

Preventive Use of Force: The Case of Iraq

STEPHEN SAWYER:^{*}

¶1 Ladies and gentlemen, I am Steve Sawyer. I am the General Counsel of the Center for International Human Rights and Adjunct Professor of Law here at the law school and am serving as a moderator on this panel which is entitled, “The Preventive Use of Force in the Case of Iraq.” I am going to make some brief remarks and then introduce you to the panel and the panel will address you.

¶2 Through your reading of the brochure and the High-Level Panel Report and to some degree the remarks of earlier speakers, you have been introduced to the UN Charter standards relating to the lawful and legitimate use of armed force by one nation or a collectivity of nations against another nation.

¶3 The Panel Report talks about two bases under the Charter for the use of such force, and I am not going to go into that much detail. Our speakers are primed to do that.

¶4 The issue for this panel’s discussion is the appropriateness – the legality, as well as the legitimacy – under the UN Charter standards of the use of force by the United States and its partners in invading the sovereign nation of Iraq last year.

¶5 As we have seen in the extensive writing in the field as well as in some of the discussion that we heard today, a question raised in some quarters is whether in today’s world these UN Charter standards still represent international law, and whether the UN is the right vehicle through which standards governing the use of force by one sovereign nation against another should be enforced.

¶6 On this point, Professor Michael Glennon who was to appear here today but was unable at the last minute to do so, said flat out or wrote flat out, when asked about the legality of the Iraq War, that that war was not unlawful because “there was no international law governing use of force.”¹ And as we are well aware, and as I am certain we will hear, there are many commentators who sharply challenge this proposition.

¶7 Another issue that I suspect will be the focus of today’s discussion is whether as a matter of plain reality or *realpolitik*, if you will, major threats to peace and humanitarian disasters simply cannot and will not be effectively addressed unless and until there is the support and participation of the great power nations, and that the UN and other world bodies, so it is said, are largely irrelevant to this process.

¶8 This thinking is exemplified by an article that appeared recently in the Op-Ed page of *The New York Times* where a professor at the University of Chicago, Eric Posner, said that successful international organizations either adapt to world power or they “wither on

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¹ Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT’L L. 91, 100 (2003).

the vine.”² This view too, as I am sure we will hear and as we have heard, is sharply contested. Put more simply, when the chips are down, can we expect that powerful nations will take the necessary actions, unilaterally if necessary, to preserve their self-interests, and that they will take these actions unrestrained by international law or by international organs like the UN?

¶9 Put even more simply, as was suggested by an earlier speaker, given what we are seeing on the world scene today, including what was said most recently in the election campaign of this country: has the world really changed since the days of Chancellor Bismarck?

¶10 I am sure from the different perspectives of our speakers, answers to these questions and others will emerge in forceful fashion, and I want now to turn the discussion over to our speakers.

¶11 First, to my immediate left, Henry Bienen, the President of Northwestern University. Next to him, Ambassador Feisal Istrabadi, the Deputy Permanent Representative of Iraq to the United Nations, and at the far end, Jan Wouters, professor with the faculty of law at the University of Leuven in Belgium.

¶12 So I now turn the discussion over to them.

HENRY BIENEN : **

¶13 Thank you.

¶14 I should say in starting that although this is an academic conference, my views here are my own, not the university’s. The university president seems to get in trouble at conferences, but I will not be talking about gender at all today.³

¶15 In any case – and I should preface my final preface to my remarks – we had the honor of having Secretary-General Annan as our commencement speaker a couple of years ago, and it really was a great honor indeed for the university.

¶16 That said, I will now talk about the issues of American intervention in Iraq. First, I should point out what maybe is obvious: between what has come to be called the First Gulf War and Second Gulf War, America had been intervening in Iraq. There was no cessation of American intervention in Iraq. We continued to have fly-overs. We did bombings, sometimes overtly, and sometimes more covertly in Iraq during this period between the First Gulf War and the Second Gulf War. (You can call it the First Bush War or the Second Bush War or the First or Second Gulf War, if you like.) Of course,

² Eric A. Posner, Op -Ed, *All Justice, Too, Is Local*, N.Y. TIMES, Dec. 30, 2004, at A23.

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³ See, e.g., Sam Dillon, *Harvard Chief Defends His Talk on Women*, N.Y. TIMES, Jan. 18, 2005, at A16 (describing remarks made by Harvard University President Laurence H. Summers in which he suggested that biological differences between the sexes may explain why fewer women succeed in science and math careers).

that period of intervention was nothing like the massive American invasion that took place the second time around.

¶17 I should state my views right off; I confess to having been in favor of this war. I do not know whether that will make most of you happy or unhappy. I argued for that war, not on the grounds that the Bush Administration gave, which were shifting grounds indeed.

¶18 There were many grounds for the Bush Administration's justification for American invasion of Iraq. The major one being, of course, the hunt for weapons of mass destruction. I can say that I never found any evidence presented for those weapons of mass destruction very credible, and we have good reasons now to understand why there was no credible evidence presented.

¶19 Nor did I find very persuasive another argument made by the Bush Administration, that Iraq was the hotbed of terrorism. Yes, it is true that Saddam provided funds to families of suicide bombers against Israel, but if one wanted to look for hotbeds of terrorism, both Iran and Syria were probably more deeply embedded in international terrorist networks than Iraq had been.

¶20 Nor did the Bush Administration make, I think, a very strong case for links between Al-Qaeda and Iraq. Undoubtedly, there was some likeness. There has been a matter of contention as to who was where and who was talking to whom at what place, but again, the evidence was not particularly strong to show very close, deep working relationships between Al-Qaeda and Iraq had been formed.

¶21 And the argument that Saddam was both a tyrant and a violator of his own people's human rights and had engaged in warfare between Iraq and Iran. Invading Kuwait was certainly, I think, true, and to me that Iraq had the potential and had been a destabilizer in the Middle East was a more important argument. I will return in a moment to what I think were some more important arguments for the justification for this war.

¶22 I was not able to be here this morning, and I am sure there was a lot of conversation about the decision between preemptive and preventive war. The Bush Administration collapsed the case for preemptive war into Iraq, which I did not find a very persuasive case, with preventive war arguments. As John Gaddis in a recent article in *Foreign Affairs* and others have pointed out, preventive war has meant taking military action against the state that was about to launch an attack.⁴ And again, as I said a moment ago, there was no real evidence that Iraq was ready to do that.

¶23 International law has long allowed such actions to forestall clear and present danger; whereas, preventive war has conventionally meant staging a war against a state which in the future that pose risks, which, I think, is a more persuasive argument with respect to Iraq. But in the post September 11th context, the Bush Administration collapsed the term. We had, in effect, a preventive war called a preemptive war.

¶24 And again, I would say that Iraq, compared to Iran and North Korea, posed fewer risks that could be justified for carrying out preventive war, at least with respect to weapons of mass destruction and nuclear weapons, in particular.

¶25 I should also say with these disclaimers that I do not know what the national estimates on Iraq have said, because we have not had a release of the national estimates

⁴ John Lewis Gaddis, *Grand Strategy in the Second Term*, FOREIGN AFF., Jan. 1, 2005, at 2.

produced by the intelligence community and by the director of intelligence in the United States. We will only know what those reports say when they are finally declassified.

¶26 I sat on the senior review panel of the CIA in the late 1980s. I almost never saw a national estimate which was unhedged and came down strongly in a very clear way as compared to “on the one hand this, on the other hand that.” So, I doubt, by the way, that the national estimate provides a clear justification for preventive war or much less preemptive war either, but I do not know.

¶27 Now, arrogating to oneself the right to intervene anywhere for preventive war purposes makes even one’s allies nervous, as we have seen in at least significant numbers of those allies. And it also has the danger of accelerating a push to countries creating nuclear options for themselves for deterrent purposes. Whether that has been true in Iran, I do not know. Iranians’ aims at creating some kind of nuclear option no doubt predate the Second Gulf War, and that is certainly true for North Korea as well. But one lesson you could learn if you were a middle-sized power with the capacity to create a nuclear option for yourself is that you want to do it as quickly as possible. That is a lesson you may draw from this.

¶28 All this said, then why was I in favor of this war? What were my own justifications for it? And I should say, having hung that label around my own neck, I was in favor in a very balanced and measured way. To me, it was always a very close call. One reason was human rights, perhaps. Saddam was a horrible killer; he had killed hundreds of thousands of his own people. I believed that he could be brought down rather easily militarily, which I think was true.

¶29 The consequences thereof we will come back to again in a moment. It is very hard to have a view, I think, of consistency with regard to interventions on human rights grounds. Often, you can justify doing what you can do and what you can not do militarily in one particular place. However, you might be able to do it in another one if there are other good reasons for acting, and I think, here, consistency is the hobgoblin of small minds.

¶30 Secondly, I thought there was not an analogy with the First Gulf War and that removing Saddam could help if one could have a reconstructed Iraq. If Iraq were joined to new diplomacy, it could lead perhaps to a renewed settlement effort on many of the outstanding efforts between Israelis and Palestinians. This may yet occur, though other elements such as the death of Yasser Arafat may be more important than the removal of Saddam from Iraq.

