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Which Law Through Which War? Law Through War Revisited

PROF. DR. PIERRE D'ARGENT†

Four years ago, David A. Westbrook published Law Through War, in the winter issue of this very Review.¹ That essay was the result of a long process of maturing thought, the first drafts of the paper having been written back in 1993, in Louvain-la-Neuve, where, making our débuts as young scholars, we met. I have had the chance to witness the slow emergence of that essay, and to entertain with David (or, hereafter, Bert) many conversations, real and virtual, over the arguments and thoughts he so elegantly assembled. So, when the editors of the Buffalo Law Review asked me to write an “essay,” I thought addressing publicly the thoughts of my friend, with whom I had discussed so much, would make sense. On an even more personal point, after much wrangling with myself and much hesitation about the subject of this paper—European writers on legal doctrine are not used to letting their minds loose in public, reaching the inconclusive positions that are so typical of “essays”—I consider it only fair to use the thoughts of Bert as my starting point, since I suspect he is behind this request that nearly transformed some nice summer weeks into a torturous experiment. . . . So, he wants an essay. Here he has one, on his own terms.

Two more objective and more serious reasons actually explain my intent to revisit Law Through War. The first is that I consider it a remarkable effort to confront honestly the difficult moral and legal questions that post-Cold War uses of armed force have raised. Bert’s articulation of the new “grammar” of international law, as well as the harsh problems flowing from it, has unfortunately received less attention from the community of scholars than I think it

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¹ See David A. Westbrook, Law Through War, 48 BUFF. L. REV. 299, 299-347 (2000). Subsequent citations to pages in this article immediately follow the quotations or propositions in the body of the text.
deserves. My revisitation is therefore firstly an invitation to (re-)read the 2000 essay. This said, I do not intend this paper as an apology. The time for Festschriften, hopefully, is not here yet! Besides, Law Though War itself calls for debate and criticism. My second "objective" reason is much more somber. Since 2000, the United States has, with varying international support, engaged in two major military efforts, in Afghanistan and in Iraq. It therefore remains to be seen how the visionary character of Law Through War, which makes it so interesting and worth meditating, can be said to describe what has happened since the essay was published, and how the essay's warning still resounds.

**LAW THROUGH WAR IN A NUTSHELL**

For the sake of convenience, the following introduction will very shortly report a general understanding of Law Through War, leaving aside many of the related interesting developments that make up the essay and give it its flavor. The essay describes itself "as a preliminary step toward a jurisprudence of warfare." (301) After some introductory remarks, the essay is articulated in three parts, which develop three main arguments.

The first part of the essay describes the shift in thinking about international relations resulting from the end of the Cold War. Bert categorizes influential descriptions of the post Cold War landscape as either progress theories or culture theories. Whatever their intrinsic differences, the two types of theory have very similar strategic implications. Those are to see the world as a dangerous place rather than a place where enemies occupy a certain space; a place where no balance of power has to be fine tuned but where democratic forces confront a certain form of political wilderness that has to be controlled, and even transformed, converted to the liberal order. The underlying argument is that we have come to see the world as divided between "Civilization and Barbarism," as the title of this first part suggests. Those words, loaded with the dark history of European colonialism, have, however, to be taken seriously anew, because, while every people and every nation are, jure et de jure, presumed to be civilized, situations of barbaric violent disorder erupt, be it in Europe (e.g., Bosnia, Kosovo), Africa (Rwanda, Congo, Sudan), Asia (Afghani-
Hence, "barbarism" is used not to describe a particular culture, a people or a country; the word is used to describe a factual situation characterized by the dislocation of social order, the transformation of politics into chaotic killings, and suffering when war lords replace public authorities, relying on blind violence, drug trafficking, corruption and ancient hatreds or irrational creeds in order to cling to power. This distinction between a civilized world and a barbaric world informs the policies of the former when it comes to contemplate using military force in the latter. In a certain way, this distinction "inclines us to military intervention." (303)

Hence, logically, the second part of the essay deals with "International Law and War." It argues that "war has become an element of international law and is no longer an object" of it. (303) After having outlawed war, international law has begun to legalize it. The reason why war, classically understood as the pursuit of national politics by other means, has changed is, fundamentally, because international law itself has changed in two ways.

