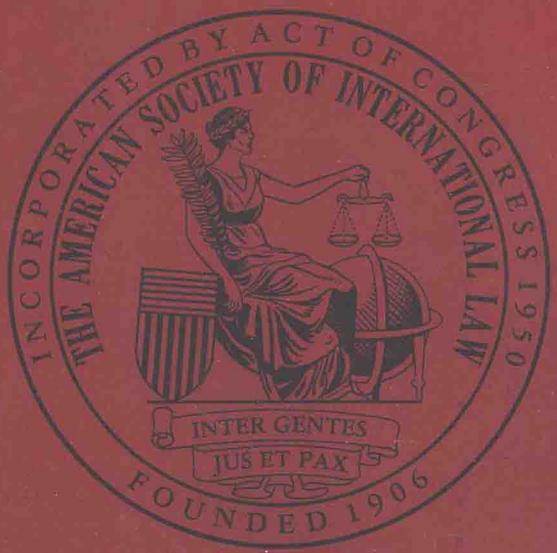
The American Society of International Law

Proceedings of the 85th Annual Meeting



Washington, D.C.
April 17–20, 1991

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PROCEEDINGS OF THE 85TH ANNUAL MEETING

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The American Society of International Law was organized in 1906 and incorporated by special Act of Congress in 1950. Its goals are "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice."

For more than a half century concerned with problems of international order and the legal framework for international relations, the Society serves as a meeting place, forum and collegial research center for scholars, officials, practicing lawyers, students and others. The Society is hospitable to all viewpoints in its meetings and its publications. Those publications include the American Journal of International Law, International Legal Materials, occasional papers and books (many of which are the product of the panels of the Society's Board of Review and Development). A Society membership exceeding 5000 is drawn from some 100 countries. Membership is open to all, whatever their nationality or profession. For information, please write to the Membership Secretary.

Subscription Information

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Introduction

The 1991 *Proceedings* are the record of the Society's 85th Anniversary Annual Meeting. In recognition of the anniversary, the Program Committee adopted a theme for the meeting: "Law and the New World Order: Continuity and Change from an Eighty-Five Year Perspective." In keeping with this theme, panel Chairs were asked to include in their introductory remarks some reference to developments (if any) over the eighty-five year period 1906–1991 in the subjects under consideration.

To pursue the theme in the Introduction to these *Proceedings*, I looked back to the *Proceedings* of the Society's First Annual Meeting held April 19 and 20, 1907 in Washington, D.C. The President, Elihu Root, opened the meeting with the hope that it would "be the first of many meetings in unbroken succession to continue long after we personally have ceased to take part in affairs. . . ." He went on to describe the Society as a "*collegium*, in the true sense of the word, in which all who choose to seek a broader knowledge of the law that governs the affairs of nations may give each to the other the incitement of earnest and faithful study and may give to the great body of our countrymen a clearer view of their international rights and responsibilities."

In keeping with Mr. Root's mandate, the 1991 program includes a diversity of subjects which now properly find themselves considered at the Society's Annual Meeting and recorded in its *Proceedings*.

As with earlier *Proceedings*, this volume represents the collective and coordinated efforts of many individuals. The text of the *Proceedings* is the product of the collaboration of panelists, reporters, the *Proceedings* Editor and copyeditors. A representative and polished record of the meeting emerges from a process of review and comment throughout the stages of editing. This record is drawn from written papers, reporters' notes and transcriptions of taped remarks.

While the Society is grateful to all who contributed to the 1991 *Proceedings*, there are several individuals whose contributions I would like to acknowledge particularly. These are Virginia Cornett, who began work on these *Proceedings* prior to leaving the staff and whose considerable efforts in 1990 cleared up the Society's four-year backlog of *Proceedings*; Fred Donovan, who undertook portions of the copyediting; and Grant McClanahan, who prepared the Index.

Charlotte Ku
Administrative and Programs Director
October 1991

PROCEEDINGS OF THE EIGHTY-FIFTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

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Wednesday, April 17: Afternoon

THE GULF WAR: COLLECTIVE SECURITY, WAR POWERS, AND LAWS OF WAR

The panel was convened by its Co-Chairs, Daniel Patrick Moynihan and Louis B. Sohn, at 2:00 p.m., April 17, 1991, at the Dirksen Senate Office Building, Washington, D.C.