¶31 I also thought – and here was my main reason for supporting the war – that for those who thought that democracy could grow in Iraq and then spread throughout the Arab Middle East, there was certainly a better chance for this to happen with the removal of Saddam. This is what has been called the spill-over argument. While I think the verdict is still out here, the initial returns are hardly good, hardly positive, and one would have to stick one’s head very deeply in the sand to say that the removal of Saddam from Iraq has led or will easily lead to the creation of some kind of democratic regime in Iraq, though that is still not inconceivable.

¶32 In any case, I think the costs have been too great. Looking at this war, I would say the costs for both the Iraqi people above all, as well as Americans, have been too large to have justified this war as I look back on it. I think my judgment of being in favor of this war was an incorrect one, and I have come to regret it.

- ¶33 Part of the reason for bad outcomes in Iraq has to do with terrible decisions made by the Bush Administration, ones that Secretary Designate Rice has been starting to allude to, although not very specifically, in her own Senate confirmation hearing. I am not going to belabor those decisions, I am just going to list them and read them very quickly to move on with my allotted time.
- ¶34 Too small levels of occupying forces and poor designation of US troop missions led to horrible security problems, looting, loss of faith in the US occupation, very slow restoration of services, and personal security problems. This, on top of poor intelligence as to how bad infrastructure had deteriorated in Iraq, and how easily it could perhaps be put together again.
- ¶35 And here, I think, is a very important point involved in a task force on the Council of Foreign Relations in New York, which is looking at post-conflict reconstruction issues. Although I am not sure looking at Iraq and looking at Afghanistan in post-conflict situations by any means, but nonetheless this task force is looking at post-conflict construction issues. Ambassador Luers referred to some of them when he talked about creating new institutions, new legal structures, which I think are very important and which have been very, very hard to bring about in the Iraqi concept.
- ¶36 But the United States itself has a poor administrative structure for police aid and for legal reconstruction. We have relatively few people with good Arabic language capacities and too little know-how on the ground. Whatever plans there were in the State Department had been chucked out the window by the Pentagon, which chose to put its own plans in place. If you could call them plans. There were very poor assumptions about Iraqi internal politics and very poor intelligence again on the prospects for Sunni insurgency especially.
- ¶37 If you want to look at all the list of horrors of what went wrong, you can look at Larry Diamond's article in a fairly recent edition of *Foreign Affairs*.⁵
- ¶38 Whether disbanding all the structure, and especially the military, was the right call seems very dubious. Though Ambassador Bremer seems to defend this position, and there are arguments that can be made on either side of it.
- ¶39 The post-invasion lack of security has been a disaster for this intervention, as I have said, above all for the Iraqi people. I leave aside tactical mistakes, but I do want to say now that the consequences of the invasion of Iraq and the aftermath of this invasion, the experiences of the last two years will have, I think, a very sobering effect on the Bush Administration's policies and on future American foreign policy.
- ¶40 And again, I think it was Sir David who took up a remark perhaps of Ambassador Luers on the Somali experience. I think those were very apt remarks. Just as Somalia had very deep consequences for Rwanda and for American foreign policy in Africa, so will this much more massive expenditure of American life in trenches have very vast consequences in the evolution of American foreign policy, even for the Bush Administration in its second term.
- ¶41 I think we are already seeing intimations of this in Secretary Designate Rice's hearings. We are going to see much more emphasis on diplomacy. Now, to be fair the Bush Administration did try to work through the United Nations and through our allies for some time before we evaded Iraq. We should remember that. We could debate

⁵ Larry Diamond, *What Went Wrong in Iraq*, FOREIGN AFF., Sept. 1, 2004, at 34.

whether the Bush Administration gave it enough time, whether war had to have been launched when it was launched.

¶42 I suspect the Bush Administration certainly could have given it more time, but it did try. It did this in a context which I want to call to your attention and which has also been alluded to in your deliberations. It was a context of extreme unilateralism which this administration brought to thinking about foreign policy, and you could see it in the attitude towards the International Criminal Court, the Kyoto Treaty, and strategic arms discussions, as well as the language the President himself used in thinking about foreign policy both before and after the Iraq invasion.

¶43 Now, I do not think anybody really expects the United States to cede its right of self-protection to others, nor would Americans agree – and it was pointed out that Senator Kerry also did not agree – that somehow or other the Security Council or anybody else would even in situations of non-imminent threat. That is the major point I wanted to make about the report: even in situations of non-imminent threat, I cannot see any American administration agreeing to non-American dispositions about the use of force. It is simply not in the cards.

¶44 They might try for some period of time for approval of international bodies, particularly the Security Council as the United States did try in Iraq. I think France made it very clear that just about nothing the United States could do in the Iraqi case would have succeeded in gaining its approval for the American-led invasion. It was not going to permit Security Council approval, and probably the Russians and the Chinese would not have either. That is again debatable.

¶45 But having said this, of course I do not want to say that only the United States is in Iraq. There has been an important British contingency. Other countries from time to time have also provided force, Italians and others. Some have withdrawn forces subsequently, but American foreign policy as a unilateralist foreign policy simply cannot succeed and cannot be sustained over time and certainly not vis-à-vis many conflicts.

¶46 The US has stretched, pragmatically speaking, too thin in utilitarian economic terms, and politically, it is extremely unwise for any great power, even a great superpower, to be as isolated as the United States has been in foreign policy over the last couple years.

¶47 But above all, burden-sharing is required, in part, because American military might is not met by economic might. The United States has nothing like the commensurate economic power in the world that it has in terms of military power. It does not dominate in any such way. It does not occupy an economic space anything like its military space. Even if we were not in a time of massive American deficits, even if we got out of that hole – which will be a very long time coming out –, even if that were the case, the United States has nothing like the position economically like it has militarily, so burden-sharing is absolutely critical in economic terms.

¶48 It is also critical in terms of personnel know-how. There are countries that are much better and have much more experience at Administration abroad with much deeper history – our British friends are certainly among them – than the United States does. You can not be very impressed by American capacity to do long-term administration abroad in terms of language skills, administrative know-how, and categories on the ground. There is a lot of deadwood around, as you pointed out, and there is not as much live wood as one would like in terms of those missions.

¶49 On critical trade and currency issues, no one can act unilaterally. These are simply issues that will be unilateral issues by definition, but the main point I wanted to make is that security stances affect other countries' dispositions to do business with you in economic terms, on trade, and on international currency issues. Not perfectly correlated, but those issues are affected by security stance.

¶50 Now, let us be fair. In many places where the United States – and these are my concluding remarks, Mr. Chairman – in many places where the United States did take action, it did so, I would say, hesitantly. The United States, if you recall, was not quick to act in the former Yugoslavia. It ceded action including military action to the Europeans, who even in their on backyard did not act on human rights grounds or any other grounds, because they either lacked good logistical capacity or the political will.

¶51 So, the United States acted with much more force than its European allies were willing to do in the former Yugoslavia. If one looks at the current discussions going on with North Korea today, it is other countries that often have pushed the United States to enter bilateral talks with North Korea. It has been the United States that has wanted multi-party talks with North Korea, involving Russia, China, and Japan and the Republic of Korea in the South. So, one should not come to the conclusion that everywhere you look, the United States wants to act unilaterally.

¶52 It is very fair to ask, is NATO really ready for burden-sharing? Have European powers and our other NATO allies, including our Canadian friends, been willing to tax themselves and create military forces required, so that there truly is burden-sharing across the world in military terms? That is, I think, a fair question to pose.

¶53 I exempt the United Kingdom from that question, Sir David. I would not exempt all our other NATO allies from it.

¶54 Is the Security Council willing to make tough decisions? Sudan does not suggest so. Yes, one can say Sudan is a complicated place, but it does not get you off the hook from really saying, "What is the Security Council willing to do, and what kind of muscle is it really willing to put behind its own resolutions or even to be able to formulate those resolutions?"

¶55 So, what the many last months have shown is that if you start with a mission that others see as ill-founded and illegitimate, it is very hard to engage those others ex-post, although the UN did come into Iraq by June 2003.

¶56 It was not only the devastating loss of people in the UN mission which led to the partial withdrawal, it was also the willingness of the US to share decision-making, and to implement in a shared way in Iraq. And if you want others to be with you, you have to do some sharing of common ground, not only the tasks and the burden, but on the grounds of decision-making and how you can conduct business. Thank you.

STEPHEN SAWYER:

¶57 Thank you, President Bienen. We will now hear from Ambassador Feisal Istrabadi.

FEISAL ISTRABADI:***

¶58 Good afternoon. I want to say how very pleased I am to return to Northwestern. I would say that it is a homecoming, except that I have not yet managed actually to finish my LL.M. in human rights here.

¶59 In the presence of this distinguished audience, including the president of the University, let me thank Professor Doug Cassel for his support of my efforts –interrupted first by my participation in writing Iraq’s interim constitution thirteen months ago, and then by my current duties– to obtain the degree. He has done everything to get me to finish (except actually writing my papers), and I will always be grateful to him. I say it publicly: I still have high hopes for May. I pause to note that Doug and I first met in October 2002, when he and I debated the legality of the then-impending war in Iraq. Here we are again.

¶60 I should say that I am here in my personal capacity. My observations today are my own, not those of my government.

¶61 The premise of this panel is that the Bush Administration, in the case of Iraq, used the doctrine of preventive force against future threat. I am not quite certain that that is true, although I recognize that some of the language used by the Administration might suggest it is.

