global governance—the hegemonic paradigm. This approach represented a reaction to the trauma of 9/11, allowing America to demonstrate that it could successfully function as the world's policeman and stop the spread of WMDs.[29] America would also impose a massive social engineering project in the Middle East by assisting in the overthrow of authoritarian regimes and placing the people directly in charge. Access to oil, insurance of control in a geopolitically vital region, the deterrence factor of WMDs in the hands of rogue states, and Israeli security were all important. But governing adoption of the new paradigm proposed by the Bush administration was an attempt to redefine America's identity and its relationship with the world and, thus, the question of how the United States should seek to attain material goals.

This new strategy of preventive war meant abandoning the search for stability as the ultimate geopolitical goal, one that had included at least leaving the option open for negotiating with adversarial rogue states in the Middle East. The United States would serve its geopolitical, security, and economic interests by imposing its will on the region and reconstructing that area in its own image.[30] This process would begin with regime change in some states that sought WMDs, thus ensuring the intimidation of other

adversarial actors.[31] Because the United States could not afford to wait to be attacked, it would strike first and change the international order, given the potential catastrophic consequences of not doing so. It would also enjoy the benefits and perceived low costs of using its awesome military might to eliminate enemies quickly.[32] By following the normative logic of preventive war as the world's policeman, America would serve its global and regional security interests.

The Cautious Constructivist Argument: Norms as a Supplement to Interests

According to more cautious constructivists, the United States went to war in Iraq to meet the needs of both interests and normative aspirations, specifically by exerting control over a geopolitically vital region and establishing a new vision for America's role in the world—the hegemonic paradigm. This cautious vision appealed to its messianic Wilsonian tendencies by promoting the spread of universal democratic values through the de facto utility of a prospective norm of preventive war.[33] This norm, once the Iraq War had served one of its purposes as a successful test case, would become part of a larger proposed social structure of benevolent hegemonic global governance.[34] As causes of the war, cautious constructivists saw access to oil, the insurance of control in a geopolitically vital region, the check of WMDs on American power and physical security, and Israeli security issues all working with a need to redefine what constituted appropriate behavior for how the United States should seek to attain its goals. In sum, cautious constructivists suggested that interests interacted with how the United States defined who it was, what it should stand for in terms of its strategic culture, and how this definition shaped the outcomes of national security policy. No longer would America seek geopolitical stability in the region through unsatisfying compromises, such as balancing the support of Israel with obtaining access to oil from states antagonistic toward it.[35] For the Bush administration, according to the constructivists, the United States would meet its security and economic interests by imposing its will on the region and reconstructing it, beginning with the elimination of states seeking WMDs, thus demonstrating the futility of challenging America.[36] In brief, a successful war and democratic reconstruction of Iraq would serve as a de facto legitimation of overt American hegemony. For cautious constructivists, the Bush administration's attempt to inaugurate the proposed hegemonic paradigm sought to satisfy both Wilsonian idealism

and pragmatic interests in the outcomes of national security policy. This would be quite a departure from the cold, calculating logic of the previous Cold War normative paradigm in American strategic culture, one often criticized for appearing to sacrifice ideals for material gains.

Constructivism: Explanation for the Iraq War

The Cold War Normative Paradigm before 9/11: The Case of the Gulf War

Before 9/11, as seen in the example of the Gulf War, a dominant Cold War strategic cultural paradigm governed American foreign policy. Such a conservative normative structure valued geopolitical stability and sought acceptance for American interests via multilateralism. This system of strategic cultural norms also included a reliance on deterrence and containment when the employment of force became necessary. The Gulf War represented a response to the threat posed by Saddam Hussein's opportunistic grabbing of Kuwait, leading to America's abandoning its policy of cultivating him as an ally.[37] From the realist perspective of the first Bush administration, allowing a revisionist actor with WMDs like Saddam to get away with invading Kuwait would promote instability and further aggression in the post–Cold War era.[38] That is, Iraq would dominate the supply of Middle Eastern energy resources by force, allowing Saddam to hold hostage the economic security of the West.[39] Such a situation could subject the United States, its allies, and the global economy to blackmail at the hands of an unreliable and ruthless dictator who had demonstrated his capacity for aggression.[40] Consequently, the United States went to war.

By the same token, the Cold War paradigm that drove the logic of the first Bush administration during the Gulf War also sharply constrained its actions. The United States committed itself to war only after building a large, multilateral coalition of support, including winning acceptance for its actions from authoritarian Middle Eastern governments like Syria and Egypt.[41] In addition to sharing the costs of intervention with European and Japanese allies, the coalition cast the United States in a favorable light in the Arab world.[42] By respecting the wishes of Arab governments, the United States held off claims of acting as a neocolonial power.[43] Moreover, it sought limited objectives in this war—namely, removing Saddam from

Kuwait and shoring up the strategic position of the oil-rich and vulnerable Gulf states.[44] This course of action reflected how the traditional approach to the Middle East called for maintaining peaceful stability in the region, therefore ensuring the stable flow of oil necessary for fuelling the global economy.[45] After all, when America viewed a strong Iraq under Saddam as a bulwark of stability, Rumsfeld played a central role as the political envoy who opened up relations between Iraq and the United States during the Iran-Iraq War, making possible financial, agricultural, and technological support for countering the influence of Iran and jockeying against the Soviets for favor from Saddam.[46]