REMARKS BY DANIEL PATRICK MOYNIHAN*

My remarks will be very much by way of introduction. If you think world peace and law is of some consequence, you should get into a fight between the New York Stock Exchange and the Chicago Hog Belly Pit—which is taking place on the Senate floor right now. Our subject today is the Gulf War: Collective Security, War Powers, and Laws of War. I would like to put this subject into a certain perspective.

In September 1990, I published a small book that only the Harvard University Press would dream of publishing called *On the Law of Nations*. It was basically a discourse on the "law of nations," which in my view had been—the term I use is a reference to Clausewitz—lost in the fog of the cold war. This law of nations had been an active commitment, engagement, and concern for American statecraft. But responsible people within successive administrations began to deny the existence of such a body of norms and to associate them with weakness in foreign policy and politics. International law is no doubt an admirable aspiration, but, they seemed to say, it need not affect our international behavior.

As an example, a couple of years ago the American Society of International Law and the American branch of the International Law Association established a committee to discuss the role of the legal adviser of the Department of State. Some of you probably served on that committee. Its report, using a delicacy of phrasing that would commend itself to Talleyrand, included a long discussion of this office that once loomed large in the profession. For instance, when Woodrow Wilson became President, he appointed his legal counsel, John Bassett Moore of Columbia University, to the Department of State. When Wilson went to Paris to negotiate the end of World War I, to his great regret he took only one Republican, but he certainly took Professor Moore.

We have gone from this point, where the President's legal adviser was central to our foreign policy, to the point where the ASIL includes the following "diplomatic" phrase in its report. "In view of the unique responsibilities of the Legal Adviser regarding international law, it is highly desirable that the Legal Adviser have some previous professional training and experience in international law." "Desirable," but not required. It's desirable, if you are going to do brain surgery, to learn certain surgical techniques. People, as serious and as important as Judge Robert Bork, have written articles in responsible journals in which the term international law is placed in quotation marks. These people virtually accuse the Americans for Democratic Action of thinking it up. I have discussed this issue in the book I mentioned, without any great expectation of success.

The bulk of international law—except for a few provisions that have to do with piracy on the high seas—is overwhelmingly, as it affects the foreign policy of the

*U.S. Senator from New York.

United States, to be found in treaties. The United States is party to some 6,000 treaties. Under Article 6 of the Constitution, treaties are the supreme law of the land. When you question whether international law exists, or at least whether anyone should pay attention to it, you are questioning whether a body of law, enacted by the Congress and under the Constitution the supreme law of the land, should be paid attention to. When you ask whether laws have to be obeyed, you are asking the most serious question you can ask in a civil society.

A funny thing happened on the way to the Harvard University Bookstore. Before the book reached the shelves, the fog of the Cold War lifted. Suddenly, the U.S. government was facing a foreign policy crisis and conducting a vigorous policy, by invoking one after another of the principles of international law—in particular the principles of the UN Charter. The time came in August of 1990 when the President used the term international law six times in fifteen minutes during a press conference. That was about the net usage of the previous six presidents.

President Bush went on to invoke the Charter eleven times, and just for good measure, he ended up with a favorable reference to the rule of law. This has been part of the rhetoric of the Gulf crisis ever since, and it was at least part of the calculation in the debate that preceded the use of force against Iraq under Article 42.

In the course of our deliberations here in the Senate, we discussed a long forgotten statute called the United Nations Participation Act of 1945, which provides, as contemplated by the Charter, that the United States would make available to the Security Council certain forces. Thereafter, the Security Council could deploy those forces without further reference to Congress. The 82nd Airborne would be made available to the United Nations and Subic Bay and Clark Airfield. Obviously the President, or his representative, would have to vote for this on the Security Council; but this having been done, Congress would have no further say in the matter. I can tell you, without being specific, that most of the senators we discussed this with did not believe that the Senate had ever voted for such a thing. That's how far we have come—perhaps wisely, perhaps unwisely—from the time in 1945. We are returning to 1945 so quickly that I would like to say let's slow down a little bit. In that mother of all resolutions, Resolution 678,[1] the Security Council invoked the provisions of Chapter VII, about the threat to peace and security, to override section 2(7) on sovereignty. On that basis, the Senate passed a sense of the Senate resolution[2] that I sponsored that said, "well good, so let's do something about it with respect to northern Iraq." Since then, we have been hearing claims that the age of sovereignty is behind us and that the Security Council has made new law, creating the right of interference in internal affairs. On Sunday in the *New York Times*, a French professor spoke of this new right to interfere as a new chapter of international law. For some reason or another, he ascribed it all to the work of France: The Université de Paris Sud, President Mitterand, and the head of international law there have done it again. Whenever the French start getting enthusiastic about something, I start getting cautious. I can't help it.