¶62 It seems to me, however, that the administration relied not so much on this doctrine as on Iraq’s failure to discharge its obligations, imposed multiple times by the Security Council under Chapter VII, fully to disarm and disclose. It then asserted that in a world after September 11th, it was unwilling to chance its vital security interests on the good conduct of Saddam Hussein –an eminently rational view.

¶63 Even if I am correct in this interpretation, I suppose an entirely different set of questions might arise, such as whether a member state has the right unilaterally to enforce Security Council resolutions. Fortunately, that issue is far beyond the parameters of this panel.

¶64 Though the authors of the report clearly reject the coalition’s use of force in Iraq, I would argue that the report itself mandates action in Iraq. After all, it endorses the use of force to relieve humanitarian suffering brought about by regimes which effectively declare war on and slaughter their own populations. It is true that the authors sometimes reject such action where the Security Council refuses to authorize action – Iraq is a paradigm – but the authors undercut their own argument against unauthorized intervention, it seems to me.

¶65 As I will show, when the Council fails to act in a conflict where intervention appears desirable to the authors, and where member states act notwithstanding lack of

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Security Council authorization, the report does not criticize the intervention; rather, it criticizes the Security Council.

¶66 One general observation is worth making. An arguable weakness of the report is that it treats the Council as though it were composed of wise and learned judges and scholars applying the norms of international law impartially. Of course, the Council is no such thing. It consists of fifteen member states of disparate power, each attempting to vindicate often irreconcilable agendas.

¶67 Many council members play a zero-sum power game. In short, to take the recommendation of the Panel seriously on interventions in sensitive places like Iraq or the former Yugoslavia, requiring Council approval for intervention relegates the United Nations at best to the status of a debating society, if not to that of an idle and mildly interested spectator.

¶68 I begin by observing that, had the report's view of the coalition's intervention in Iraq prevailed, I would not be here, certainly not as an ambassador from Iraq. In my place, I suppose, Muhammad al-Dori, Saddam Hussein's last Permanent Representative in New York, might be on this panel. Except that he was not allowed to travel outside the five boroughs, this scenario is not so far-fetched. Dr. al-Dori is a former dean of the Faculty of Law at the University of Baghdad, and specialized in international law.

¶69 If, as the report implies it should have, the United States had backed down in light of the Security Council's failure to act against Saddam, I imagine al-Dori would be congratulating himself and the conference participants at the victory of the rule of law over lawlessness, emphasizing that, without adherence to international law, the law of the jungle would obtain.

¶70 In the meantime, I, like an estimated three to five million other Iraqis, would be midway through my thirty-fifth year in exile, a milestone I would have marked on June 1st. Rather than awaiting trial, Saddam would still be free to terrorize twenty-seven million souls, treating Iraq like a Mafia family, except that Mafia dons do not have the capacity to exterminate hundreds of thousands of people on a whim.

¶71 Iraq would still be operating under a brutal regime of sanctions which eviscerated its middle and intellectual classes, aimed as it was directly at them. The Kurds would still have de facto independence, and the two poles, Baghdad and Erbil-Sulaimania, would be continually moving farther apart. Every now and then, some human rights organization or another would regret the gross violations of human rights extant in Iraq. God would be in his heaven, and all would be right with the world, in the report's Weltanschauung.

¶72 But that is not quite the full picture. To begin with, the report notes that tyrannical regimes – or at least sufficiently tyrannical regimes – constitute a threat to world peace and security. Two paragraphs in the report which I have here quoted in full, in the interest of time I will not read them, but two paragraphs that are of most particular interest here are paragraphs twenty-nine and thirty-six.

¶73 Paragraph twenty-nine talks about the concept of limiting state sovereignty and derogation of the Westphalian system, such that when a member state signs the United Nations Charter, it not only has the benefits of sovereignty but also accepts the responsibilities of sovereignty. One of those responsibilities is the obligation of a state to protect the welfare of its own people and meet its obligations to the wider international community.

¶74 Paragraph thirty-six notes that the principle of collective security means that some portion of those responsibilities should be taken up by the international community, including supplying the necessary protections in the case of human rights abuses.

¶75 Therefore, governments individually owe the world a duty of protecting their citizens against gross human rights abuses, and UN member states have a corresponding collective duty to protect citizens of those states whose governments fail to abide by these international obligations. In the context of judging the Iraqi intervention by the report's standards, it is also important to recognize that collapsed or failing states – arguably Iraq was certainly collapsing and/or failing – constitute a threat to world security, according to the report.

¶76 In this context, the authors are candid in their criticisms of some of the places around the globe where a collective failure to intervene has caused much suffering. The report is scathing in its assessment of the failure to intervene in Rwanda, for instance. Here, the authors name names, as we have heard this afternoon, saying that the reason that the Security Council failed to act timely is that it was bowing to United States pressure.

¶77 It is curious, however, that, while noting in the next sentence of this paragraph that the Council also failed to act to prevent ethnic cleansing and genocide in Bosnia-Herzegovina, the authors fail to note it was another permanent member on this occasion which applied pressure to which the Council bowed. I will leave it to others to comment upon why it is that the United States is named as the reason for whatever failure obtained, while other countries get a pass.

¶78 Kosovo is precisely the type of collective security intervention by the United Nations of which the authors seem to approve. Unfortunately, of course, there was no such collective intervention. For the same reasons that such intervention was impossible in the case of Bosnia-Herzegovina, the Security Council failed to act in the case of Kosovo.

¶79 There, it was NATO which intervened. The listener, expecting objectivity from a report of this type will, quite naturally, expect the same scathing criticism of NATO as one finds of the Iraq Coalition for “erod[ing]” the “spirit of international purpose” by intervening in Iraq. Such a listener would be disappointed. Paralysis in the Security Council, according to the report, led NATO to bypass the UN. It is the UN's fault, in other words, that NATO was left with no choice but to act outside the international system.

¶80 Why the intervention in Iraq cannot be justified on the same basis, I must confess, is a mystery to me. I take it that the brutality of Iraq's previous regime is stipulated in this audience. No need for me to mention the genocide of the Kurds, the mass killings of the Marsh Arabs, and the total brutalization of an entire country. We all know that the Baathist government continued to carry out a brutal regime of ethnic and sectarian cleansing. That regime's history regarding its weapons program is also of record, and I need not recite it here.

¶81 Notwithstanding these facts, two permanent members announced prior to 19 March 2003 that they would veto any authorization resolution in the Security Council, one saying that in no circumstance would it fail to veto an authorization resolution. One can easily imagine a different, perhaps more consistent, set of authors concluding that it was

this paralysis on the Council which compelled the coalition to intervene in Iraq, thus bypassing the UN.

¶82 The report elsewhere criticizes the UN for its docility. In the authors' words, the world body has acted with "glacial speed" in Darfur, for instance. Indeed, in exasperation, the authors note that over the past decade and a half, the world body has only acted in East Timor in concert with national governments and regional organizations to prevent mass-killings. The catalogue of failures by the Security Council to prevent or intervene in places where genocide and mass-killing were underway does not, it is worthy to note, allude to Iraq and its former government –not Iraq's invasion of Iran, not Saddam's brutality. One might be accused of gross naïveté in hoping that the oversight was not done intentionally to avoid any chance of sympathy the reader might have for the 2003 intervention in Iraq.

¶83 I realize that the report's conclusions are hortatory, not descriptive. Still, in this audience many of whose members will be quite sympathetic to the positivist legal tradition, I must ask: whence emerges this predisposition towards collective action by the Security Council? For all the protestations to the contrary, a careful reading of the report indicates that the instances in which member states have sought and obtained Security Council approval to go to war can be counted on the fingers of one hand. Chad, for instance, appears nowhere in the report. Putting aside East Timor and peacekeeping operations authorized after the fact, Iraq in 1991 seems to be the foremost example, along with Afghanistan in 2001.

¶84 Indeed, the report concedes as much, when it allows in one of its understatements that "Collectively authorized use of force may not be the rule today." Yet the authors assert that an expectation obtains that the Security Council should be the arbiter of the use of force. Who has that expectation? Can it be reasonably asserted that such an expectation is extant when two permanent members went to war with a coalition of some thirty nations without troubling themselves over the lack of specific Security Council authorization?

¶85 Other than efficiency, why should the Security Council be the UN arbiter anyway? My colleague, Mr. Luers, predicted someone from the Third World would say that and here I am.

¶86 The Security Council operates very much like a closed club, with zero transparency. Even if the number of seats on the Security Council is increased, the proposed total membership will not significantly exceed ten percent of UN member states. The General Assembly, on the other hand, operates far more transparently, and has the advantage of having every member state represented. I ask rhetorically why it should not be the arbitrator of the use of force, and is it, in fact, realistic to expect great powers to cede this power to any organ of the United Nations or any other international body.

¶87 As it relates to Iraq and its liberation from a brutal tyrant, the report leaves much to be desired. Nor is it only the report which is wanting. At the opening of the fifty-ninth session of the General Assembly last September, the Secretary-General repeatedly emphasized the rule of law, exhorting member states not to act unilaterally. That was obviously a thinly-veiled criticism of the coalition's intervention in Iraq. I begin with the premise that a world order which can justify the continued presence of a brutal tyrant like

Saddam Hussein by congratulating itself about the existence of the rule of law is an order that has nothing to say to me or to my compatriots.

