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Recent Developments in International and Comparative Law and Feasible Alternatives to the Use of Force in Contemporary International Law

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by

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RECENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE LAW AND FEASIBLE ALTERNATIVES TO THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW

Mr. President of Golden Gate University,
The Dean of the School of law,
Distinguished Fulbright Scholars in Residence,
Honorable Members of the American Society of International Law
and of the American Society of Comparative Law,
Fellow Members of GGU Faculty,
Consoeurs et Confrères,

This is the beginning of the Second Cycle since Golden Gate University hosted its First Annual fulbright Symposium on international legal developments. Today, Golden Gate University School of Law is also celebrating the close of the First Cycle, the Twelfth Regional Meeting of the American Society of International Law.

This is the time of year that international legal scholars and practitioners of international law and comparatists in diverse fields are gathered at Golden Gate University from the region of the Bay Area and yonder to pursue a meaningful, purposeful and peaceful exchange of views among themselves and with learned counterparts from outside the United States, notably a selected group of Fulbright scholars in Residence and comparatists from within the region and beyond. I would like to take this opportunity to reaffirm once more the heartiest welcome extended by the President and the Dean to visitors from afar. It is thanks to visiting scholars that we in the United States may expect to enhance and widen our vision.

Last year, Golden Gate presented "A Survey of Progressive Developments of International Law and Order since the events of 11 September 2001". This year, a further succession of events have taken place that warrant a fresh examination of "Recent Developments in International and Comparative Law on the Urgent Necessity for Feasible Alternatives to the Use of Force in Contemporary International Law." An imminent and impending threat of the pre-emptive use of force to prevent war and continuing deployment of forces poised to strike as if to demonstrate that the only plausible means to achieve the ultimate peace is to be prepared for the outbreak of hostilities. *"Si vis pacem para bellum"* appears to be the uncontested order of the day.

To broaden the horizon of our legal perspective, we should not relent in our effort to seek further internationalization of legal education in this country, the United States and in the

Western Hemisphere. We should not stop shy of allowing and listening to the voices of the outside world beside our own.

Many new legal techniques have emerged since we last met here at Golden Gate University School of Law. New rules have come to be used for the first time : rules that would have seemed unthinkable before the events or rather the *armed attacks* against the United States on 11 September 2001. Existing rules of law as well as regulations have been revised, re-examined and even reversed in order the keep up with the march of time and the rapid succession of events following the *armed attacks* against the United States which have been so expressly named and forcefully condemned by the Security Council of the United Nations the very next day, 12 September 2001. In its Resolution 1368 (2001) unanimously adopted on 12 September 2001. In its own words,

> *"The Security Council,*
> *Reaffirming the principles and purposes of the Charter of the United Nations,*
> *Determined to combat by all means threats to international peace and security caused by terrorist acts,*
> *Recognizing the inherent right of individual and collective self-defence in accordance with the Charter,*
>
> *1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington D.C., and Pennsylvania, and regards such acts, like any act of international terrorism, as a threat to international peace and security ...*
>
> *5. Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with responsibilities under the Charter of the United Nations."*

The above Security Council Resolution, as cited in part, is in reality very far reaching indeed. It went considerably beyond what met the eyes at first contact. Upon in-depth analysis and intensive reflection, this Resolution, at the minimum, contains the following eye-opening findings, rulings, decisions and determinations.

I. THE "INHERENT RIGHT OF SELF-DEFENCE" REVISITED

(1) Recognition and reaffirmation of self-defence

In the first place, it *recognizes and reinforces the inherent right of individual and collective self-defence* in accordance with the Charter. This Resolution clearly confirms the Security Council's *recognition and endorsements* of the inherent right of self-defence, individual and collective, under Article 51 of the Charter. The language of Article 51 strongly supports the supremacy of the inherent right of every State, individually or collectively, to defend itself.

"Nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Under Article 51, all other obligations and responsibilities of State Members of the United Nations are subordinate to the exercise by the State of its inherent right of self-defence, individual and collective, conditional upon the occurrence of one thing, an armed attack. The Charter has endeavored to establish a hierarchy of norms and principles or obligations incumbent upon its Member States. It has gone to the length of laying down as an essential yardstick to measure the binding authority of international obligations. Under Article 103 of the Charter, for instance, "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail."