What the UN General Assembly says about international standards is interesting, but not binding, and what the Security Council says is binding under Article 25, but it's not law. *Stare decisis* does not obtain. There are ways to create law, the Geneva Conventions having been a specific example.

[1] 29 ILM 1560 (1990).
[2] 30 ILM 296 (1991).

I would like to suggest this is a time when the legal profession should stress that there is some discipline in this subject. Those of us who went around saying there was something called international law should not have found ourselves being treated as well-intentioned, but misguided, liberals by people who should have known better. It would do us no harm to say: There are processes by which things become international law; they are very specific; you will know when something is a law when the Senate has ratified a treaty, and not until; and if you have some other ideas, let's hear about them. I note for example Brian Urquhart, who is, God knows, a hero in these things; nonetheless, in this morning's *Washington Post*, he has what can only be described as an irritable op-ed piece. When are we going to get rid of this thing called national sovereignty, he asks.

I think we have come together at a very appropriate time. I would like to thank you for doing so, and I welcome you to the Dirksen Senate Office Building.

Remarks by Louis B. Sohn*

Thank you, Senator. We know that you have to go to the Senate floor. We have a large agenda before us, and I hope the speakers will limit themselves to outlining the main issues.

I have been asked to raise one additional topic that became urgent after our agenda was prepared. Its basic theme is—from aggression to repression. This topic involves two questions. First, could the United Nations have authorized UN forces in Iraq to stop the civil war there that followed the termination of the Iraqi aggression on Kuwait? In particular, could the United Nations have authorized the use of military forces in the Gulf area to use all necessary means to save the Kurds from genocide? Second, could the United Nations, regardless of any Iraqi objections, have provided humanitarian aid to a million refugees fleeing from civil war?

As you know, the Charter prohibition against intervention in "matters which are essentially within the domestic jurisdiction of any state" (Article 2(7)) is subject to one important limitation, namely that "this principle shall not prejudice the application of enforcement measures under Chapter VII." There is also the additional issue whether the genocide of hundreds of thousands of people and military activities resulting in a flood of refugees to neighboring countries are matters "essentially within the domestic jurisdiction of any state." The Security Council has already declared that the repression of the Kurds by Iraq, which led to a massive flow of refugees across international borders, "threaten[s] international peace and security in the region." Does this provide an exemption from the restrictions imposed on the Security Council by Article 2(7) of the Charter? Can it authorize those states that are able and willing to help, to take any action that may be necessary to stop the slaughter of the Kurds, to protect them against any further assault, and to provide them with food and shelter in an area of Iraq temporarily put under UN protection?

I shall not try to answer any of these questions at this time; but I hope you will think about them during the introductions to, and discussion of, the three main issues. I shall try to reserve some time at the end of our allotted time for the issues I have just raised.

*Woodruff Professor of International Law, University of Georgia School of Law.

REMARKS BY ALLAN GERSON*

I fully agree with the comments of Senator Moynihan. It is time for us to get back to basics in terms of exploring what the appropriate role of international law is in the conduct of our nation's foreign policy. I also believe that the questions raised by Professor Sohn are very timely and important, and I hope to provide answers to some of these questions.