¶188 I applaud the authors of the report for their conviction in insisting that the civilized world should not tolerate the existence of despotism. I regret that they did not have the courage of that conviction in recognizing that coalition intervention in Iraq accomplished precisely that greater moral and legal good: the liberation of a member state and its people from absolute tyranny.

¶189 Thank you.

STEPHEN SAWYER:

¶190 Thank you, Mr. Ambassador. We will now hear from Jan Wouters.

JAN WOUTERS:

¶191 It is a great pleasure and honor to be here at this Fourth Transatlantic Dialogue co-organized by the Universities of Leuven and Northwestern.

¶192 The first of these conferences have taken place in Brussels in the European Parliament, focusing on terrorism, the death penalty, and international criminal justice, respectively; now we have moved to the other side of the Atlantic to Chicago to discuss a number of interesting issues relating to human rights and UN reform.

¶193 I was told – but I will not quote my source – that a good slogan characterizing Chicago and its citizens is “*Ubi est mea?*”, a Latin phrase which one can freely translate as: “What can I find in this for me?” We could apply this saying to the High-Level Panel Report on Threats, Challenges and Change: what can the United States find in this report to legitimize its war against Iraq? When reading the report, the question how the United States’ decision to act without Security Council authorization in the war with Iraq has impacted the future role of the UN, which is one of the crucial questions of this conference, could receive a rather brief answer: it has not.

¶194 The Panel has not only been very pragmatic in the changes that it recommends to make the UN better-suited to face modern threats to security – remember Lord Hannay’s words of this morning: no blue sky thinking. It has also, with regard to the *jus ad bellum*, firmly confirmed its belief in the solidity of the UN Charter as it stands: no need for changes.

¶195 The Panel strongly reiterates the Charter’s fundamental principle prohibiting the use or the threat of force, and sees no reason for changing or even re-interpreting either Article 51 of the Charter on the right to self-defense or the provisions of Chapter VII, which sets out the enforcement powers of the Security Council in the face of threats to, and breaches of, the peace. Only the references to the Military Staff Committee should be removed in the articles concerned, as the Panel recommends, making the Secretary-General’s Military Adviser and the members of his staff available on demand by the Security Council in order to provide professional military advice to the latter.

¶196 However, upon closer reading of the Panel Report, one does notice some very interesting considerations which are clearly aimed at addressing the United States’ security concerns as they also underlie the US decision to go to war with Iraq. In my presentation, I will focus on these considerations, first of all, by addressing the right to

self-defense, and by looking into the role of the Security Council under Chapter VII of the Charter.

¶97 One preliminary reflection upon reading the report relates to the following. The Panel attaches, and I think rightly so, great importance to a common global understanding and acceptance of when the application of force is both legal and legitimate, as “[o]ne of these elements being satisfied without the other will always weaken the international legal order – and thereby put both state and human security at greater risk.”⁶

¶98 I fully endorse that statement, which stresses the need to have both legality and legitimacy in place in order to sustainedly uphold the international rules on the use of force. I would just observe that, in terms of the structure of the report, it is interesting to see that the right to self-defense is only addressed from the legal point of view and not from a legitimacy perspective.

¶99 The report only develops a five-pronged test of legitimacy criteria for the Security Council to apply when it authorizes or endorses the use of force. That is maybe logical in light of the restrictive interpretation which the Panel gives to the right of self-defense. Some may argue that, with such a strict interpretation, the legitimacy issue does not really arise here.

¶100 Still, I think it does, and I would submit that if UN member states were more lenient in their interpretation of self-defense, the least one should say is that the considerations of the Panel concerning the legitimacy of the Security Council mandating the use of force should also be taken very seriously for unilateral action as well. But maybe that is what we can read in paragraph 209 of the report,⁷ where the Panel states that it would be valuable if individual member states, whether or not they are members of the Security Council, subscribe to these guidelines.

¶101 Let me now share with you some reflections about the right to self-defense. As is known, the US Government did not invoke the right to self-defense as a legal justification for its military actions against Iraq in 2003. The legal base asserted by the US was that the invasion was lawful under international law based on previous Security Council resolutions from the early 1990s by which the Security Council had authorized a coalition of states to repel Iraq from Kuwait and to restore peace and security in the area.

¶102 I will come back to this issue of Security Council-based mandates in the last part of my presentation.

¶103 This being said, I personally continue to have difficulties with a legal reasoning that reads into old Security Council resolutions a revitalization of an old mandate to use force more than ten years afterwards with a different coalition and with a different purpose. It is often stated in the literature that the Iraq War did, in fact, constitute a first application of the doctrine of preemptive strikes as laid out in the new US Security Strategy in 2002. If that were the case, how would one deal with this from the viewpoint of the Panel Report?

¶104 For all clarity: I am now going to use, in accordance with the Panel Report, the expression “preemptive” use of force when speaking of acting in anticipatory self-defense against an imminent threat, and will therefore change terminology. “Preventive”

⁶ High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 184, UN Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

⁷ *Id.* at ¶ 209, UN Doc. A/59/565 (Dec. 2, 2004) (“We also believe it would be valuable if individual member states, whether or not they are members of the Security Council, subscribed to them.”)

use of force means the use of force against non-imminent or non-proximate threat. In passing, I would observe that there is a place in the Panel Report where, interestingly, when discussing “preemptive” use of force, it speaks not only just of imminent threats but also of “proximate” threats.⁸

¶105 As to the preemptive use of force, the Panel takes the position that the current legal framework is enough in the sense that it is of the view that one should keep Article 51 of the Charter. It does not favor rewriting or reinterpreting it. However, it should be noted that when the Panel makes statements about the interpretation of the right to self-defense, it refers not to Article 51 but to established international law, in other words, to customary international law. The Panel states that, under customary international law, it is lawful for states to take military action in the face of a threat, as long as the threat and attack are imminent, no other means will deflect it, and the action is proportionate. There is an interesting footnote in the report at this juncture: it makes reference to three American authors. I would respectfully submit that there is other literature that takes another point of view, but only these three authorities were mentioned.

¶106 What is interesting here is that the Panel says that one does not need to reinterpret Article 51, when, in fact, it is doing just that. It considers this same Article 51 through the lens of customary international law; whereas, in the Nicaragua Case, the International Court of Justice indicated that there are two regimes. On the one hand, there is customary international law with the inherent right of self-defense; on the other hand, there is the Charter regime of Article 51. In the Nicaragua Case, the ICJ has, in fact, rejected the complete identity of the customary law regime and the Charter regime.

¶107 So it is not necessarily the same thing, but the Panel interprets Article 51 in a manner consistent with general international law, which I find a very interesting point of view.

¶108 But what is not addressed at this juncture in the report and what is also rather important is the question as to how far the notion of self-defense goes with regard to the armed attack and the question of who is doing the armed attack. You may remember that with regard to 9/11, there was a whole debate on whether the terrorist attacks constituted an attack under Article 51, i.e. whether these attacks emanated from a state or were at least attributable to a state. This is not addressed in the report.

¶109 When one deals with terrorism, the counterparts are often non-state actors, so the whole question of whether or not the acts are attributable to a particular State should be addressed. In the most recent case law of the International Court of Justice, such as the advisory opinion on the Israeli security wall, one sees that the ICJ sticks to the idea that, at least, the attack should be attributable to a state.

¶110 In any event, the most interesting part comes when we deal with the preventive use of force, i.e. where there is no such imminent or even proximate threat. There, the Panel makes a statement that merits full quotation. In paragraph 190, when it deals with the question whether there can be a legitimate use of preventive force, the report states: “The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so chose, there will be, by definition, time to

⁸ *Id.* at ¶ 189.

pursue other strategies, including persuasion, negotiation, deterrents, and containment – and to visit again the military option.”

¶111 This is a fascinating paragraph, because the question arises: what does it mean to visit again the military option at the end?

¶112 I do not dare to say what the Panel had in mind – this is more or less an open invitation to Lord Hannay to comment on it – but can we not interpret this quotation in two ways? Either you have to go back to the Security Council and stay there even if the latter persistently says no, or you can, after having really tried all the options, including persuasion, negotiation, deterrents, and so on, finally revisit the military option as a unilateral action.

¶113 This is a very interesting passage in the report. In any event, the question arises whether, if we were to apply this quotation to the case of the Iraq War, the US’s action and decision to go to war was in conformity with it. We know that the US went to the Security Council. We also know that, at least in Europe, there was a perception that there was some impatience with regard to the results that had to be produced and the deliberations. Was there enough time left to pursue other strategies? Were UN inspections given sufficient time? My personal assessment is that they were not.

¶114 The question arises whether the doctrine of humanitarian intervention would have been a better call from the viewpoint of the Panel. One may recall from this morning’s presentations that the Panel indeed recognizes in its report the emerging norm of a collective international responsibility to protect. However, the report speaks of a collective international responsibility, and it adds to this, that the duty is “exercisable by the Security Council authorizing military intervention.”

¶115 So only the Security Council can mandate this in the eyes of the Panel. It is also spelled out that this is only to be done as a last resort and only in the event of genocide, other large-scale killing and ethnic cleansing, and violations of international humanitarian law. The report does not mention anywhere unilateral humanitarian interventions. It would be interesting to come back to this point later in the discussion.

¶116 Prodemocratic intervention, which was also sometimes mentioned as a justification for the Iraq War, can not be found in the Panel Report, neither to justify a collective use of force, nor to justify a unilateral use of force.