First, international law no longer pretends to be the opposite of war. Most obviously, international law, through the U.N. Charter, has integrated force in itself as a mean to secure, or rather engender, compliance with its commands. Even if the potential of the Charter has only been revealed after the end of the Cold War, this legal change had been envisaged in San Francisco back in 1945 where it was understood that the provisions of the Pact of the League of Nations and of the Briand-Kellogg Pact were insufficient to provide collective security. Outlawing the "private" wars of States had to go together with a mechanism allowing for "public" wars; i.e., public order violence. International law has also changed in another way, which explains why the first change has been possible. International law is no longer perceived as the result of consecrated or mediated national interests; it appears to be a "precondition for political action within the civilized world." (328) In other words, international law has become the expression of common values and common purposes, truly transcending national politics and interests by preconditioning their expression. In that new international legal order, sovereignty is no longer the ultimate value and explanatory conceptual tool. The intrinsic autonomy that it expresses is rather the result of the "participation in the civilized order." (329) The
fact of departing from that participation opens the way for a possible forcible disrespect of formal sovereignty. Needless to say that the traditional notion of statehood, becoming in a way conditional rather than purely factual, is put under very much pressure by these propositions.

“What law do we give our wars?” (302) is the question explored by the third part of the essay, entitled “Civilizing Violence.” The reader will be disappointed if (s)he is waiting for definite answers to that difficult question. Rather than clear answers, this last argument “suggests ways we may begin to think about our capability for violence” (303) by discussing some realities in American politics and history. By concluding with powerful words—“we moderns fight wars in order to prepare people for politics” (346)—, the essay refers once again to the distinction between barbarism and civilization, not without stressing that our own fears of seeing social ties dissolving at home if barbarism is left unchecked abroad might explain our haste to engage in forcible actions. Not without warning us also that by judging barbarism by default and by too easily justifying political violence, we may come close to engaging ourselves in barbaric acts for the sake of upholding our vision of civilization.

Even if this summary does not stress that point, the first and third parts of Law Through War are actually very much embedded in American realities. The question asked at the very beginning of the essay—“how should we Americans begin to think about using our capacity to make war?” (299)—is always present as a concrete political issue for a specific polity. No doubt, the question is also the result of an overwhelming and unchallenged military capacity which, as such, is never really questioned. The fact that the U.S. military superiority, as a choice and not simply a fact, is never questioned by the essay might lead the reader to think that it seems to be implicitly considered by Bert as a positive factor of potential global order. Needless to say, that view is not unproblematic and is not shared by all. This is not the place to enter in that kind of geo-strategic debate for which I must confess great ignorance, or, to put it more scientifically, abyssal epistemological doubt. Whatever one might think of it, U.S. military superiority is a fact and it would be foolish to think the world we live in without taking it duly into account. This is just what the essay does: Bert is actually not arguing for or against U.S. military superiority. His essay tries to deal with the moral ques-
tions, i.e. the responsibilities, that this very fact engenders. So, because it is written very much from an American perspective, one has to be careful when reading the essay, since some of the proposals it discusses are concretely out of reach for most nations, even if international support—"or at least explicit acquiescence" (333)—for the effort undertaken mainly if not exclusively by the United States is recognized as being desirable when hostilities are undertaken in the name of civilization, or, at least, when they are conducted in order to tame barbarism.

WHICH LAW?

It is one thing to argue that, in the forcible interventions of the post Cold War era, “we are legislating through war.” (334) It is another thing to define the legal product of that forcible effort, to know what law we make through war. This question is not related to the legal reasons justifying the resort to force, the law (be)for(e) the war. It is about the legal principles upheld by war, about the legal order imposed by it, resulting from it, the law made by the war. Is this law a production of the war itself, the result of a violent process? Or is this law predefined, elsewhere, and implemented through the use of military coercion and eventually adapted on the edges in order to fit specific post-war situations?