The handling of the war-termination phase during the Gulf War also reflected this cautious orientation in strategic culture. Operating within the Cold War paradigm, the realist logic of national security adviser Brent Scowcroft, best friend to the elder Bush and mentor of Condoleezza Rice, led decision makers to see Iraq as a valuable instrument for checking Iranian power.[47] The first Bush administration also feared the potential danger of bloody regional chaos if Iraq collapsed.[48] In "Why We Didn't Go to Baghdad," Bush and Scowcroft explain why they did not aid the postwar revolts: "We were concerned about the long-term balance of power at the head of the Gulf. Breaking up the Iraqi state would pose its own destabilizing problems."[49] Moreover, going to Baghdad would have led to costly "'mission creep,' and would have incurred incalculable human and political costs," especially as "the coalition would have instantly collapsed, the Arabs deserting it in anger and other allies pulling out as well."[50] This desire by the United States to maintain the unity of Iraq and preserve the multilateral coalition meant abandoning the Kurds and Shiites when they revolted after the Gulf War.[51] Furthermore, Bush and Scowcroft stressed that "Turkey—and Iran—objected to the suggestion of an independent Kurdish state," while Secretary of Defense Cheney argued that both Syria and Iran desired Iraqi territory.[52] The administration also wished to reduce casualties and costs, Cheney bluntly arguing, "How many additional dead Americans is Saddam worth? Our judgment was, not very many, and I think we got it right."[53] Even Paul Wolfowitz did not want to overthrow Saddam at this time, primarily concerned that the war had ended prematurely in terms of degrading the latter's military forces.[54] The Cold War paradigm of calculating prudence dominated policy making.The ruthless caution of the Cold

War paradigm produced a situation that the idealistic perspective of neoconservatives considered deeply unsatisfactory. Saddam's surviving the revolts led to a policy of containing his power under the rubric of legitimating international institutions such as the United Nations (UN), no-fly zones, and weapons-inspection regimes backed up by the threat of punitive deterrent force.[55] One can describe such behavior only as the exact type of multilateralism and balancing tactics the neoconservatives railed against—a far cry from the policies followed by the Bush administration after 9/11. For neoconservatives, the Cold War paradigm allowed the bad guy, an enemy of the United States, to walk away and engage in more heinous behavior.

From the Weinberger-Powell Doctrine to the Election of 2000

One finds the de jure expression of the normative logic of American strategic culture, as reflected in the de facto conduct of the United States during the Gulf War, in the Weinberger-Powell Doctrine—the antithesis of the national security strategy of 2002 as a formal guide for American national security policy. This doctrine from the early 1980s—a reaction to both Vietnam and the bombing of the Marine barracks in Beirut—captures the epitome of what the second Bush administration rebelled against after 9/11.[56] It stipulated that "America should not send its combat forces on overseas missions unless doing so was vital to U.S. interests, . . . [the mission enjoyed] 'clearly defined political and military objectives' for a combat mission, . . . [and it had a] reasonable assurance that the mission would have the support of the American public."[57] Furthermore, "the use of American combat troops should be a last resort," and they should be employed "only in cases in which the United States had the clear intent of winning."[58] Such caution was antithetical to the employment of preventive war. The doctrine's circumspect tone also set it completely at odds with the messianic Wilsonianism and ambitious aims of overt American hegemony found in the proposed hegemonic paradigm during the second Bush administration, when the younger Bush and Rice abandoned the Weinberger-Powell Doctrine after 9/11.

Policy Advocacy: Neoconservative Norm Entrepreneurs

From the end of the Gulf War to 9/11, the dominant Cold War paradigm faced challenges by the hegemonic paradigm, a dissident vision of benevolent hegemony and the right of unilateral American intervention upon confrontation

of rogue states. Long before 9/11, in fact, neoconservative norm entrepreneurs set the stage by pushing for an open assertion of unilateral hegemony over the suffocating facade of multilateralism. They also pushed for relying on preventive war rather than traditional strategies of deterrence and containment as part of this proposed overall normative paradigm. For neoconservatives, "the truth is that the benevolent hegemony exercised by the United States is good for a vast portion of the world's population," "nor can one easily imagine power on an American scale being employed in a more enlightened fashion by China, Germany, Japan, or Russia."[59] In fact, "no nation really wants genuine multipolarity" because none are "willing to make the same kinds of short-term sacrifices that the United States has been willing to make in the long-term interest of preserving the global order."[60] Even if nations do desire true multipolarity, it would only lead to greater strife and conflict, as seen in the regional tensions created by China's attempts to build up its power.[61] According to neoconservatives, multilateralism of this sort, as practiced by China, instead of an open acknowledgement and acceptance of American hegemony, is dangerous because it gives actors without the strength or desire to truly play a role commensurate with their responsibilities in a multipolar world a veto over American policy.[62] Neoconservatives pushed for a new normative proposal, the hegemonic paradigm, to guide American strategic culture and thus national security policy.

Accordingly the neoconservatives saw preventive war as an essential component of a new prospective hegemonic paradigm, one that would avoid the dangers of multilateralism. For the United States, given its global interests and commitments, multilateral activity offers little and in fact may cost a great deal since indulging European sensibilities may delay a timely, effective, and therefore responsible first strike to threats that America's military prowess, unlike that of its European allies, can actually do something about.[63] Such multilateralism, according to Lewis "Scooter" Libby, hindered American policy by fostering cooperative support with lukewarm or even antagonistic authoritarian regimes in the Middle East prior to 9/11.[64] This cooperation also spawned terrorism against the United States during the Clinton administration, acts that were then encouraged through American responses which involved weak or empty diplomatic gestures.[65] Libby concludes that multilateralism, as opposed to assertive hegemony, has made Americans appear as if they "don't have the stomach to defend

themselves" and are "morally weak" since deterrence and containment do not "help to shape the environment in a way which discourage[s] further aggressions against U.S. interests."[66] This thinking demonstrates the larger logic behind support for a revisionist hegemonic strategic cultural paradigm that would replace the logic of the Cold War status quo.