¶117 If I may, I would still like to give some brief reflections from the viewpoint of Chapter VII of the UN Charter.

¶118 The Panel Report, in fact, is very orthodox when it comes to reaffirming the exclusive right of the Security Council – barring self-defense, of course – to authorize the use of force. It does not speak out on the question, which more or less arose in the Iraq case, whether old Security Council mandates can be revitalized when a material breach of the conditions of a cease fire occurs.

¶119 Let us assume for a moment that the Security Council back in 2003 would have gone along with the US. The question, from the viewpoint of the Panel Report, would then arise whether the five-pronged legitimacy test that the Panel advances, would have been met.

¶120 I briefly recall it: serious threat, proper purpose, last resort, proportionality, balance of consequences. I would respectfully argue that (almost) none of these five tests were met in this case. A serious threat, justifying – as the Panel says – prima facie use of military force: in my view, and with hindsight, this was not the case.

- ¶121 Proper purpose. There, of course, one can have a whole debate. What the Panel Report asks, is what the primary purpose to halt the threat is. There has been a lot of disagreement on this in the international community.
- ¶122 Was the use of force the last resort? I think that is almost a rhetorical question based on the fact that UN inspections could have been carried much further under Security Council Resolution 1441.
- ¶123 Was it proportional? There, the big question is, when the Security Council mandates the use of force to, for instance, rid the country of weapons of mass destruction, whether that is a sufficient mandate to go as far as a forcible regime change.
- ¶124 The final test – and the most difficult I find – is the balance of consequences where the Panel asks: “[i]s there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction.”⁹ Were the consequences of action – in this case, invasion – not likely to be worse than the consequences of inaction? This is a very difficult test to apply, and I think, in all fairness, that very few countries and observers would have predicted that the toppling of Saddam Hussein would lead to such a period of prolonged instability in Iraq.
- ¶125 Therefore, there are some sobering lessons for all of us to draw from this tragedy. The richness and the detail of the text and considerations in the Panel Report regarding the use of force shows, I think, that one could staunchly contradict what I read in a book that I bought just yesterday in a famous book store not too far from the Northwestern law library.
- ¶126 It is a book by Jed Babbin, a former Deputy Under Secretary of Defense under the administration of President Bush, Sr., entitled “Inside the Asylum: Why the United Nations and Old Europe Are Worse than You Think.”¹⁰ From the first page, it is more or less a vitriolic attack on the United Nations. The interesting thing is that it also attacks the European Union and repeatedly refers to the United States as “the EUnuchs.” On page seventy-nine, Babbin writes about the setting up of the High-Level Panel Report and says, “The panel will labor for months and produce a mouse. Or more likely a rat.”¹¹ Babbin then submits that because Annan has already told the Panel what he wants (he wants a third world country, probably from among the Arab states, to become a veto-holding member of the Security Council), this will make Security Council actions against terrorists and the countries that harbor them impossible.
- ¶127 With all due respect, I would argue as an international lawyer and also as president of the United Nations Association of Flanders-Belgium that the Panel did not produce a rat, but rather a unique reflection on how to revitalize an essential institution of world peace, the United Nations.
- ¶128 Thank you.

⁹ *Id.* at ¶ 207.

¹⁰ JED BABBIN, *INSIDE THE ASYLUM: WHY THE UNITED NATIONS AND OLD EUROPE ARE WORSE THAN YOU THINK* (2004).

¹¹ *Id.* at 79.

STEPHEN SAWYER:

¶129 On behalf of us all, I thank our panel members for highly interesting and stimulating remarks. Our purpose now is to call upon you, the members of the audience, to pose questions.

¶130 However, before we hear from the members of the audience, I would like to offer the opportunity to Lord Hannay and to Mr. Luers to make some brief comments in connection with what the panel has said this afternoon.

¶131 So Lord Hannay, will you proceed?

SIR DAVID HANNAY:

¶132 Thank you very much. Well, I am afraid you have all been hearing too much from me today, but let me very briefly respond.

¶133 First of all, I think perhaps it might be honest of me to tell you that my personal position on Iraq is quite similar to that of the president of this great university; that is to say, I too supported the action that was taken, although I have come later to doubt whether the consequences were properly thought through. And I have very severe criticisms of a number of the decisions that were taken after the end of the military operations.

¶134 I just wanted to say that because I think it is always well on these occasions to be clear about where you are starting from.

¶135 Secondly, again on Iraq, I would say that – I am sure you know this – the British Government’s case for taking military action was solely based on an interpretation of Security Council resolutions. It did not, therefore, lend itself to any application of doctrines of preventive war or anything like that.

¶136 Saddam had not complied with the Security Council resolutions and had been found by the Security Council not to have complied. That is what 1441 said in the fall of 2002, and the new way therefore that it was legitimate to take military action against him under the preexisting authorizations of 1990 and 1991.

¶137 That was the basis. Now, the fact that the factual underpinning of that has subsequently disappeared has, of course, caused all the politicians concerned an enormous amount of trouble, but that is the position.

¶138 Now the points on the Panel. I was fascinated by the Iraqi Ambassador’s very ingenious reconstruction of the report in such a way as to show what the report would have meant if it had been applied to the action in Iraq which actually took place two years before it was written.

¶139 We went to the very greatest trouble in writing this report not to recycle the events of Iraq through what we were writing because it was quite clear to us that if we had done so, we would have made enemies on all sides and not have advanced anything at all.

¶140 So, although I enjoyed listening to his analysis, I have to say that you will not find anyone on the Panel who will say what would have happened if the Panel’s report had been applied by United Nations to the events in Iraq two years before. It was a deliberate decision not to say that. I cannot and should not stop anyone who wishes to try and analyze it in the way he has analyzed it. That was not the way that we went about our business at all.

¶141 On the famous paragraph 191, I am afraid I am not going to be very helpful to you. I am not going to try and construe it. I am certainly prepared to construe the recommendations of the report. But when it comes to the commentary, and this paragraph is a paragraph in commentary, it is not a recommendation, I think it is better not to elaborate. If I had to say just one word about it: yes, indeed, there is a kind of loophole there that is perfectly clear.

¶142 I think the Panel was very conscious of the fact that we were not the International Court of Justice. It was not for us to write international law, and we were not writing international law when we wrote that report. We were writing a policy report with policy recommendations; and secondly, we were very conscious that the UN, as somebody said this morning, has fallen into problems for many, many years through excessive expectations and through a rather, I would say, sloppy way of giving the impression that it can solve absolutely every problem all the time. "Just come along to Uncle at the UN and we will give you the answer."

¶143 I think in that paragraph we are admitting that even the Panel's report did not have the answers to all situations, and we were not trying to produce a kind of matrix which would be applied rigidly to every circumstance that might come along, and that is what that paragraph really says.

¶144 But I do not want to go any further than that in commenting upon it.

STEPHEN SAWYER:

¶145 Mr. Luers.

WILLIAM LUERS:

¶146 If we are confessing where we stood, I will have to say that I stood one hundred percent opposed to that war, and I never thought in the case of my friendships in New York, virtually everybody I knew and respected in the area of foreign affairs referred to themselves as reluctant hawks. That was the term of reference in terms of how they thought about the war. They did not really want to do it, but they thought it had to be done.

¶147 Two points. One, I think something that Henry said sparked my thinking. Rand Corporation is doing a study, which is coming out very soon. You know, Rand gets a great deal of its money from the Department of Defense, and they are doing a study on peacekeeping over the last forty years, what worked and what did not. They take the case of several US operations and several UN operations, and they conclude surprisingly that the UN does far better than the United States time and again and that the United Nations has the capacity to stick with the problem and work it through.

¶148 And the recidivism of those places where the United Nations was, I can not cite all the cases, but I think it will be an interesting book to come out.

¶149 Let me just say one more thing about the future.

¶150 I said in my conversation that, in fact, I cannot imagine an exit strategy from Iraq without the United Nations. I have to say that there is the very optimistic scenario that these elections and the subsequent work on the constitution will lead toward a political amelioration of the civil war that we are witnessing, and eventually toward an Iraq that has a representative government of some sorts that can manage its own affairs internally.

¶151 I guess my own reading today is that that is an extremely unlikely possibility and that the more likely possibility is that this election, although it has to be held next week, will result in a pre-civil war environment in which one large important group of Iraqis feel disenfranchised. The Kurds will feel overwhelmingly disenfranchised as will the Shiites, and that is a formula possibly for a continuing deterioration, both militarily and politically.

¶152 And the question I have is at some point: will the President and will the administration decide that this is not going well and say it in saying, “The dream that we hoped for is not going to work.” Or, “It is going to work and we are going to make it work in a different way than we are doing now,” and not manage to deal with the situation with military force but through a political negotiation which ultimately is what has to happen.

¶153 At that point, although the United Nations cannot enter physically with any substitute military presence, it will only be the United Nations, it seems to me, that will be able to pull together the neighbors who ultimately will be the answer to this problem.

¶154 And the United States without the United Nations will have to find ways in which Iran, Syria, the Saudis, the Turks, and the Jordanians will to come together in some way to help work with the political factions over which they have influence and relationships in order to find a way for the neighborhood to work this out.

¶155 Nobody in the neighborhood, with the possible exception of Israel, would like to see this continue in the mess it is in now. It is not in anybody’s interest for this to be prolonged, and it is likely to be clearer and clearer over time that a large-scale US military presence is a profound inhibition to further work in reaching a political solution.