I think a great deal of confusion presently reigns about the subject of international law and its proper role in our country's conduct of foreign affairs. Let me cite an example. Writing two days ago in the *Wall Street Journal*, my erstwhile colleague at the American Enterprise Institute, Irving Kristol, argued, "It is both right and sensible for the Bush Administration to remain 'aloof' while the Iraqi regime of Saddam Hussein slaughtered thousands, perhaps tens of thousands, of Iraqi Shiites and Kurds who at our prompting rose up in rebellion." Ostensibly, Mr. Kristol was suggesting that it was "right and sensible" for us to stay aloof even though those slaughtered clearly included noncombatant, innocent civilians—men, women and children. The same Kurdish population today is so fearful of continued slaughter by Saddam Hussein's forces that they have abandoned their homes and escaped with little or no food, water, or shelter to the hazardous border regions with Turkey and Iran in order to avoid the greater risk of genocide at Saddam Hussein's hands. Why, may I ask, is it "right and sensible" for the United States to stay aloof in such circumstances? Mr. Kristol readily acknowledges that the United States, in his words, had "at least two other alternatives": (1) to send our troops to Baghdad so that we can more humanely keep the rebellions in check; and (2) to send our troops to Baghdad so that, against the wishes of our allies, Iraq can be partitioned. As to the latter suggestion, no one has really made or taken it very seriously, but there are in fact other alternatives to the ones posed by Mr. Kristol.

We tend to forget who we are and what it is that we have accomplished. Allied forces, in 100 hours of minimal ground fighting on the heels of a month of devastating air attacks, won in effect the total surrender of Iraq's military. That the U.S. government chose not to actually secure that easily achievable goal is another matter. Then, as now, the United States and allied forces are the de facto authority in Iraq. They tell Saddam Hussein what he can and cannot do, where he can and cannot fly aircraft, and when he may sell his oil and under what conditions. Saddam Hussein takes his cues from us. There were, and are, many ways of telling Saddam Hussein that targeting Kurdish civilians is unacceptable behavior that will not be tolerated. Whatever we order, Saddam Hussein salutes. A few stern words, let alone downing an Iraqi helicopter or two firing at Kurdish civilians, would have been all that was needed. Unfortunately, no such clear signal was forthcoming.

Instead, what happened? Look at UN Security Council Resolution 687[1] of April 3, 1991, perhaps the longest Security Council Resolution on record. Yet, not a single paragraph makes mention of the need, let alone the obligation, to respect the laws of war and the human rights of the Kurdish and Shiite civilians even while fighting their insurrection.

No, I submit that the concerns of Mr. Kristol, and I fear those of President Bush, go much further. They do not want to give the appropriate signals for restraint. I believe this is due to confusion in one case, that of President Bush,

*International Institute, George Mason University.

[1]30 ILM 846 (1991).

and wrongheadedness in the other, that of Mr. Kristol, over the constraints and obligations of international law. Mr. Kristol's argument for staying aloof while civilians are slaughtered is based upon the idea that "national interests alone" should govern our foreign policy, not, in his words, "abstract moralism and high sentimentalism," which are euphemisms for international law. We apparently can justify our behavior in world affairs only by reference to, as Mr. Kristol writes, "resisting aggression, or fighting oppression, or protecting human rights, or vindicating the right of self-determination. In short, by reverting to the rhetorical mode and conceptual categories that Woodrow Wilson didn't invent but helped establish as an orthodoxy and which are now a part of the way we think and feel." (I use Mr. Kristol only as an example of a school of thought which extends from Dean Acheson's derision of international law to George Kennan's attack on America's moralist strain and too I fear extends to President Bush and Secretary of State Baker despite all their pronouncements of a conception of a New World Order as a driving force behind U.S. involvement in the Gulf.) What does Mr. Kristol's view of the "national interests" stand for? What does it require? What gauge does it provide for decision making? It requires, he seems to suggest, first of all, solidifying our alliances with Turkey and Saudi Arabia, both of whom see the prospect of an Arab-Shiite or Kurdish victory in Iraq as trouble for them back home. Human rights abuses in dealing with rebellions do not particularly concern them, and therefore should not concern us. As to the fate of the unfortunate Kurds, chalk that up to, as Mr. Kristol states in his *Wall Street Journal* piece, "bad luck." That is to say, it is bad luck that their twenty million people are divided up among Turkey, Syria, Iraq, Iran, and the Soviet Union—none of which cares to encourage the idea that a united Kurdistan can ever come into existence.