Neoconservatives believed that the case of Iraq in particular demonstrated both the failure of multilateral deterrence and containment as well as the need for hegemonic policing. Dissatisfaction with the morally ambiguous political end state of the Gulf War, coupled with the stunning success and low cost of American military might, led neoconservatives and sympathetic traditional conservatives, such as Rumsfeld, to feel that conflict had been a lost opportunity.[67] For neoconservatives, the United States could have used the war as a springboard for global governance based on benevolent American hegemony.[68] Through the virtue of overwhelming military power, the United States could preclude the rise of any hostile peer competitor.[69] Neoconservatives argued that America could not have deterred Saddam because he was "a pathological risk-taker. Theories of deterrence notwithstanding, he attacked Iran under the misguided belief that its regime would quickly collapse . . . and attacked Kuwait because he calculated that the United States would not respond."[70]

According to the neoconservatives, a hegemonic American sheriff can keep the peace through preventive action—but only by eschewing the constraint of glacial multilateral diplomacy. As evidence that "one of the virtues of preemptive action . . . is that it is often less costly than the alternative," they turned to the Israeli attack on the Osirak nuclear reactor, which prevented Saddam from having nuclear weapons by the time of the Gulf War.[71] The almost universal condemnation of Israel's attack in multilateral institutions such as the UN represents evidence in general of the futility of subjecting decisions on the use of American power to such a weak reed.[72] In fact, neoconservatives contend that multilateral accommodation of Saddam during the Reagan and Bush years, based on the logic of realpolitik, blew up in America's face after the invasion of Kuwait.[73] Thus, in a world where American hegemony and military might are indispensible and accepted by the international community on this basis in de facto terms, neoconservatives argue that American supremacy should be considered desirable—not burdened under cumbersome multilateral constraints and hand-wringing.[74]

With the example of Iraq in mind, as Zalmay Khalilzad has argued, the United States should also "preclude the rise of another global rival for the indefinite future" and "be willing to use force if necessary for the purpose."[75] The proposed hegemonic paradigm, with the big stick of preventive war to keep rogue states and potential peer competitors in line, could attract more than just neoconservatives.

Attractions and Limits of the Neoconservative Proposal Prior to 9/11

The sympathy of senior Bush policy makers to neoconservative policies was evident even before 9/11. For example, distrust of multilateral institutions revealed itself when the Bush administration "rejected the Kyoto Protocol, . . . withdrew from the Anti-Ballistic Missile Treaty, [and] scuttled the Land Mine Treaty and the Comprehensive Test Ban Treaty."[76] Further, it refused to allow American servicemen and citizens to be subject to the International Criminal Court.[77] Thus, "within [its first] six months [in office], the administration announced its intention to reject six international agreements."[78] These attacks on multilateralism were fully consonant with the defense policy guidance of 1992, made by such neoconservatives as Wolfowitz and Libby and sympathetic conservatives like former secretary of defense Cheney, who argued for preventing the "reemergence of a new rival," even if this meant preventive military action.[79] At the time, lacking a transformative event like 9/11, the leaking of the defense policy guidance of 1992 to the *New York Times* led to a massive, negative domestic and international reaction, forcing the retraction of the original work and its eventual resubmission in a more moderate form that stressed traditional multilateralism, deterrence, and containment strategies.[80] Despite some confluence of sympathy between senior Bush policy makers and neoconservatives, the actual ability of either group to reach its shared goals was sharply circumscribed prior to 9/11.

One also saw the openness of Bush policy makers to the neoconservative plan for remaking America's strategic culture, and thus its national security policy, in their dissatisfaction with the Clinton administration, especially regarding rogue states. Under Rumsfeld the 1998 Commission to Assess the Ballistic Missile Threat to the United States argued that "the threat to the U.S. posed by these emerging capabilities is broader, more mature and evolving more rapidly than has been reported in estimates and reports by the Intelligence Community."[81] The commission further cautioned that

through new means of delivery, rogue states could strike the United States "within about five years of a decision to acquire such a capability (10 years in the case of Iraq) . . . [and with] alternative means of delivery [that] can shorten the warning time of deployment nearly to zero."[82] Rumsfeld in particular reflected the philosophy of many conservatives, neoconservatives, and the military when he initially met the North Atlantic Treaty Organization's (NATO) offers to help in Afghanistan with an cool response.[83] He considered the political benefits of such aid of secondary value compared to the tactical and operational constraints on the hegemon's ability to flex muscle and control overall strategy with NATO involvement.[84] This dismissal of multilateral military aid resulted from the unsatisfying experience of Kosovo, where "U.S. aircraft flew two-thirds of the strike missions," yet America found itself constrained by squeamish Europeans who interfered with targeting policies and missions.[85] Both neoconservatives and senior Bush policy makers felt that since the United States did the fighting, it should have the lion's share of decision making.[86] The role of the Europeans in NATO and the UN involved "cleaning up the mess" of reconstruction afterwards via peacekeeping and nation-building activities as befit satisfied client states and satellites.[87] The Clinton administration's behavior in the face of recalcitrant rogue states led to dissatisfaction among Bush policy makers and neoconservatives.

Despite these irritations, prior to 9/11, the prospective hegemonic paradigm advocated by the neoconservatives had little traction in terms of gaining the acceptance among senior policy makers necessary to overthrow established Cold War norms in American national security policy. These attempts to redefine American foreign policy in a more aggressive and explicitly dominant manner, especially through using regime change in Iraq as a test case, proved largely unsuccessful.[88] Due to domestic and international opposition, the leaked version of Wolfowitz and Cheney's defense planning guidance of 1992 had to be toned down in its call for the United States to resist the rise of any peer competitor and extend the unipolar moment.[89] The document especially needed this change because it singled out allies in Europe, not just traditional enemies or adversaries such as Russia and, increasingly, China.[90] The open letter from the Project for the New American Century calling for the United States to commit itself to overthrowing Saddam's regime may have led to the Iraq Liberation Act, but actual attempts

to overthrow the government were limited to abortive and cautious covert operations by a Clinton administration and US Central Command much more enamored of the Cold War normative paradigm's mentality of containing Saddam.[91]

In terms of the Cold War paradigm in American strategic culture, the beginning of the Bush administration appeared to offer more of the same. By its first term before 9/11, elite policy makers' orientation toward Iraq was often cautiously realist, with Rice calling for "a clear and classical statement of deterrence."[92] Similarly, "Cheney appeared to endorse the Clinton administration's containment policy, saying that 'we want to maintain our current posture vis-a-vis Iraq.' "[93] His position included moving toward smarter sanctions to placate increasingly queasy multilateral support.[94] It also meant a reduction in American overseas humanitarian interventions like Bosnia, Somalia, Haiti, and Kosovo.[95] Or, as Bush argued, "I'm not so sure the role of the United States is to go around the world and say, 'This is the way it's gotta be.'"[96] As a result, other than a handful of deputy neoconservative officials like Wolfowitz and Libby, no one wanted war with Iraq.[97]

September 11 and the Neoconservative Normative Paradigm

For constructivists, 9/11 called into question the entire Cold War normative edifice that governed American foreign policy, not only with regard to the Middle East and Iraq but also with what was identified as the proper role of the United States in the world. Before 9/11, few people in the Bush administration (which had mainly concerned itself with the rising power of China and ballistic missile defense as an alternative to the Anti-Ballistic Missile Treaty) regarded terrorism as a serious threat.[98] The American attempt to preserve stability through multilateralism led to al-Qaeda's perceiving the United States as the "far enemy" that supported the "near enemy" of oppressive authoritarian governments.[99] In sum, the attacks of 9/11 called into question the traditional approach to Iraq and the Middle East, opening the path to the shift in national security policy offered by the proposed hegemonic paradigm put forth by neoconservatives.