Such being the case, all international obligations arising out of international agreements other than the Charter are subservient if not subordinate to those under the Charter in the event of a conflict. It follows that if "nothing in the present Charter shall impair the inherent right of self-defence of a State," the right of a State to defend itself either individually, i.e., single handedly, or collectively, e.g., with coalition forces, an alliance, or a collective defence Treaty organization, is placed in a predominant position, second to no other international obligations, including those arising out of or contained in the provisions of the Charter. The right of legitimate self-defence under the Charter as well as under customary international law is thereby elevated to the top of the legal hierarchy of all international obligations, of all principles or norms of international law.

Without going as far as former Secretary of State Dean Acheson in regard to his view of the state of necessity which, as in the Cuban Missiles Crisis of 1962, would know no law, or that States could divest themselves of obligations to respect international law, or totally ignore its binding force when their very existence of the maintenance of self-preservation was in question or being threatened.

(2) Finding of the occurrence of *armed attacks*

In the case under review, the Security Council not only condemned the *horrifying terrorist attacks* against the Untied States and regarding such acts, like any act of international terrorism, as a threat to international peace and security, but it did so condemn by recalling the inherent right of self-defence. Following the occurrence of what were determined to constitute *armed attacks* against the United States in New York, Washington D.C. and Pennsylvania, the Council left no room for any doubts as to the right of the United States to defend itself, after the Council's own finding that a series of *horrifying terrorist attacks* had occurred on 11 September 2001.

A question may be raised whether the so-called *horrifying terrorist attacks* constituted *armed attacks* within the meaning of Article 51 of the Charter, so as to entitle the United States to resort to what the Security Council expressed as "its readiness *to take all necessary steps to respond to the terrorist attacks of 11 September 2001.*"

This response may clearly include the use of force, either individually by the United States itself alone or collectively together with some of its NATO or other allies such as Australia and the United Kingdom. All these are permitted under the Resolution 1368 of the Security Council even without or prior to the participation of the Security Council or UN Forces. Article 51 of the Charter did not take away the inherent right of the United States to defend itself by responding to the terrorist attack, until such time as the Security Council shall itself have taken measures necessary to maintain international peace and security. Until then, the United Nations could remain out of combat, but could join forces with the United States and its allies at any time it deems necessary or appropriate to help put an end to the threat..

What used to be considered as armament or an *armed attack* also has undergone some drastic changes due to a fundamental change not only of circumstances but also in the range of weaponry from the use of human shield to suicide squad since World War II Kami-kaze, and now terrorist attacks by human suicide bombs. What was considered hazardous and perilous, although not an armed carrier like an innocent civilian aircraft carrying civilian passengers on a regularly scheduled commercial flight could be converted and may have as well as could have been converted into a *weapon of mass destruction,* in fact, jet fuel and carburant carried on *ab initio* commercial airplanes could be turned into armed warheads to commit an armed attack against any target, strategic whether military or non-military. The law is often slow to catch up with developments in international practice. The conversion of passenger airlines when hijacked and used as weapons of mass destruction was recognized and condemned by the Security Council and strongly condemned by the ICAO Assembly in its Resolution A33-1 on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation as contrary to elementary considerations of humanity, norms of conduct of society and as violations of international law. The Assembly also urged all Contracting States to cooperate with each other

and with the ICAO and other specialized agencies of the United Nations in the suppression and prevention of such illicit use of civil aircraft.

(3) Security Council Resolution 1368 (2001) calling on States and the international community to prevent and suppress Terrorist Acts

Paragraph 2 of the Resolution "*expresses* its deepest sympathy and condolences to the victims and their families and the people and Government of the United States of America;"

Paragraph 3 "*calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;"

Paragraph 4 "*calls also* on the international community to redoubled their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999..."

These are measures called upon by the Security Council as part of the exercise of self-defence by the States victims of the *armed attacks* of 11 September 2001 and the international community to prevent and suppress recurrence of terrorist attacks.

The Security Council in its Resolution 1373 (2001), dated 28 September 2001, recalled the inherent right of self-defence reiterated in Resolution 1368 of 12 September 2001, and acting under Chapter VII of the Charter,

> (1) *Decides that all States* shall *inter alia* (a) prevent and suppress the financing of terrorist acts; ...
>
> (2) *Decides also that all States shall ... (b)* take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; ...
>
> (3) *Calls upon all States* to ... (b) exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist act; ...
>
> (4) *Notes with concern the close connection between international terrorism* and *transnational organized crime,* illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials and in this regard *emphasizes* the need to enhance coordination and efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security; [and]

(5) *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

Thus, the United Nations Security Council has deemed it expedient to resort to Chapter VII of the Charter to authorize and call for cooperation among States to combat, suppress and prevent terrorist acts, while maintaining without in any way impairing the inherent right of self-defence, individual and collective, without excluding the inherent right of the Super-Power from defending itself by all means necessary to combat, suppress and prevent terrorist acts and to prevent the repetition of terrorist armed attacks. (See also Security Council Resolution 1377 (2001) of 11 November 2001.)