¶156 I was around and deeply involved when we pulled out of Vietnam. That option we do not have. We do not have that sort of, “We won, let us get out.”

¶157 There has to be another option. I do not see that option taking place, assuming things go badly, which is my bet, without the United Nations. Okay.

STEPHEN SAWYER:

¶158 Okay. We will take questions now from the floor.

AUDIENCE MEMBER:

¶159 All that you have just said, in your view, I would like to hear the Ambassador’s view from where he sees things as an Iraqi and as having continued to work with the population, so you painted us a picture, and I do not – I mean, I totally accept what you are saying, and I understand it. I would like to hear his picture as he sees things at this moment in that vein.

STEPHEN SAWYER:

¶160 Okay. Next.

AUDIENCE MEMBER:

¶161 Thank you. Two questions for the Iraqi Ambassador. (Inaudible). Could you tell us more about this assumption?

ANTHONY SMITH:

¶162 My name is Anthony Smith. I am a local engineer for the Burlington Northern Santa Fe Railroad, and the question I had, I heard one member of the panel who was for the war in Iraq say that some of the reasons that he had for going to war, he had changed. And the question is, if it was wrong to go to war, why is it so right to stay there?

STEPHEN SAWYER:

¶163 Okay. Yes, sir.

AUDIENCE MEMBER:

¶164 To what extent does the self-serving personal and national interest of a Council member affect their vote? For example, in reading some items on the Arab press, we used force in order to obtain oil resources in the base of the Middle East as one of the goals. With regard to other countries, other members, there has been some benefit from the Oil for Food Program, and also they had large debts to collect from Iraq when Iraq would fall.

STEPHEN SAWYER:

¶165 All right, sir.

CHUCK PAYNE:

¶166 My name is Chuck Payne and I am from Wisconsin.

¶167 My question relates to the five principles, and particularly the proportionality principle regarding the legitimacy of war and the idea that the Iraq War may be the latest in a long series, including Vietnam, World War I, and then the others, where we seem to learn from unfortunate experience that the war that you get is not the war that you envisioned. So that whatever concept of proportionality you may have had in advance does not play out, and especially in the era of nuclear weapons. Should that not be borne in mind in looking at proportionality?

STEPHEN SAWYER:

¶168 All right.

AUDIENCE MEMBER:

¶169 It seems to me that possibly from the standpoint of the Ambassador that it was a good thing because it worked out, at least to some extent in Iraq, but what if it did more damage to international relations, and led to greater turmoil in other areas in the future? I am wondering if anybody can comment on whether they feel it did more damage aside from the immediate situation in Iraq.

STEPHEN SAWYER:

¶170 Okay.

MIKE KIRK:

¶171 Mike Kirk, Citizens for Global Solutions. If 9/11 had not happened to the US, would the Administration have been as readily available to go into Iraq and do what it did, or would that have been delayed somewhat?

STEPHEN SAWYER:

¶172 All right.

AUDIENCE MEMBER:

¶173 I would like to address the three reasons that President Bienen gave for why he initially supported the war in Iraq.

¶174 I noted that when he changed his mind, it was not because he felt the reasons were wrong, but it was a cost-benefit analysis that changed his mind.

¶175 Okay. The first reason was that Saddam was a killer, so this is a human rights issue, so he poses it in an issue of war or no war. However, if the sanctions had not been trumped by greed and had really worked well in the benefit of the citizens, would that have been a possibility of dealing with Saddam without going to war?

¶176 The second one that you gave was the road to Jerusalem leads through Baghdad. I would really like a more in-depth explanation of what you mean by that.

¶177 And then the third one, the spill-over argument of removing Saddam from Iraq, well, one could say that maybe we had better grounds to establish democracy in Iraq.

STEPHEN SAWYER:

¶178 All right. Thank you

SARAH JOE:

¶179 Hi. I just have a question, I guess, for everyone. I am Sarah Joe. I am a student here at the school.

¶180 For the question of the human rights violations, what specifically was going on now that needed to be addressed as opposed to other human rights violation that are going on that should be addressed now?

¶181 And also specifically for the Iraqi Ambassador, would it be that you were saying that any kind of tyrannical dictatorship should be overthrown, but would you advocate going to war in cases like the Saudis?

STEPHEN SAWYER:

¶182 Okay. We will now turn to the panelists in the same order as they proceeded before to respond to the questions that have been put. President Bienen.

PRESIDENT BIENEN:

¶183 Thank you.

¶184 On this cost-benefit question, I think you are characterizing me pretty much accurately. First, cost-benefit has to always be looked at in timeframes, and that is one of the most difficult things about any assumption or analysis of costs and benefits.

¶185 And my favorite little epigram on that is Chou En-lai once was asked to assess the consequences of the French Revolution, and he said, "Too soon to say." And I think it is a very good point. So as we look back on all sorts of difficult decisions which are taken, our optic on those decisions, I think, varies depending on the hindsight, the time of the hindsight.

¶186 You know, you can think about this in terms of the Vietnam War where lots of the arguments that were given for it look very odd in terms of what was then the Sino-Soviet conflict, but the perspective on it at the time was somewhat different. A decade later or another decade, I think it will be different twenty years from now.

¶187 I think it is an important point for everybody to have in their mind when talking about cost and benefits. Sometimes the cost looks very staggeringly high at a given point, and sometimes they look worth it or not worth it at different time periods as well as the benefits.

¶188 The other general point that I wanted to make, and I will try to be more specific about it in a moment, is unintended consequences. Every social scientist knows that all kinds of actions have unintended consequences, and policy makers try to think about consequences in terms of intentional, what may be the conceivable unintended consequence or effects of their actions.

¶189 And so when the – maybe not the very First Gulf War, you are right, there have been more than one Gulf War. From the point of view of Iraqis it is not just two by any means, but if you go back to the multiple reasons that the first Bush Administration, George the first, gave on the invasion into the Gulf, it was shifting even at that time.

¶190 Multiple arguments were made from oil to destroying Kuwait's sovereignty and not letting violation of international norms when Saddam invaded Kuwait, preserving sea lanes. I mean, there were ten different arguments and they shifted around to some extent to what we have now. Why? Because that is an accurate reflection of the way policy makers think.

¶191 It is not just cynical having lots of floating-around arguments. It is when you have policy decisions, lots of people bring up lots of reasons for doing or not doing something

in terms of unintended consequences, and you try to understand in a position of imperfect information, and that is the third general point I want to make.

¶192 Everybody's information is highly imperfect in the world. If you had perfect information, life would be nice in running a university or running a foreign policy or anything else, making economic decisions, investing in the stock market. We have very imperfect information in the world, and we often have asymmetrical information. Somebody else you are dealing with may know more or less than what you know about it.

¶193 When I think back on the war, which is still ongoing, if I had known that this insurgency would be so difficult, so embedded, and the Ambassador and I were talking about this after the Panel, I would have said that the costs were too high, maybe even the costs for the Iraqi people, but I am not an Iraqi. I do not live in Iraq. And that is a funny judgment that I make about that. Iraqis can make their own judgment, and I am sure they will make their own judgment about this.

¶194 From the perspective of the United States, if one had told American policymakers at the time that these decisions were being made that it would cost this many billions with this much debt, and that the exit would be not in sight, and as to what the exit might even look like, I do not think that the same decisions would have been made.

¶195 Now, it is hard for me to know how much of the outcome was from bad strategic and tactical decisions that the United States took, and how much of it was in the cards. To me, that is just an unanswerable question until we get lots of history, and even then we might never be able to come to a judgment. It is an important question because it affects how you will act in the future, and it is in a way almost unanswerable, but it is why we often go back to history to learn lessons.

¶196 The trouble is that history does not repeat itself neatly for us, and so we never learn lessons because they are in a way not quite learnable. It is not that we are stupid; it is that life changes. It is, you know, the old question about putting your finger in the stream. Is it the same stream, you got the same finger ten seconds later or whatever.

¶197 Now, the proportionality argument is in part what I am talking about, and I take this gentleman's point on proportionality because I think the unintended consequences and the problem of understanding the downstream consequences of what you are doing should make one adverse to going to war.

¶198 That would be my view, and that was my view in the Iraqi case, partially because it was hard to know and hard to measure what the consequences would be. And, at best, you knew that overthrowing a Sunni minority in Iraq would mean that large numbers of people, including large numbers of people that had much use for Saddam, would be very unhappy. This was as an historic minority regime, going back to the post-tradition colonial regime. There would be many people whose privileges rested on that minority Government who would not have the same kinds of privileges in something like a democratic system. Moreover, it was a place with lots of ethnic and geographic conflicts not located in any neat way.

¶199 The Kurds are not just in the north, but there are Kurds in Baghdad. The Shiites are not just in the south, but there are many in Baghdad. Even in Mosul, there are both Kurds and Sunnis. There are Arabs in Mosul. It is a very mixed-up place, which made it hard to sort out and hard to know what the local conflicts would be and how they would play out independently of what happens at the national level.