First, the neoconservatives critiqued the Cold War paradigm via a threat analysis which emphasized that rogue states, in addition to the terrorist organizations with whom they often allied themselves, could not be deterred—a situation demanding preventive war. Such interventions using

superior military technology would inhibit rogue states from doing the same thing that al-Qaeda had done.[100] By contrast, preventive war offered the option of rapidly eliminating antagonistic regimes and getting other states to fall in line out of fear of being next.[101] Second, according to the Bush administration, goading cumbersome multilateral alliances into taking action in a world where the diffusion of technology and radical Islamic fundamentalism required rapid responses could lead to catastrophe.[102] Colin Powell argued in favor of this new neoconservative doctrine: "The potential connection between terrorists and weapons of mass destruction had moved terrorism to a new level of threat, a threat that could not be deterred because of this connection between States developing weapons of mass destruction and terrorist organizations willing to use them without any compunction and in an undeterrable fashion."[103] Under the logic of the proposed hegemonic paradigm, a strategic cultural norm espousing preventive war would ensure no repeat of the disastrous terrorist attacks on the World Trade Center and the Pentagon.

The attacks on 9/11 also gave credence to the neoconservative argument that regime change could shore up American hegemony by forcibly exporting democracy. Neoconservatives argued that the old policy of supporting friendly authoritarian governments had led to supporting dictators like Saddam and rejecting democracy, which led to the political repression that motivated groups like al-Qaeda.[104] In neoconservative eyes, the Cold War emphasis on respecting sovereignty to support stability resulted in the United States' ignoring the political needs of the Arab people, thus allowing Islamic jihadism to blossom.[105] Working with authoritarian governments to deter and contain common threats, such as Iran in the past and now Iraq, gave rise to supporting governments disliked by their people, who then disliked the United States.[106] By contrast, relying on preventive war via unilateral hegemony would mean that the United States could uphold its values and build support among the people of despotic states, "as the realist obsession with 'vital' interests never fully jibed with America's definition of its national interest" anyway.[107] Neoconservatives believed that overthrowing these regimes would provide the option of a more attractive government to the people of the Middle East via the introduction of liberal democracy and free markets as a viable alternative to Islamic jihadism, feudal autocracies, and corrupt Ba'athists.[108]

After 9/11, neoconservative norm entrepreneurs went on the verbal offensive, arguing against the validity of Cold War norms governing American strategy and pushing for preventive war. Richard Perle and Paul Wolfowitz were in the neoconservative vanguard, arguing against a "myopic and false realism that wrongly had sought accommodation with evil."[109] According to Wolfowitz, "the idea that we could live with another 20 years of stagnation in the Middle East that breeds this radicalism and breeds this terrorism is, I think, just unacceptable—especially after September 11th."[110] Such beliefs had arisen from his personal witness of the democratization of close allies like the Philippines and South Korea, leading him to declare that "democracy is a universal idea" and that "letting people rule themselves happens to be something that serves Americans and American interests."[111] David Frum and Perle made the case for invasion explicitly, contending that "Saddam Hussein's ambitions were dangerous enough before 9/11; afterward, they had to be regarded as a clear and present danger to the United States."[112] The Project for the New American Century's open letter of 20 September 2001, nine days after 9/11, summed up this perception of the need to eliminate Iraq: "Even if evidence does not link Iraq directly to the attack, any strategy aimed at the eradication of terrorism and its sponsors must include a determined effort to remove Saddam Hussein from power in Iraq."[113] Underlining the neoconservative case for invasion is Douglas Feith's contention that "terrorist organizations cannot be effective in sustaining themselves over long periods of time to do large-scale operations if they don't have support from states."[114] These revolutionary statements illustrate the intensity of the neoconservatives' desire to overthrow the existing Cold War paradigm that constituted American strategic culture.

In addition to the costs of inaction in the face of aggressive rogue states and the potential benefits of democratization, advocates postulated preventive war as a low-risk strategy for the sole remaining superpower. Ken Adelman assisted in laying the groundwork for such a neoconservative attacking of Iraq by arguing in a *Washington Post* editorial that he believed "demolishing Hussein's military power and liberating Iraq would be a cakewalk"; prior American military performance against Iraq coupled with both exponential advances in American military capabilities such as precision-guided munitions and the corresponding degradation of Iraqi conventional military power under sanctions formed the basis for this optimism.[115]

Ultimately, Adelman's statements capture three components of the neoconservative case for unilateral, hegemonic preventive war. First, enemies—especially states with their superior resources and desire to obtain WMDs—could inflict catastrophic damage. Second, the attraction of democracy and American military technical proficiency would lower the cost of war and reconstruction. Third, the elimination of a threat and its replacement with an ideologically satisfied state could help transform a geopolitically vital yet problematic region. After 9/11 the traditional Cold War approach offered none of the lure of this silver bullet.