II. THE NOTION OF SELF-DEFENCE AND THE RIGHT/DUTY OF A STATE TO SUPPRESS AND PREVENT TERRORIST ARMED ATTACKS

Having been adjudged and declared to be among the chief victims of armed attacks which occurred in New York, Washington D.C. and Pennsylvania on 11 September 2001, the United States scarcely needs any further proof of its having been subjected to an armed attack, let alone *horrifying terrorist attacks* in the wording of the Security Council Resolution 1368 (2001). No further attempts need be made to demonstrate the occurrence of an armed attack as a prerequisite of the exercise of the right of self-defence, including resort to the use of force, which is regarded at all times and by all legal systems, including the international legal order as lawful and legitimate within the conditions prescribed by law, i.e., until the threat of the recurrence of an armed attack is eliminated.

The expression *armed attack* must by now be understood to include, not only the converted use of a civilian aircraft as human missiles or the use of other types of weapons of mass destruction, such as biological or chemical weapons. The United States has not been free from such attack as anthrax, which is clearly a chemical and biological lethal weapon of mass destruction.

(1) The continuing nature of the threat or use of force to stage an armed attack

It is not difficult to fall into a trap of one's own invention. International law is apparently inter-temporal. There is always a clear and present danger of over simplification.

Once bitten, twice shy, is an English saying. This was not followed recently in Thailand, where a mad dog was allowed to attack more than 50 victims before it was ordered to be put to rest. The reality of legitimate self-defence by the community for its members should have called for the destruction of that mad dog after its first attack, after the first victim was killed. If we, in Thailand, have now learned a lesson, we should no longer wait for the mad dog to make its second or third strike. One strike and it should have been out. What we could learn from this tragic lesson at least is that we should not waste any further time to allow the "mad dog" to attack again and again. Unless and until the threat is eliminated by removal of the "mad dog", could the community be once more safe and secured. Everyone has the right of self-defence against the mad dog, but it may take more than even a carefully well planned procedure to put an end to the dog, which has continued to present a clear and unmistaken risk for the community. There is for present purposes no end to the exercise of legitimate self-defence for the United States unless and until the danger of recurring attacks is eliminated. Nowhere in the Charter is a State prohibited from defending itself against a systematic series of unauthodox terrorist armed attacks. The United States has endured this continuing threat with very little sign of its subsiding.

(2) The principle of proportionality

One admitted limitation to the exercise of self-defence is the principle of proportionality. Proportionality is indeed guided by reasonableness. To repel force by equivalent force is proportionate and legitimate. There have been instances in international arbitral awards such as the Naulilla Incident and the Cygne even as early as World War I where in some cases excessive use of force beyond what was needed could turn an otherwise legitimate counter-measure into an internationally wrongful act engaging the responsibility of a State.

Similarly, barking up the wrong tree or mistaken identity of the party responsible for the attack would provide no circumstance precluding wrongfulness of the use of force. To switch to a more modern case-law, the defence of the USS Vincennes which was anticipatory of a mistaken scenario, to pre-empt an armed attack by an unarmed civilian aircraft Iran Air airbus carrying Muslim pilgrims to Megga from Teheran to Saudi Arabia was no real or actual threat to the USS Vincennes. Only earlier incidents of a friendly fire against the USS Starke and what could be diversionary tactical maneuvers on the dame day preceding the incident, which combined to lead the captain of the USS Vincennes, under a mistaken but unpardonable belief, to respond to a fast rushing object on the radar screen which could have been anything including an attacking jet fighter bomber in the Gulf of Persia.