- ¶200 All this, I think, gave me great pause in terms of proportionality, so I accept the proportionality arguments.
- ¶201 One of the reasons why we were talking about this was with respect to Rwanda. I was very much in favor of American intervention in Rwanda. One, because I thought it would save many lives, and, two, because I thought it would be intervention. There was no army that you were confronting in Rwanda. There were gangs. And you could go in and go out, and still save lots of lives, and there was a misunderstanding of the historical experience in Somalia.
- ¶202 The American intervention in Somalia worked in my mind. We saved lots of lives in Somalia. We delivered lots of foodstuffs so many thousands of people did not die of famine, and unfortunately Congress did not have any patience with it. Americans soldiers were dragged through the streets of Mogadishu and we went out. But, we also changed the position in Somalia from the time we started to the time left. All that is important, I think.
- ¶203 I will try to finish up with one other point, and that is the point that was asked – two points maybe.
- ¶204 One, sanctions, and the other the road to Jerusalem runs through Baghdad. What I meant by that is in the aftermath of the invasion of Kuwait, which was overturned when Saddam's forces were driven out of Kuwait, it opened up prospects for negotiations. A kind of logjam broke open between Arabs and Israelis, if you recall. There was much momentum, and Israelis felt that the most formidable army (or certainly one of the formidable armies) that threatened them was now gone. This, I think, made them more willing to enter negotiations and to take perhaps some risks. Not perfectly so. Saddam certainly was not the only obstacle to a settlement between Arabs and Israelis, but he was a very formidable obstacle indeed.
- ¶205 So the argument that was made in policy circles, both in the early 1990s as well as now, that the removal of Saddam would be a removal of the obstacle to peace. Obviously, he was not the only obstacle to peace. He was very difficult. I do not know what I think of the argument that Israelis would be in favor of instability.
- ¶206 Maybe that argument that Israel would gain could be made with regard to the Iran-Iraq War and the weakening of two major armies. I think that would be a very short-sighted Israeli view, if it is a view. Instability in a core part of the Middle East and in as important a country as Iraq is, in my mind, not in Israel's interest. Israel's interest is in a stable regime and a very different regime from Saddam's.
- ¶207 Whether people share that view, maybe not all Israel policy, but that was the point. This gentleman asked the same question. It was an opening up and a chance, you know, does that mean that the Iraqi Government that comes to power after the election or a year from now will necessarily be friendly to Israel? Not at all. That is a regime that will have its own interest and its own concerns and will be an historic forum. What its relations with Iran will be, I do not know, but at least it will be a different regime than the Saddam regime.
- ¶208 I have learned a lesson in thinking that things could not be worse. I will give you a little vignette. I was working in the Sudan with US AID at the time when Nimeiri was very shaky. The project was to advise the Sudanese Government on a new exchange system and a trade agreement which they had no interest in. I advised about it because

they would make a fortune with the kind of regime they had set up. It worked for them very well.

¶209 But when I came back, the US was spending about \$400 million a year in the Sudan. It was the second largest trade mission in Africa, after Egypt, by far. And I was asked what I thought. I said, “This is a terrible place, these are horrible policy makers. It is really a nasty regime. You could not get a worse regime, pull the plug.” I am not saying that is why we pulled the plug. But we did pull the plug and that regime tottered and fell. There were lots of elements opposing it as well, and we got a worse regime.

¶210 So from the point of view of American interest, and probably even from the point of view of Sudanese interest, I have learned my lesson. There is always something worse. Could there be something worse than Saddam? It is pretty hard to envision that because I think he is about as bad as it gets. However, at least there is the potential of creating something better, but the costs are terrible and very real.

¶211 The final point I want to make is with regard to sanctions. Sanctions did not work very well vis-à-vis Iraq for many reasons. They imposed hardships on the wrong people so many people suffered. It was a regime that took its money and spent it the way it wanted to spend it. And, in a way, that always happens with sanctions. It is very hard to fine tune sanctions. Sanctions are a second-best policy for people who do not want to use force but who do not want to do nothing either. It is particularly hard to make sanction regimes work when the sanctioned country has something that everybody wants, which is oil.

¶212 And when your neighbors have a very strong interest in violating or abrogating sanctions – the Turks want oil to transit out and they wanted stuff to be imported in, which the Syrians could profit from doing – there were too many people with a stake in having the sanctions regime fail, including people who were lending to Saddam in a short-sighted way. It is fine with me if the French never get paid back or if the Russians never get paid back. I take some pleasure in that, in fact. But I do not think sanctions – sanctions were given much time in Iraq, and they did not produce – they produced something: an attrition of the regime and a weakening of the regime.

¶213 Maybe five years later the Government would have fallen just the same. I can not tell you.

STEPHEN SAWYER:

¶214 Mr. Ambassador.

FEISAL ISTRABADI:

¶215 Thank you. This is the difference between me and a trained diplomat. Lord Hannay said I was ingenious. It is much nicer than saying I was wrong. But with all due respect, I am reminded of Claude Raines’ character in “Casablanca,” when he was *shocked, shocked* to discover that there was gambling going on at Rick’s place as his winnings were handed to him.

¶216 To have the committee saying, “We did not say anything about Iraq, of course. We did not consider how Iraq fit into all this.” Clearly, as I think I quoted accurately that the report accuses the United States and the United States-led action in Iraq as having eroded the international order.

- ¶217 They do not use the word “order,” but it is something to that effect. That, of course, assumes that there was an international order to erode. Part of what I was saying is that it is not clear to me that, in fact, there is an international order to have eroded, since it all seems rather ad hoc to me.
- ¶218 I am going to combine two questions together, and one is the obvious question about the American failure to – no, that is too passive – the American tolerance and willingness to allow Saddam Hussein to massacre hundreds of thousands of rebels in Iraq in 1991. When the first President George Bush exhorted the people of Iraq to rebel, they did. Fourteen of Iraq’s provinces were in rebel control in March of 1991.
- ¶219 Then, Saddam asked General Schwarzkopf whether he could use helicopters, whether they could fly helicopters, and Schwarzkopf said, “Oh, certainly.” And of course the Iraqi Air Force had helicopter gun-ships and the rebels did not, and they literally massacred hundreds of thousands of Iraqis in a very short period of time.
- ¶220 And I will not forget Robert Pelletreau, who was President Clinton’s Assistant Secretary of State, for saying very publicly to the Iraqi opposition in 1992 with a Cheshire cat smirk on his face, “Well, the United States certainly wished the Iraqis well in their efforts to” – and with a dismissive gesture of his hand, in fact – “in their efforts to bring down the previous regime.”
- ¶221 Coupled with the realization of the Iraqis that it was, in fact, the United States with the United Nations that enforced the most comprehensive set of sanctions aimed directly at a civilian population. Here, once again, the report says that the sanctions failed. They did not fail. They succeeded most excellently because they were aimed at interrupting all commerce in Iraq and it worked.
- ¶222 What they failed to do was to affect the conduct of the previous Government; in that sense they failed. But, I remember one time being debated by somebody from the University of Chicago who said something about the sanctions not working, because they were affecting the population of Iraq. Senator Durbin said – this was on John Calloway’s old show – “They are supposed to affect the civilian population.” And that is right. That is the only honest appraisal of sanctions I have ever heard. That is what they were designed to do. That is what they did.
- ¶223 Why am I saying all this? The notion that the United Nations has any legitimacy in Iraq may fly in Chicago and New York. It does not in Baghdad. I say this as one of two Iraqi Ambassadors to the United Nations. There are tremendous resentments on the part of the Iraqis vis-à-vis the United Nations and the Oil-for-Food scandal is just part of it. Iraqis, I think, could probably have lived with some skimming off the top. We are not unfamiliar with that concept in the Middle East, however repugnant it may be.
- ¶224 But, this goes far beyond that, and the resentments are deep. There is a friend of mine who did not have the good fortune of being able to leave Iraq, as my family did, who was an amateur artist who has painted a painting of the United Nations – of the Security Council members, and actually of the UN members and their view of Iraq, and what he has done is he has put Iraq in the middle of the table. I actually thought that it was Iraq on a cross. Having lived in the United States, I sort of was predisposed of thinking in these terms, I suppose, but in fact, it is Iraq on an autopsy table, and when you get close to the painting, that is what you see. And you have the British very clearly with the, you know, sort of looking away and not wanting to look. Kofi Annan is just a big mouth, no other discernible feature. The French and the Russia speaking over here. The

smaller African states in the corner. By the way, when I asked him where the United States was, he said, "This entire picture is the United States."

¶225 So that is the Iraqi view of the United Nations. When I sat for the first time in the Security Council chamber, I thought that every time the United Nations imposes sanctions again that painting should be brought up in the middle of the horseshoe for all the members to see.

¶226 Now, as a practical matter, it may very well be that the United Nations is going to have to have a role in whatever comes about and I understand that. It is one of the reasons I wanted to be in the United Nations, but it is not going to affect legitimacy of how an Iraqi Government is perceived from the perspective of the Iraqis. Let me be very clear about that. At best it will have to do with international legitimacy in a sense of a potential exit strategy for the United States. Without 9/11, I do not think the United States would have acted in Iraq. I do not think that the stars would have aligned properly.

¶227 I want to address one other question, and that is about tyrannical dictatorships. I understand that it is not possible for all the world's tyrannies to be made to fall *deus ex machina*. (There has been a lot of Latin in here. I thought I would get in on it.) But, the fact that you cannot intervene everywhere is not a reason not to have intervened in Iraq. Now, there may be reasons for not having intervened in Iraq, but the mere fact that you cannot intervene everywhere is certainly not one of them.