Successful Persuasion: The National Security Strategy of 2002

These views found formal expression in the national security strategy of 2002, written by the National Security Council under Rice. In 2002, no longer faced with a Cold War threat that it could deter via multilateral containment, America needed a new normative structure to meet the threat of "radicalism and technology" and of enemies that were pursuing WMDs—a structure that could act "against such emerging threats before they are fully formed."[116] The strategy began by defining what America was—the victor in "a great struggle over ideas: destructive totalitarian visions versus freedom and equality."[117] Such victories demonstrated that the liberal democratic and free-market model of the United States was universally applicable and responsible for its status as the dominant global power, thus requiring that it "defend liberty and justice because these principles are right and true for all people everywhere."[118] Deterrence may have worked against the "status quo, risk-averse adversary" of the Soviet Union, but it was "less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations."[119] Furthermore, the statement that "the overlap between states that sponsor terror and those that pursue WMD compels us to action" implicitly ties state sponsors of terrorism directly to terrorists as possible recipients of WMDs, which could lead to further catastrophic attacks.[120] Given this picture painted by the strategy, preventive war became all the more necessary because "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."[121] The national security strategy of 2002 offers an excellent starting point for

understanding the Bush administration's acceptance of the prospective hegemonic paradigm, justifying the invasion of Iraq.

Evidence of Persuasion: The Views of Senior Policy Makers

Statements by some traditional conservative elites in the Bush administration, such as President Bush and Rice, reveal how neoconservative norm entrepreneurs were able to convince senior policy makers to accept the prospective hegemonic paradigm's vision of America's global role. The danger of Iraq's possessing WMDs resided in the fact that Saddam "could provide these arms to terrorists, giving them the means to match their hatred."[122] Consequently, in remarks at West Point on 1 June 2002 (barely nine months after 9/11), Bush warned that "if we wait for threats to fully materialize, we will have waited too long. . . . We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[123] Moreover, the United States was justified in enjoying this hegemonic exemption to international law both by virtue of its power as well as by moral legitimacy in its status as the "single surviving model of human progress."[124] In asking for UN support for enforcing its resolutions on Iraq, Bush made the choice clear: "Will the United Nations serve the purpose of its founding, or will it be irrelevant?"[125] Furthermore, echoing the neoconservative Robert Kagan and the national security strategy of 2002, Rice stated that "the United States is a very special country in that when we maintain this position of military strength that we have now, we do so in support of a balance of power that favors freedom."[126] This also legitimated prevention of the rise of other powers and the use of preventive war, according to Rice, because the leader of the free world had always reserved the right to strike first if necessary to secure its physical security.[127]

Bush's passion was matched by the cooler, but no less ideological, calculations of Cheney on the need for the sole superpower, America, to lead with unilateral preventive war as a way of remaking the world for the better. The neoconservatives' normative vision of the hegemonic paradigm met the vice president's calculations concerning the security interests of the United States. On the 8 September 2002 segment of *Meet the Press*, Cheney argued that containment and deterrence, for all their utility during the Cold War, were of little use against Saddam.[128] He cited not only the breakdown of sanctions but also 9/11, contending that just as America could not deter or

contain terrorists, neither could it do so with a leader obsessed with obtaining WMDs.[129] As evidence of the need to take preventive action to initiate regime change, he referred to his experience with Central Intelligence Agency (CIA) briefings during the Gulf War which had informed him that Iraq was several years away from obtaining nuclear weapons.[130] New intelligence, however, indicated that Iraq had been only six months away from developing a nuclear device at the start of the war.[131] Therefore, Cheney used neoconservative rhetoric to contend that "if we fail to respond today, Saddam and all those who would follow in his footsteps will be emboldened tomorrow. . . . Some way, some way, I guarantee you he'll use the arsenal."[132] This statement justified preventive action at the present time, both for Iraq in particular and for rogue states in general.[133] The neoconservatives' proposal for a new set of norms in American strategic culture, and thus for guiding national security policy, was consistent with Cheney's calculations of American security interests.

Cheney's personal beliefs and emphasis on the utility of hegemonic force as a way of intimidating adversaries were consonant with both neoconservative principles and the proposed normative paradigm. In a speech before the Veterans of Foreign Wars on 26 August 2002, he declared that "we will, no question" employ preventive war to preclude the occurrence of an "even more devastating attack [than September 11th]" at the hands of terrorists or rogue regimes.[134] He then mentioned the pacifying benefits of regime change in Iraq, where "the freedom-loving peoples of the region will have a chance to promote the values that can bring lasting peace."[135] The Bush doctrine of unilateral action by a benevolent hegemon was thus buttressed by the "one percent logic" of Cheney, which held that even if only a 1 percent chance exists of a WMD attack in the future, the United States must respond to eliminate this threat.[136] According to former adviser Aaron Friedberg, Cheney was looking for a "demonstration effect" by "taking him [Saddam] down because [we] could" and thereby "encouraging the others" to behave.[137] The idea behind attacking Iraq was that since the United States had suffered a devastating strike, America had to make it clear to those who supported such acts that they would pay a horrible price for doing so.[138] The United States needed to "encourage the others" not to mess with America by demonstrating its strength and power.[139] The agreement between Cheney's ruthless, interest-based calculations and the normative ideals of

the neoconservatives reveals that support for the hegemonic paradigm could also be synergistic—not just a case of senior Bush policy makers accepting the guidance of subordinate neoconservative norm entrepreneurs, as Flibbert suggested. This sharing of goals between senior policy makers such as Cheney at the Office of the Vice President (OVP) and neoconservatives within the Department of Defense made for a powerful one-two punch in their construction of a flawed and often false case for war.

Strategic Norm Construction as Policy Behavior

Neoconservative norm entrepreneurs manipulated intelligence, as seen in their slipshod vetting of sources. They selected sources on the basis of ideological utility in an attempt to strategically construct support for using Iraq as a test case for establishing their vision of American hegemony. According to such critics as Greg Thielmann of the State Department's Bureau of Intelligence and Research, the neoconservative approach to intelligence gathering "became a failure of process as nobody goes to the primary sources."[140] This sloppy treatment of sources, from the perspective of critics in the intelligence community, came about because the Department of Defense and OVP behaved in a "dogmatic manner, as if they were on a mission from God," so "if it doesn't fit their theory, they don't want to accept it."[141] To implement their beliefs, the neoconservatives in the Office of Special Plans (OSP), backed by a Rumsfeld suspicious of the CIA after his unsatisfactory experience with its assessments during the Rumsfeld Commission, set themselves up as an alternative intelligence-gathering and information-distribution system unconnected to the CIA and the Defense Intelligence Agency.[142] Shortly after the beginning of the war in Afghanistan, Rumsfeld's and Wolfowitz's close associates, Douglas Feith, Abram Shulsky, and William Luti, led the OSP's initiative to garner intelligence for creating the case for going to war.[143] They also handled planning for the postwar reconstruction of Iraq.[144] The OSP garnered raw intelligence data from other agencies and relied heavily on intelligence from the self-serving Iraqi exiles of the Iraqi National Congress under Ahmed Chalabi.[145] In John Bolton's work as undersecretary for arms control and international security, moreover, a similar process occurred as they examined unvetted human intelligence and electronic intelligence data with "hand-picked loyalists while Bolton ran his own ad hoc intelligence agency."[146] The neoconservatives and allies like

Cheney manipulated intelligence in their efforts to strategically construct the case for war.