International law does not impute criminal intent or attribute penal responsibility to the flag State of the USS Vincennes for what would otherwise have constituted an act of terrorism, State terrorist attack against an unarmed passengers airline on a pilgrimage flight, were the intention of

the USS Vincennes not an honest mistake of self-defence against an impossible but imaginable attack by Iran Air, a regularly scheduled commercial flight. The United States Government would have been inexcusable had the conduct of the USS Vincennes been either reckless or negligent or even willful misconduct. The only excuse was a mistake, an honest mistake, because under what was believed by many American authors to be part and parcel of customary international since the Caroline Incident between the United Kingdom and the United States during the different rebellious secessionist movements in Canada against the United Kingdom in the 1840s, there was a state of necessity, or the necessity of self-defence. All the ingredients specified by Secretary Webster to Mr. Fox appeared to be absent: the necessity of self-defence would have to be instant and overwhelming, (the Captain of the USS Vincennes saw on the radar screen a fast moving object rushing towards the Vincennes, not different from what his predecessor saw when the USS Starke was mistakenly attacked by Iraqi friendly fire, which then the United States was even escorting and reflagging Kuwaiti tankers carrying Iraqi crude out of the Persian Gulf,) leaving no choice of means and no moment for deliberation. The reactions of the Vincennes were understandable in the light of earlier incident in that area and under what may have been presumed as the rules of engagement by the United States Navy at that time. Without engaging State responsibility of the United States for the mistaken exercising of impossible self-defence in international law, it nevertheless entailed for the United States absolute liability to make reparations to Iran, Iran Air, its victims passengers and the bereaved families for the loss of their loved ones in accordance with international law, indeed within or beyond the limitation of the Warsaw system established since 1929 with successive amendments.

(3) Changes in the law of civil aviation and clarifications of the notion of pre-emptive strike

That the law of air transport has undergone significant changes since 11 September 2001, has been noticeable since the adoption of Security Council Resolution 1368 (2001) and the ICAO Assembly's Declaration A33-1 on the misuse of aircraft as weapon of mass destruction, no one denies. What is startling was the fact that President Bush of the United States, as Commander in Chief, had ordered all aircraft in flight, if and when there was evidence of it being hijacked and used as a weapon of mass destruction, to be shot down as a matter of self-defence. This has become a clear-cut case of pre-emptive strike or anticipatory self-defence, not only for the international or foreign flag airlines but more particularly also for United States international or domestic flights with more or less full load of passengers, mainly U.S. citizens or residents, could be shot down. This was amazing in light of the recent acceptance by the United States, since the downing of U.S. private planes by Cuba, of the ICAO amendment of the Chicago Convention, aimed at preventing the downing of civilian aircraft in flight in any circumstances.

What President Bush has utteredd has become not only law for the United States, but it has had considerable influence on the development of international civil and commercial aviation law. The criteria proposed by the United States Secretary of States Webster still remained in full force, although they have recently been somewhat misread if not misconstrued.

Secretary Webster was not discussing the scope and definition of self-defence even in the 1840s, he was in fact referring to the *necessity of self-defence.* At that time international legal theories concerning the *state of necessity* or *necessity* as such have not developed to such an extent as to be visually separable from self-defence. Indeed, the expression *necessity of self-defence* refers to the combination of two principal legal theories, which today are classified as *circumstances precluding wrongfulness* in the law of State responsibility.

It was by no means intended to limit the reaction of the victim State of an armed attack, after the attack was committed, to respond or reply or repell the armed attackers by the use of proportionate force. To suggest otherwise or that the attacks against the twin towers of the World Trade Center in New York or of the Pentagon in Washington D.C. were *faits accomplis*, and that the time has long passed for the exercise of self-defence by the United States is not only inaccurate in the extreme, but also unjust by any standard of civilization. The attacks were not a one-shot affair and the United States, unlike Kuwait for a short while, has always withstood the attacks, a continuing series of different forms and types of terrorist acts by different weapons of mass destruction. The United States still stands and facing the possibilities of real attacks. The Taliban and the Al Qaeda have not ceased to threaten further recurrences of terrorist attacks against the United States and the American people. The magnitude of this continuing use of force or threat of force is such that the Security Council had no hesitation in classifying it as a threat to the international peace and security. It is the primary responsibility of the Security Council to maintain international peace and security.

That primarily responsibility by no means and in no measure takes away or impairs or nullifies the inherent right of any State, by which expression the United States should not be excluded, from the legitimate exercise of its measured self-defence, individual as well as collective, global as well as regional and sub-regional. Resolution 56/88 adopted by the General Assembly on 24 January 2002 on measures to eliminate international terrorism on the Report of the Sixth Committee (A/56/593) echoes and reaffirms all Security Council Resolutions 1368, 1373 and 1377 (2001).