Since law is not a guidepost for foreign policy, what, in Mr. Kristol's view, should President Bush do? The answer is that he should stop talking about a New World Order because that only creates the false impression that we are genuinely interested in democracy and freedom, as opposed to being interested in solidifying relations—at whatever human rights cost—with our strategic allies. Mr. Kristol, therefore, urges the President and the American people to recognize that the time has come for America to realize its "imperial responsibilities." There are no restraints on what we can do as a nation. As to what we *should* do, all that Mr. Kristol (and his school of thought) suggests is that we abide by the wishes of our allies. Thus, we should constantly be seeking the enhancement of national strength.

The alternative, of course, is the rule of law in international relations: the concept of universal standards reciprocally applied. The alternative to power politics is a return to the tradition of Woodrow Wilson, and earlier, on which the UN Charter is based. This approach applies the principles of resisting aggression, of protecting human rights, and of supporting freedom and self-determination everywhere (or at least of being committed in principle to that goal and letting it be our lodestar in foreign policy), while allowing calculations of prudence and of costs and benefits to be factored in to the overall decision of how best to respond to any particular crisis.

If Mr. Kristol is indeed wrongheaded on the idea of the role of law in international affairs, President Bush is somewhat, as I've suggested, confused, and understandably so, and I say this with all due respect. We are swimming today in uncharted waters. I agree, at least roughly speaking, with the article by Jim Hoagland in the *Washington Post* a few days ago. He wrote that with President Bush's repeated references to the New World Order, as a premise for U.S. entry to the

Gulf War, the President may not have "misled others, but he certainly misled himself." My disagreement with Jim Hoagland is that the President did indeed mislead others. He misled them into thinking that the U.S. government was serious about creating a new international order, that it placed respect for promoting freedom and democracy at least as high as it valued the prerogatives of state sovereignty, and that the Bush administration remained as committed as the Reagan administration to the goals of promoting freedom and democracy.

Having said this, let me "put my money where my mouth is" and provide some professional advice—assuming I would be called upon to offer such advice as an international lawyer. What is there specifically that I disagree with and what would I counsel the President to do differently?

First, I would tell Bush that having staked himself as a champion of a New World Order, which is really the old world order of the UN Charter, now is not the time to back down—if for no other reason than that the appearance of vacillation can only hurt him politically. Now, President Bush may respond by saying, "What vacillation?" I would respond by pointing to the recent press conference in which he said, "The United States is not going to intervene militarily." At other times he used the word "intervene" without qualification, but yesterday he said, "The United States is not going to intervene militarily in Iraq's internal affairs and risk being drawn into a Vietnam style quagmire." I would respond that Iraq is certainly not Vietnam: The United States never had de facto control over North Vietnam; it was never in a position to dictate terms to North Vietnam; North Vietnam never suffered a resounding defeat; and North Vietnam was never occupied by U.S. forces. There is, therefore, no factual basis for drawing analogies to North Vietnam, nor is there any basis for viewing the current situation as one in which the United States is in a state of peace with the government of Iraq, in which case the normal rules of law applicable to peace would apply. The situation is far from that. The United States and allied forces and their governments are in a cease-fire mode. You, Mr. President, as commander in chief, are in charge of an occupying power. You should comply with the requests of the International Committee of the Red Cross (ICRC) that the United States acknowledges that it is de jure an occupying power bound by the Hague Conventions of 1907 and the Geneva Conventions of 1949. I know that you are basing that refusal on the grounds that the Palestine Liberation Organization and the radical Arab states would be in position to castigate the United States as being no different than Israel—both working hand in hand as occupying powers in the Middle East, one in the West Bank and Gaza and the other in Iraq. But, please Mr. President, I urge you to think beyond these relatively petty political concerns. You are an occupying power, and you should acknowledge that fact.

In fact, Mr. President, if you accept the idea that you are an occupying power of at least a part of Iraq, then you can achieve a much clearer picture of what your rights and responsibilities are. You see an occupying power is bound by Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land to "take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Now, how far the obligation, territorially speaking, extends is open to question. I would say (and this is controversial) that as a matter of law it extends to all of Iraq. You see, under Article 42 of the Hague Regulations territory "is considered occupied when it is actually placed under the authority of the hostile army." Functionally speaking, all of Iraq is under American or allied authority. Mr. President, you told the Iraqis exactly where their aircraft may or