Moreover, the OVP and the White House duplicated the behavior of the OSP and Bolton as part of this larger strategy of strategic norm construction. Cheney's office also eschewed properly vetting raw data on Iraqi WMDs at the level of primary sources, especially when it came to the dubious claims of self-serving Iraqi exiles.[147] The OVP then manipulated the mass media by leaking this questionable information to the press and by putting it out in public statements at the same time.[148] This deception created the illusion of two sources, thus enhancing the credibility of the case for war to journalists.[149] Finally, because no one leaked skeptical expert assessments, nothing countered the false information disseminated in the public realm.[150] The behavior of Cheney's office demonstrated how senior policy makers built a case for war that involved the dissemination of distorted data.

This process of information manipulation in the interests of strategic norm construction did not confine itself to the public. Advocates also inflicted it on other policy makers to influence them. For example, according to Dick Armey, to gain Armey's support for the October resolution authorizing the use of force against Iraq, Cheney told him that "Iraq's 'ability to miniaturize weapons of mass destruction, particularly nuclear,' had been 'substantially refined since the first Gulf War,' " and that "al Qaeda was 'working with Saddam Hussein and members of his family.'"[151] However, the Bush administration knew over three months prior to this meeting the falsity of evidence supporting allegations of Iraqi progress toward gaining a nuclear weapon.[152]

For constructivists, the behavior of the Bush administration leading up to the invasion of Iraq also demonstrates how it sought to use the war as a test case for reshaping the strategic cultural norms governing America's national security policies. Within hours of the attack on the Twin Towers, "Rumsfeld raised with his staff the possibility of going after Iraq . . . 'hit S.H. [Saddam Hussein] @ same time—not only UBL [Usama bin Laden].'"[153] Moreover, "the next day in the inner circle of Bush's war cabinet, Rumsfeld asked if the terrorist attacks did not present an 'opportunity' to launch against Iraq."[154] During another meeting on 15 September, Wolfowitz contended that they should attack Iraq at the same time as Afghanistan since "he estimated there was between a 10 to 50 percent chance Saddam was involved in the 9/11 attacks."[155] Cheney was supportive but not in favor of

immediate action, saying that "he would not rule out going after him at some point."[156] By late July of 2002, Sir Richard Dearlove, head of British intelligence, noted in the Downing Street Memo that "Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD."[157] In short, within eight months of the end of fighting in Afghanistan, and often much earlier, senior national security policy makers were in agreement with the neoconservative script and pushing for war with Iraq.

Based on the behavioral groundwork of the OSP, the OVP, and the White House, the Bush administration sold the case for war to the American public and elites outside the executive branch. As Stefan Halper and Jonathan Clarke pointed out, the neoconservatives so successfully created a political discourse linking 9/11 to Iraq "that seven in ten Americans thought Saddam Hussein had played a direct part in the terrorist attacks" by September 2003.[158] The neoconservatives had presented nightmare scenarios that played on the immediacy of the threat, "such as when President Bush argued that 'according to the British government, the Iraqi regime could launch a biological or chemical attack in as little as 45 minutes after the order is given.'"[159] Another example includes the case for Iraq's potentially providing nuclear weapons to terrorists, based on the unverified report of "[Abu Musab Al-]Zarqawi's two-month stay for medical treatment in Baghdad and his links to Ansar-al-Islam, a localized terrorist organization."[160] This report was fully consistent with the claims made by Secretary Rice and President Bush's State of the Union address which indicated that Iraq had sought to purchase yellow-cake uranium from Niger for over six months after the story was called into question.[161] This statement, in particular, had proven central in persuading fearful congressmen to agree to the October 2002 passage of the resolution authorizing force against Iraq.[162] In fact, "when Iraq released the 12,200-page weapons declaration to the U.N. on December 7th, the administration included in its eight essential omissions and deceptions the assertion: 'The declaration ignores efforts to procure uranium from Niger.'"[163] As a result, the Bush administration successfully (at least before the insurgency blossomed) obtained most Americans' support for invading Iraq as part of a larger strategy of strategic norm construction.

Limits of Diffusion: Fall of the Proposed Paradigm

The de facto hegemonic position of the United States was the greatest asset to attempts to gain global acceptance for the prospective hegemonic paradigm. At the domestic level, the congressional resolution of October 2002 authorized the use of force, and the national security strategy of 2002, the executive legal document used to formalize and justify the new grand strategy, authorized both hegemonic governance and preventive warfare.[164] The global applicability of such arguments, made at the municipal level of the state, rested on the prominence given the proposed norm by the United States as the hegemon that enforces international order.[165] As Kagan contends, for Americans, "such law as there may be to regulate international behavior . . . exists because a power like the United States defends it by force of arms."[166] His view reflects the Bush administration's belief that "the other great powers actually *prefer* management of the international system by a single hegemon as long as it's a relatively benign one" (emphasis in original). This eliminates both the danger of systemic war and advances "certain values that all states and cultures—if not all terrorists and tyrants—share," such as condemning the "targeting of innocent civilians for murder."[167]