Let us not misuse, the Caroline Incident which was intended by the United States to reject the far-fetched notion of self-defence advocated by the United Kingdom for sending an armed band across the frontier to the United States, to cut loose a ferry that drifted over the Niagara Fall, thereby killing human lives as a limitation or restriction of the right of self-defence that is so inherent and natural that even the San Francisco Charter of 1945 cannot ever dream of impairing, let alone an obscure correspondence between a foreign secretary of a State, and a reply by a

successor to the same post of the recipient State more than a year after over one hundred and fifty years ago.

(4) Multi-dimensional limits of the exercise of self-defence

Just as restitution stops where repayment begins, the lawful use of force in legitimate self-defence has its limitations in addition to the principle of proportionality. It can only last as long as the armed attacks or the threat thereof continues. It is limited thus not only in the duration of time but also in the territorial location. Once the source of armed attacks is eliminated or the danger removed, the necessity of self-defence vis-a-vis that area of danger and the zone of risk alert has subsided. The response of the victim State in regard to the armed attacks is likewise limited in location to the territories, which have served as the training ground or places for planning and plotting, or place of harboring, as sanctuary or funding or sponsoring of terrorist activities in any way whatsoever, technically, financially, logistically by furnishing of armaments, means of delivery or otherwise. Beyond the narrow confines of self-defence, acts attributed to a State could still be legitimate as counter-measure , self-protection or otherwise, but self-help and self-preservation lie outside the parameter of self-defence permissible under traditional and current international law.

International law, customary or institutional, has long recognized and honored the legitimate right of self-defence of every State, and since recent United Nations General Assembly Resolutions have also supported the rights of peoples to liberate themselves as part of the right of self-determination, the right of the liberation movements to take up arms against their colonial oppressors; and those supporting oppression would be acting contrary to the principles and purposes of the United Nations.

As the methods of inflicting harm have expanded from conventional weapons to nuclear, biological and chemical weapons of mass destruction, the means to suppress and prevent acts of terrorism or armed terrorist attacks must also grow in volume, gravity and variety to be better equipped to contain, suppress, prevent and best of all to pre-empt the recurrence of such terrorist attacks, or any armed attacks for that matter.

One other caveat which serves as a limitation on the exercise of the right of self-defence lies in the lawfulness of the ground upon which the use of force is necessitated. Self-defence is possible legally only if an armed attack occurs. Absent an armed attack, or the actual reality of such an attack, the State resorting to self-defence by the use of force does so at its own risk.
while no higher authority nor the Security Council could compel the United States not to shoot down a civilian aircraft in flight, whatever the reason which prompted the downing of Iran Airbus, be it an honest mistake, panic or *ex abundante cautelae,* without the *mens rea* or criminal intent to commit an act of terror, the United States would not be responsible for the offence of

State terrorism, in that case, because of genuinely mistaken belief that it was defending itself from an impending armed attack.

Although the United States was not responsible for the act of terrorism attributed to it for want of an illicit motive or criminal intent, it had to pay for the injurious consequences resulting from its inaccurate assessment or miscalculation. Subject to the obligation to compensate and make reparation for the losses suffered by Iran, Iran Air and its multi-national passengers, the United States was in exclusive control of its right to determine the risk it was prepared knowingly to take in the mistaken understanding that it was taking a pre-emptive strike or resorting to the defensive use of force to prevent the materialization of an armed attack against its man-of-war, which in the eyes of the United States would be tantamount to an attack against the United States.

II. THE IMPENDING USE OF SUPERIOR FORCES AGAINST SADAM HUSSEIN AS MEASURES *EX ANTE* TO PREVENT RECURRENCE OF FUTURE BREACHES

It has taken the United States some months of preparation to assemble all the military might with superior air, naval and ground forces combined to subdue Sadam Hussein into submission. In other words, the United States Government has publicly internally authorized the use of military might to disarm Sadam Hussein, with the authorization, approval, sanction and blessing or participation of the Members of the United Nations, in particular, the Security Council, if at all practicable. If not under the cloak of self-defence, no one could impair this inherent right of the United States, with or without the sanction of the international community, the United States would do so at its own risk, in any event.

Legally speaking, the risk lies in the thin link or thread that the United States must establish between the various groups of terrorists, namely, the Al Qaeda, the Taliban and possible use of biological, chemical or nuclear weapons of mass destruction from Iraq together with the vehicles to delivery these agents to harm and hurt human beings in the United States. This link is not impossible but could be difficult to prove. But once the military might of the United States is brought to bear upon the chief of Government of Iraq, several scenarios could unfold themselves.