¶228 The nature of the Iraqi dictatorship, however, is different in kind than the fairly petty dictatorships one finds in the region. Obviously, there is a limit to what I can say, but I will say this: The nature of the dictatorship in Iraq had far more in common in terms of scope, in terms of its impact on the population of Iraq and the predisposition of the regime to use whatever means necessary to maintain itself in power, had far more in common with fascism in Europe in the '20s, '30s and the '40s and with Stalinism than with any other regime in the area, or indeed with any other regime in the world with some exceptions. Once again I can not name names; I do not know if there are any reporters here or not.

¶229 So, we have to understand what it is we are talking about when we talk about Saddam. Saddam was not another banana republic dictator. He was far more than that. He did not kill hundreds of thousands of Iraqis. He killed two million Iraqis out of a total population, when he took power, of fourteen million. It is a startling statistic.

¶230 I do not know what is going to happen. I think the elections are going to occur on January 30th. I can tell you this: there has been a real debate about that in Iraq, and the debate continues in Baghdad about whether or not elections should be held or delayed. It is a sophisticated, subtle, meaningful debate going on in Baghdad, the likes of which is not occurring in any other foreign capital. There is a tremendous amount of sloganeering about this issue in other capitals. It is being truly debated in Iraq and that, by the way, in itself is a tremendous progress in Iraq.

¶231 I do not accept that we are in civil war now, certainly not in the manner that was suggested. I do not believe that Iraq is liable to ethnic unrest. I do not accept an analysis of Iraq that attempts to break it into its elements, Sunnis, Arabs and Kurds, locked together rather unfortunately by the British.

¶232 Iraq was a nation long before the British entered in 1917, and I do not have time to get into the history of Iraq. But, even if it were not, even if it were a country put together through an exercise of British colonialism in the 1920s, it has been a nation for eighty-

five years now. When the United States was as the modern state of Iraq currently is, I do not think anyone would have said, “Well, it is not a real country despite the fact that at four score and seven years it had a civil war precisely over the issue of whether it should stay together or not.”

¶233 There are foreign pressures that are clear foreign elements in the insurgency which drove the beginning of the insurgency. The number of mistakes made by the occupation authorities in Iraq, including the very fact that an occupation was created, are monumental.

STEPHEN SAWYER:

¶234 Before we turn to Professor Wouters, I would like to offer President Bienen an opportunity to respond briefly to what the Ambassador said.

HENRY BIENEN:

¶235 I mostly agreed with what the Ambassador said, but we have a difference of opinion about ethical differences in Iraq, but that is not what I wanted to respond. I want to put a historical footnote on one point.

¶236 I very much agree that absent 9/11, there would have been no American intervention in Iraq. The political system would not have allowed it, and I do not think that policymakers would have even thought to have moved in that way. But, I do think that what happened in the murder of large numbers of Kurds in the north and Sunnis in the south made a profound impression on policymakers in the US Government.

¶237 I was asked to come back to the Government; I was there, I went out, and I came back during that time. There was a huge debate as to whether to go all the way to Baghdad in the beginning. It was decided, of course, not to do so but rather to stop. President Bush himself was on the fence. The generals did not want to go. General Powell above all was against going; he had always had a very restrained view of American force. You recall the Powell doctrine. There also was the view that there was a fair chance of overthrowing Saddam without American troops. There was concern about being embroiled; what did you do once you got to Baghdad, and how did you get out?

¶238 All those issues were on the table, and they were discussed and debated. When he did not fall and when in the tens of thousands of these helicopters just shooting people in the back of the head in the south and elsewhere, he murdered many Iraqis, I think I had made a very profound impression on a bunch of policymakers who felt guilty. And it has always been said that this President Bush wanted to get even with Saddam because he had ordered his assassination.

¶239 I think more psychologically profound is that the people around now, Vice President Cheney and other, lower level officials, felt very deeply about this policy decision not taken and had a lot of blood on their hands. I myself think it was one of the more disgraceful periods in American foreign policy, and it certainly influenced my view as well – when we are doing all this mea culpa – as to how people think psychologically in the present about the experiences that passed.

¶240 I am convinced that the decision to let him fly and not to create the no-fly zones immediately and profoundly influenced people in this last go-round. That is my belief and there is no statement to the contrary that could persuade me of the difference.

STEPHEN SAWYER:

¶241 Jan.

JAN WOUTERS:

¶242 I must say, all the questions were addressed to the gentlemen here and they have responded to them all, I think, in great detail.

¶243 I do not think there was an answer to the gentleman's question, the gentleman in the back who so pointedly said, if it was wrong to go to war, why is it right to stay there? That is a question to which I do not have an answer. I wonder about the other distinguished panel members.

¶244 I would also like to tie in with one of the observations of this morning's keynote address, in which Lord Hannay mentioned the potential for regional organizations to do something about security and peace under Chapter VIII of the UN Charter. Lord Hannay rightly pointed out the weakness that is caused by the absence or the ineffective character of certain regional security organizations, he mentioned the Gulf, and I would like to ask a very naive question.

¶245 If it is so sensitive and so difficult, given the resentment the Iraqis have for the United Nations, to have an option where the UN is really involved in the first place, is there any potential of having a kind of regional coalition that could provide some stabilization? That is the question I have.

FEISAL ISTRABADI:

¶246 The interim government whose mandate is on the wane obviously made a decision that it would not accept assistance from any of Iraq's immediate neighbors in terms of troops although some offers were forthcoming. Our neighbors as a rule are not Luxemburg and Switzerland, and there was some concern about that. I expect that the transitional government will continue in this policy, and so there are difficulties.

¶247 One of the problems is that there have not been very many offers forthcoming for assistance in Iraq, in part because I think that a legal state of affairs was created whereby Iraq became technically occupied. Resolution 1483 talks about the usages and customs of war and international humanitarian war, specifically referencing the Hague Convention and the Geneva Conventions.

¶248 It is naturally, in some sense, a defeat from the jaws of victory. It took what many Iraqis were willing to accept as a liberation into fact and occupation. That is an image we have not been able to shake off, frankly, even through the transfer of authority and the reassertion of our sovereignty. I was a part of the negotiating team that negotiated Resolution 1546. We wanted the concept of reasserting sovereignty there. I think this is its first use in international law.

¶249 Still, we have an image problem, and so there have not been a tremendous number of offers forthcoming.

¶250 In the end, the actual fact of the matter is – I have to say this, I believe that the Iraqis have had a profound sense of having been alone for twelve years in the arena with Saddam. It may be that Saddam was being weakened, but the people of Iraq were being weakened at a greater rate than Saddam was being weakened.

¶251 I am reminded of the story of the two hunters who stumble onto a bear. The bear surprises them. They lose their guns. The two friends start running and the bear chases them. And the one says to the other, “I do not think I can keep up running.” And the other friend says, “I am not trying to outrun the bear, I am trying to outrun you.”

¶252 Saddam was able to outrun the people of Iraq and that would have continued ad infinitum. He had to go. And I believe this was a just war or right war, although for the wrong reason.

¶253 As far as why should the United States stay in: first of all, I have to say a lot of problems that have been created were created by well-intentioned people who did not really know what they were doing in Iraq, which is unfortunate. A lot of the problems that have been created in Iraq have been created, frankly, by officials employed by the United States.

¶254 I am a kind of semi-quasi-legal argument that there is an assumption of the duty here to see it through. However, I would make an argument from the perspective, “Forget about my desire to have my country not fall apart into utter complete chaos.”

¶255 I could make an argument, which I think now is quite credible and quite true, that from the perspective of the United States interests there, the United States cannot be seen to run away from Iraq. Iraq and the Middle East are too important to the political strategic interest of the United States. We are not South Vietnam of thirty years ago, and the environment in 2004 and 2005 is not what it was in 1975.

¶256 There is September 11th, and if I were an American policymaker, my response to that question would be in the post-September 11th world, do you want to give Abu Musab al-Zarqawi the ability to argue that he drove the United States out of Iraq? That is something for American citizens to ponder.

¶257 As far as the negotiated settlement – by the way, I did not address this – I do not know how you negotiate with al-Zarqawi, and I think Mr. Luers does not think we should negotiate with him either. He has to be taken on and made to meet the maker. I agree that there are forces within the insurgency such that it is possible to peel away those groups with whom it is very possible to negotiate. I can tell you that the interim government offered an amnesty, for instance, for anyone who had been in the insurgency. Immediately.

¶258 This was very early on when the prime minister first took over at the beginning of June. Immediately, the United States said, “That will not apply to people who killed Americans.” That immediately had to put him in the position to say, “That will not apply to whoever killed the Iraqis either.” Who was it going to apply to? I agree with you that the solution to this must be identifying who you can have a rational conversation with and you who you cannot have a rational conversation with and treating those different groups accordingly.

STEPHEN SAWYER:

¶259 I would like to give Lord Hannay an opportunity, if he wishes, to offer a brief comment upon what has been said, and perhaps take us back to where we began with the

High-Level Panel Report where the focus was on the use of force in terms of legality and legitimacy, and I offer the opportunity to Lord Hannay and to Mr. Luers, should they choose to, to offer any concluding remarks that they would like to offer following the remarks of our panel.

¶260 (No response.)

STEPHEN SAWYER:

¶261 Now you can clap.

¶262 (Symposium recessed at 5:30 p.m.)