Despite support by the American superpower, this was almost certainly not enough to ensure acceptance of the prospective hegemonic paradigm. John Lewis Gaddis argues that the limits of trying to sell the paradigm solely on the material hegemonic power of the United States lie in the relationship of "hegemony, prevention, and consent."[168] The problem is that the American people and America's allies, who are supposed to grant consent based on the benefits offered by the leadership of the United States, find themselves frightened by the military adventurism of hegemony, leading them to question whether "there could be *nothing worse* than American hegemony" (emphasis in original).[169] In addition, the feasibility of a dominant American sheriff imposing a new order of freedom in the Middle East is called into question because of problems with the occupation in the Iraqi test case and concerns over whether liberal democracy is even a practical route for the Middle East.[170] Or, as Madeleine Albright noted regarding the problems of preventive war, the act of "transforming anticipatory self-defense—a tool every president has quietly held in reserve—into the centerpiece of its national security policy" sets up the danger of creating "a world in which every country feels entitled to attack any other

that may someday threaten it."[171] One also sees such concern over preventive war in the preponderance of international jurisprudential criticism, much of which accepts the traditional concept of preemption but rejects the legitimacy of preventive war as enunciated by the Bush administration.[172] Joseph Nye wrote that the Bush administration failed miserably in terms of "contextual intelligence, the ability to understand an evolving environment and to match resources with objectives by moving with rather than against the flow of events."[173] Central to this failure was the discovery that no WMDs existed, a fact that blotted the credibility of preventive war by undermining the basic legitimating factor for its employment.[174]

The proposed hegemonic paradigm supported by the Bush administration never achieved, or even came close to achieving, a norm cascade. Instead, the neoconservatives' proposed normative paradigm managed to earn the opposition of virtually all of America's allied governments in Europe and Japan, including great powers such as Russia and China, and of almost all of the Middle East except Israel.[175] Even in those states in which the *government* provided support for the proposed normative paradigm and for invading Iraq, such as Great Britain, the *population* overwhelmingly opposed the war.[176] For example, "those opposed to U.S. and allied military action rose from 65 percent in September 2002 to 77 percent by February 2003," while "in Russia, opposition to military action in Iraq rose from 79 percent to 87 percent in March 2003," and "in Britain, the percentage of those who approved of the way Bush was handling Iraq fell from 30 percent in September 2002 to 19 percent in January 2003."[177] When the United States went to war, its "coalition of the willing" did technically include 50 states, but only Britain and Australia were considered significant contributors; the other actors were a mixture of microstates and minor African, Latin American, and Caribbean nations.[178] Moreover, the attempt to gain UN support for using force against Iraq in a second Security Council resolution failed disastrously as Russia, China, Germany, France, Canada, and the rotating members of the council ultimately came to oppose Britain and the United States.[179]

In the wake of a costly and increasingly disastrous insurgency and civil war, the Iraq War as a test case for preventive war blew up in the face of the Bush administration and the neoconservative norm entrepreneurs. The *Iraq Study Group Report* of 2006, led by realist James Baker, observed that the

"situation in Iraq is grave and deteriorating."[180] This policy outcome discredited the entire normative project both in a practical and moral sense. In fact the outcome was so bad that many of the original neoconservative norm entrepreneurs lost faith in the chance for success.[181] For example, Richard Perle blamed the "devastating dysfunction within the administration of President George W. Bush"; it was so bad, according to Perle, that "if he had his time over, he would not have advocated an invasion of Iraq."[182] Kenneth Adelman glumly added that he "believe[d] that neoconservativism . . . [was] dead, at least for a generation."[183]

The proposed hegemonic paradigm that was to transform American strategic culture and thus its national security policy has collapsed. Some individuals argue that it did so because factors that allowed for the new normative structure to be diffused—"the sudden sense of vulnerability Americans felt following 9/11" and "a feeling of tremendous power"—have passed, forcing a retreat to the old Cold War strategic-cultural normative paradigm.[184] Consequently, Robert Gates replaced Donald Rumsfeld, and "pragmatists such as Deputy Secretary of State Robert Zoellick, Undersecretary of State Nicholas Burns, and North Korea negotiator Christopher Hill" replaced "neoconservatives Wolfowitz, Feith, and Bolton."[185] Ultimately, with the election of President Obama and the retreat of American troops in Iraq to bases and pledges of further withdrawals, one can claim that the test case has produced a suboptimal outcome—one that has led to discrediting of the norm that sought success as its validation.

Conclusion

For constructivists, strategic culture is the product of norms and culture-bearing units such as norm entrepreneurs. From the constructivist perspective, the United States invaded Iraq to replace the strategic cultural norms found under Cold War logic with a new proposal advocating democratic regime change via preventive war. However, during the Iraq War, a proposed paradigm of preventive war, supported by neoconservative norm entrepreneurs and traditional conservative converts and sympathizers in the Bush administration, ultimately failed to replace the Cold War–era strategies of multilateral containment and maintenance of the geopolitical status quo. This proposed norm was part of a larger revolutionary strategy that backed a policy of preventive war, the hegemonic paradigm, whereby

the American hegemon promoted democracy through the use of force. To diffuse this new vision, the United States used the Iraq War as a test case that would prove the validity and effectiveness of the concept of preventive war. New international groupings like "coalitions of the willing" and the national security strategy of 2002 would provide the documents legitimating these new policies. Yet diffusion encountered heavy opposition at both the domestic and international levels as well as the costly nature of the war. Thus American strategic culture and national security policy briefly flirted with the proposed dissident neoconservative paradigm, but presently they appear to be returning to some variant of the Cold War normative paradigm. From a constructivist perspective, the Iraq War not only failed to demonstrate the validity of a new vision of American strategic culture but also undermined the very paradigm it was supposed to inaugurate.

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A Frenchman at the US Air Force School of Advanced Air and Space Studies

Lt Col Olivier Kaladjian, French Air Force*

> *[Theory] is meant to educate the mind of the future commander, or, more accurately, to guide him in his self-education, not to accompany him to the battlefield.*
>
> —Carl von Clausewitz

Clausewitz's assertion seems to capture the essence of the education provided at the School of Advanced Air and Space Studies (SAASS), an institution that produces the next generation of US Air Force strategists. Part of Air University, the school is located at Maxwell Air Force Base, in Montgomery, the very heart of Alabama, where the Wright brothers opened the nation's first aviation school in 1910. According to Col Timothy Schultz, SAASS commandant, the school seeks to "develop the weapon system of one's mind, the most powerful of all weapon systems." To do so, SAASS, which celebrates the 20th anniversary of its founding this year, brings to bear three strengths that account for the school's success.