For the United States to act alone or with the United Kingdom and others such as Australia in the name or in the exercise of self-defence, individual, several and collective, proof of linkage to the world-wide plot by terrorist groups to stage terrorist attacks against the United States and or the United Kingdom would be vital. There have been some evidences of linkages to other or the same groups in the countries, such as Indonesia, where a nightclub in Bali was last attacked with multiple Australian casualties and other nationals of western countries.

But according to Secretary of State Collin Powell, the United States is engaged in pursuing a two-pronged tracks, the second set of Security Council Resolutions on Iraq, Resolution 1441

(2002) of 8 November 2002, which also recalled its earlier Resolutions, in particular 661 (1991), 678 (1991), 687 (1002), 688 (1991), 707 (1991), 715 (1991), 986 (1995) and 1284 (1999) and all the relevant statements of its President.

In Resolution 1441 (2002), the Security Council deploring further that Iraq repeatedly by obstructed immediate, unconditional and unrestricted access to sites designated by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA), failed to cooperate fully and unconditionally with UNSCOM and IAEA weapons inspectors as required by Resolution 687 (1991) and ultimately ceased all cooperation with UNSCOM and IAEA in 1998; deploring the absence, since December 1988, in Iraq of international monitoring, inspection, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles, in spite of the Council's repeated demands that Iraq provide immediate, unconditional, and unrestricted access to the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) established in Resolution 1284 (1999) as the successor organization to UNSCOM and the IAEA, and regretting the consequent prolonging of the crisis in the region and the suffering of the Iraqi people, "*Decides* in paragraph 4 that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementing of, this resolution shall constitute a *further material breach* of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below."

Pursuant to paragraphs 11 and 12, Dr. Hans Blix, the Executive Chairman of UNMOVIC and the Director-General of the IAEA, presented a number of reports to the Council on interferences by Iraq with inspection activities, as well as failures by Iraq to comply with its disarmament obligations. However, the progress reports submitted to the Council at subsequent meetings on 27 January 2003, 14 February 2003 and 7 March 2003, appeared to indicate a slight improvement in the attitude of the Iraqi Government by way of cooperation and declaration of some forbidden missiles destroyed. The United States has been anxious to put an end to this seemingly endless game of hide and seek. Meanwhile, on 13 December 2002, the Security Council took occasion in Resolution 1450 (2002) to condemn the terrorist bomb attacks at Paradise Hotel, in Kikambala, Kenya on 28 November 2002 as well as other recent terrorist attacks in various countries.

For the United States, it serves the dual purposes of self-defence, individual and collective, as well as enhancement of the international peace and security, a primary responsibility of the Security Council. It remains to be seen whether after the original deadline of 17 March 2003, when United States forces were ready to undertake the task of disarming Iraq to prevent the recurrence of armed attacks on its neighbors, whether any supervening exit could be found to provide a peaceful resolution to the persistant recalcitrance of Iraq's failure to cooperate and to disarm in material breach of its obligations under Resolution 687 (1991).

Diplomacy by conference within the Security Council of the United Nations which met with initial success on 8 November 2002 when Resolution 1441 (2002) was unanimously adopted. But when it came to the pursuit of paragraph 12 upon receipt of reports from Dr. Hans Blix as envisaged by paragraphs 4 and 11 in order to consider the situation and the need for full compliance with all the relevant Council Resolutions in order to secure international peace and security, there emerged not consensus but more of a divergence of positions. An amendment or proposal led by Prime Minister Tony Blair of the United Kingdom made a very minor headway with little chance of rallying either support or gathering momentum to call for a vote with an assured majority of no fewer than nine affirmative votes, let alone including all the five concurring votes of the Permanent Members of the Security Council. At one point in the recent past, there were only two (the United States and the United Kingdom) with three other Permanent Members either casting negative votes of at best abstentions. What best could the United States and the United Kingdom expect to be able to achieve in the circumstances? The favorable votes that could be counted by 15 March 2003 probably included Bulgaria and Spain. Indeed, one last attempt at diplomatic means was scheduled for a summit meeting of three wise men, the Triumvirate, heads of State or Government from the United States, President George W. Bush, Jr., Prime Minister Tony Blair of the United Kingdom and Prime Minister of Spain, to take place at the Azores, Portuguese Atlantic Island, to discuss military and other plans with regard to the State of Iraq, under Sadam Hussein, on Sunday, 16 March 2003, one full day before the deadline originally scheduled for "the forcible disarmament of Iraq". An ultimatum was issued as a result by President Bush for Sadam Hussein to leave his country within 48 hours, i.e., by the end of Wednesday, 19 March 2003. Today is Friday, 21 March 2003, and the operation enduring freedom must continue.

III. ENCOURAGING SIGNS OF SUCCESSFUL DISPUTE SETTLEMENT IN OTHER PARTS OF THE WORLD

While the prospect of a military campaign was probable on 15 March 2003, although not absolutely inevitable for Iraq, as the British Foreign Secretary was quoted in his personal assessment of the situation in Iraq, where all recourses to peaceful means of negotiating or settling existing disputes appear to have been exhausted and proven in vain, a far brighter outlook seems to be shining in Southeast Asia and to some extent also in the Western hemisphere.

(1) Indonesia/Malaysia, ICJ Report 2002

It is to say the least gratifying to note a fundamental and constructive change of attitude between two Southeast Asian nations, Indonesia and Malaysia. Having regained their well-deserved and hard-earned independence from Western colonial powers, namely, the Netherlands and the United Kingdom respectively, both Indonesia and Malaysia have had to weather a great many storms, political, economic and financial. Instead of returning to the policy of confrontation or Kontrontasi, both nations, having since 1967 been founding members of the Association of Southeast Asian Nations (ASEAN). The Association, originally counting five founding members, now with membership redoubled, the two ASEAN States have been able to overcome their differences and agreed to settle their territorial dispute, regarding two islands in the Celebes Sea, the Pulau Litigan and Pulau Sipadan by a joint agreement submitting the dispute to the International Court of Justice with a firm commitment in advance to abide by the decision of the Court, almost as if it were a *forum prorogatum*. The Court before the year end reached a quasi unanimous decision, pacifically accepted by both Parties, thereby putting an end to another legacy left by former colonial powers since bygone days of Western expansionism.

The Charter in its Articles 2(3) and 33 provide ways and means of their choice for States to settle their differences, disputes or disagreements peacefully and amicably without having to resort to the use of force. The wisdom which finally prevailed between Indonesia and Malaysia, both being confirmed founding members of ASEAN, augured well for the time-honored regional association for economic cooperation currently of ten Southeast Asian States, which can show to the whole world the art and skill of diplomacy and agility in dispute settlement which should be followed by the rest of the world, advanced or least developed or in the earliest stage of economic and industrial development.

Back to another front, on the other hand, following the excellent example of Indonesia and Malaysia, its Asian Islamic brother, the leader of Iraq, one of the most ancient civilizations of the world, could be persuaded to relinquish his total disregard for the obligations *ex ante* imposed by the Security Council, in its High-level Meeting of 20 January 2003, which in Resolution 1456 (2003) expressed its concern over a *serious and growing danger* of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and stressed the need to strengthen control of these lethal agents. Again the Security Council called on all States to take urgent action to prevent and suppress active and passive support to terrorism, and comply with all relevant Security Council Resolutions.

The Security Council requested that all States cooperate closely to *implement fully the sanctions against terrorists and their associates, in particular Al Qaeda and the Taliban and*

their associates. At the same time the Security Council cautioned that States must ensure that any measure they undertake in combating terrorism must comply with their obligation under international law, in particular the application of torture is not permissible but human rights and due process must be respected even in the arrest, detention, trial and punishment of alleged terrorists.

In the context of logical persuasion, the Ministers of Foreign Affairs of the European Union Member States met on 27 January 2003 and urged the Iraqi leader to engage in *full and active cooperation with UNMOVIC and the IAEA.* The Ministers noted that the United Nations Security Council Resolution 1441 (2002) gives an *unambiguous message that the Iraqi Government has a final opportunity to resolve the crisis peacefully.*

On 23 January 2003, regional initiative was taken by the Ministers of Foreign Affairs of Egypt, Iran, Jordan, Saudi Arabia, Syria and Turkey, who made a joint declaration calling on the Iraqi leadership to *move irreversibly and sincerely towards assuming their responsibilities in restoring peace and stability in the region.*

As late as 14 March 2003, President Bush still retained the hope that it was up to the Iraqi leader to avoid the impending use of superior force to disarm Iraq. The choice has been and still remains Sadam Hussein's to disarm or to be forcibly disarmed.