SAASS's Tripartite Foundation

Faculty

The school's faculty members, all of whom hold a PhD and have earned recognition for their academic achievements, offer SAASS students extraordinary guidance. Most of them have published reference works in air and space history or strategy, and the faculty-to-student ratio of one-to-three makes the education process highly personal-

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ized.[1] During the first semester, each student is assigned to a professor who mentors him or her in such areas as writing techniques and reasoning. This proven system reaps substantial benefits.

Students

SAASS's highly selective admissions system (restricted to the top 5 percent of applicants) yields an extraordinarily capable student body—the best of the best. Although the class of 1991, the school's first, included only 25 students, the success of those graduates forced SAASS to increase that number.[2] The current class, the 20th, boasts 59 members, among them six international officers (representing France, Great Britain, Australia, Germany, Sweden, and India), two US Army officers, and two from the US Marine Corps. Having grown constantly since 1991, SAASS now seeks to preserve its high-quality, personalized education by limiting the student body to about 60 officers.

Curriculum

The curriculum, which represents the third pillar of the school's foundation, is designed to improve students' capacity for critical thinking and their grasp of air and space power. SAASS's motto, "From the Past, the Future," reflects the sound historical basis of the course of study.[3] Guided by their professors, students must apply theory to historical events and then extrapolate their findings to the present and future.

The education program includes three stages. During the first, students read classic works by Carl von Clausewitz, Julian Corbett, Antoine Henri Jomini, Thucydides, Sun Tzu, Alfred Thayer Mahan, and so forth, exploring the foundations of military theory and analyzing the decision-making process with regard to strategy. They also study theories related to international relations, organization, and decision making. The second part applies these concepts by examining the history of airpower and coercion as well as the use of armed force from the Napoleonic wars until today. The third portion addresses the future, including topics such as space, cyberspace, counterinsurgency, and operational planning. Each stage of the curriculum, phased over three to four weeks, culminates with a comprehensive written test that evaluates the student's originality, clarity, and powers of persuasion. The best efforts are often published as journal articles.[4]

The Intellectual Challenge

SAASS students embark upon a highly demanding journey of learning that covers 150 books and 42,000 pages of reading material in less than one year. Unsurprisingly, the reading requirement of 250 to 300 pages a day inspired the US Air Force student contingent to label SAASS the "book-a-day school." All current and former students describe the program of study as a marathon that everybody must run at the speed of a sprint. Rather than conduct lectures and conferences, the school offers seminars of 10 students (or fewer) guided by a professor, each seminar devoted to the study of concepts that emerge from the reading list. During these sessions, professors assess the extent and quality of the students' participation as well as the relevance of their reasoning and the clarity of their arguments. This educational program, which pushes the officer attendees to their intellectual limits from the first to the last day, concludes with an oral comprehensive examination based on the entire curriculum.

Recognized Excellence: Path to the Doctorate

The 20th SAASS class is the first to follow a new program that replaces the master of airpower art and science degree with the much more prestigious master of philosophy in military strategy. Most importantly, the Southern Association of Colleges and Schools, SAASS's accreditation authority, recognizes this curriculum as the basis for study toward Air University's doctorate of philosophy in military strategy. Students admitted to the doctoral program can move to SAASS graduate assignments for two to three years, during which time they begin writing their dissertations, and then return to Maxwell to finish and defend them. This program allows the US Air Force to foster general officers who will hold a terminal diploma without putting their careers at risk by spending years in graduate school and missing command assignments.[5] Even though the École supérieure de guerre (French War College) does not confer a master's degree and many of our officers join the North Atlantic Treaty Organization or European Union staffs, this innovative means of producing generals with PhDs certainly merits consideration.

The SAASS Graduate: A Scarce Resource

To the consternation of the US Air Force Personnel Center, at the end of the school year, generals directly recruit SAASS graduates for their staffs. This prac-

tice still occurs; however, it is now subject to better supervision, and the appointment of those graduates receives special attention. Without question, this custom makes SAASS even more attractive. Furthermore, the school's graduates enjoy the highest promotion rate in the US Air Force, all of them attaining the rank of lieutenant colonel. More importantly, 98 percent of those who remain in the service become colonels, compared to 47 percent for the entire Air Force. Finally, 13 of the 25 students in the eighth class are now general officers. Clearly, SAASS is an exceptional producer of senior leaders for the Air Force.

A Frenchman at SAASS

The author owes his presence at SAASS to the efforts of Gen Stéphane Abrial, former chief of staff of the French Air Force, and Gen T. Michael Moseley, former chief of staff of the US Air Force. Following in the footsteps of Lt Col Géraud Laborie and Lt Col Olivier Brault, I am the third French student to attend SAASS. The French Air Force appoints its students, who must hold a master's degree from an English-speaking university, to Air Command and Staff College (ACSC) so that they can later attend the US Air War College. During their year at ACSC, they earn a master's degree, apply for admission to SAASS, and if accepted, begin the course of study the following summer.

In conclusion, this school has no peer in terms of teaching strategy in general and air strategy in particular.[6] Indeed, if mastering strategy is a lifelong endeavor, then the School of Advanced Air and Space Studies is undoubtedly one of the best places to start.

Notes

1. Try to imagine 120 professors, all holding a PhD, working full time at the École supérieure de guerre (French War College).

2. Stephen D. Chiabotti, "A Deeper Shade of Blue: The School of Advanced Air and Space Studies," *Joint Force Quarterly* 49 (2nd Quarter 2008): 74.

3. Ibid.

4. See, for example, Géraud Laborie, "Sparta Delenda Est," *Le Piège*, December 2009.

5. Under the previous system, students interested in earning a doctorate attended a university for three years, thus jeopardizing (with very rare exceptions) their chances of becoming general officers.

6. Tamir Libel and Joel Hayward, "Adding Brain to Brawn: The School of Advanced Air and Space Studies and Its Impact on Air Power Thinking," *Air Power Review* 13, no. 2 (Summer 2010): 69.