In this connection, the efforts in pursuit of peaceful resolution of the conflict may have been exhausted or are about to be exhausted. The United States could rightfully rely on the inherent right of self-defence, individual and collective, as sanctioned by Article 51 of the Charter, once an armed attack has occurred. No one, in the right mind, could contradict the occurrence of horrifying terrorist armed attacks against the United States on 11 September 2001. Nor could anyone lawfully deny the right of the United States to defend itself by all means necessary to respond to the continuing threat, or use of force by terrorists, within the framework of the United Nations under Chapter VII, or without by operation of Article 51.

(2) Mexico v. U.S.A., ICJ Report 2003

On 22 January 2003, the International Court of Justice announced that it had concluded the public hearings on the request for the indication of provisional measures submitted by Mexico in the case concerning Avena and other Mexican nationals.

It should be recalled that no one in the whole wide world has ever questioned the binding character of provisional measures indicated by the International Court of Justice or prescribed by the United Nations Tribunal of the Law on the Sea, to the point that for the past three years or so the Institut de Droit International has offered a Gustav Rolin-Jaquemijn Prize of Swiss franc. 10,000.- for an essay competition on the topic by 31 December 2002. Yet in the Walter LaGrand Case, the Supreme Court of the United States appeared to have accepted the view of the office of

the United States Solicitor General that such a provisional measure indicated by the World Court was not binding. It has since become clear that it is binding on the Parties to the dispute, namely, the United States and Federal Republic of Germany, and it was incumbent on the United States Government to do everything within its power to suspend or delay the execution of Walter LaGrand, pending the decision of the International Court of Justice.

New understandings have been introduced and new *modus vivendi* devised or promised by the United States so as to avoid further repetition of this irreparable violation of an obligation of consular notification.

What was sauce for goose was not sauce for gander. The United States contended that it was in compliance with the promise it made to the Federal Republic of Germany in the course of the proceedings in the year 2002.

Mexico obviously entertained the same apprehension for its fifty or so nationals who are facing detention, punishment and execution without satisfying the treaty requirement of consular notification. The procedure for requesting provisional measures has undergone further positive and progressive developments. The Court gave an order indicating provisional measures to suspend the execution of three Mexican nationals, while laying down ground rules for granting such a request. There must be evidence of failure to give consular notifications in breach of the relevant provisions of the Treaty or Convention, and the matter must be so urgent as to brook no delay without the possibility of making good the loss or damage suffered by the Party requesting provisional measures.

IV. CONCLUSION

Within this brief respite, it would not be possible to give a more exhaustive survey of more than a few salient points of academic and practical interest and of immediate concern to us in the progressive developments of international law in the past twelve months.

The process of internationalization of American legal education is indeed an uphill task. But the show must go on.

When the United States is blessed with a resolute leader whose judgments have been sound and timely as in the decision to exercise the inherent right of self-defence, to disarm Iraq, the democratic institutions have confused the leaders of the opposing parties by leading them to underestimate the unity and unparalleled force of this mighty republic. It is said that every people has the leader it deserves in a true democracy. This may be an exception that proves the rule.

On the other hand, when an international judicial or quasi judicial instance renders its judgment or award, which invariably runs counter to the views held by legal scholars in the United States, the international institutions have not been understood, let alone well or properly

received. More often that not, it is more facile to leave the organization or the institution altogether, such as UNESCO and ILO, just to confirm the displeasure incurred regardless of righteousness or legitimacy of its cause. Surely, international law has its own standard, its own yardstick that everyone else has to learn. Learning is one easy way to understanding the system. It is comforting and reassuring that President Bush has found it pertinent to announce the return of the United States to UNESCO.

That is why Golden Gate University School of Law has embarked upon new programs together with the Council for Exchanges of International Scholars (CIES), and American Society of International Law (ASIL) and the American Society of Comparative Law (ASCL) among other associations of United States origin and growth. The main purpose is to instill tolerance and understanding of the differences that do exist in the world legal order. To be able to understand and survive with honor in the international legal order, it has become increasingly clear and truly indispensable that legal education, training and practice in the United States as anywhere else should begin to be internationalized. Golden Gate has started this program thirteen years ago, and I cherish the hope that it will continue unabated in the universalization of its program of international legal studies.

Thank you for your patience and indulgence.

Sompong Sucharitkul, D.C.L (Oxon)
San Francisco, Friday, 21 March 2003