What is for sure, even at first glance, is that certain predefined principles are obviously breached by a turmoil labeled “barbaric” since that characterization justifies the resort to force. In other words, seen from the other side of the same coin, the legal principles that are the ones that make civilization be what it is, i.e. civilized, are absent from the barbaric situation. Hence the civilized intention must be to establish the rules of civilization. Saying that is fairly reassuring, because it seems to suggest that law, i.e., predefined legal principles rather than naked power, is implemented by war, or at least the sorts of war legitimated by the new grammar. What brings less comfort, however, is the fact that the essay lacks a concrete statement of the rules that make up that law. At one level, the absence of any reference to any specific predefined norm making civilization what it is can easily be explained. The debate is well known and relates to tricky questions of “universalism,” “relativism,” or even “culturalism” in relation to basic
human rights, even if general references to the U.N. Declaration on human rights, the 1966 Pacts, and some basic provisions of international humanitarian law (like the prohibition of war crimes, genocide, and crimes against humanity) are fairly unchallengeable. One has to admit, however, that saying that is not saying much, since the contrary does not make any sense. It would indeed be rather surprising if States were fighting wars in order to suppress those core rights officially. It should therefore not come as a disappointing surprise if Law Through War is silent on this point. More deeply, the essay does not reduce law to a set of rules but conveys a larger understanding of it. Searching for a normative understanding of our current wars, the "law" it envisages as the end product of "war" is more fundamentally what seems to be the right and just thing to do through the incredible powerful tool of social change that armed coercion is. Hence, the "law" envisaged "through war" is actually not a predefined set of principles, being the very ones breached by the combated barbarism. The "law" envisaged is a production, rather than a predefined product.

This is all sensible, but creates unease. What has to come through war—the law that war produces—cannot be confused nor reduced to what has to stop with war—barbarism that can be technically expressed as the breach of a range of rules. Is it possible to breach the gap, to reduce the uncertainty and to affirm precisely what is the "law" resulting from "war"? If, as Bert argues, the grammar of international law now includes war, what if anything does international law say about the end of war, the establishment of lawful peace? Precise answers are obviously impossible, even if they seem desirable, because otherwise the power of the powerful seems all the more unchecked and unlimited. This said, if one turns to the processes that have emerged from the Afghan and Iraq wars of 2001 and 2003, notwithstanding their huge differences, there are no doubt some similarities. Among those are the constitutional processes that have been put in place in both countries. At the time of writing, it was clear that none of those constitutional processes were unquestionable successes, as they were still in progress. However, the purposes and intentions of these constitutional processes are quite clear and fairly similar: to enact a workable basic law that would bring both countries in line with the fundamental elements of a democratic regime, where the power of the State is vested unto
accountable institutions and the basic freedoms of the people protected. So, the general picture is fairly obvious.

This picture may falsely give the impression that the "law" produced by "war" is actually predictable and not so uncertain. This picture may also give the impression that the "law" is just a nice word for western democratic imperialism. This is not really the case, even if the risk of misunderstanding calls for greater communicational skills and efforts. Much uncertainty remains in the aftermath of war, as does the variety of concrete domestic solutions. Above all, those impressions tend to make observers oblivious of a basic fact, which is actually a fact of law: the "law" resulting from contemporary "war" is, at the same time, limited by and contained in two basic and quite traditional principles of international law—the principle of self-determination of peoples and the principle of territorial integrity of States. This might sound very paradoxical. Let me explain by taking as an example the most debated of the recent U.S. wars—the Iraq war of 2003.

**WHICH WAR?**

Before addressing the Iraq war of 2003,² I would like to stress that I do not intend to make arguments in favor of the war, and that the incomplete thoughts of this essay do not have to be understood in that way. Suffice it to say that from the start I have had reservations—to say the least—on the political wisdom and moral justification of the operation, as well as on its legal foundations. I'm not going to comment on politics or morality. As I am writing, fairly embarrassing reports for the U.S. and U.K. governments are being published, and could fuel much debate on those two last dimensions.

As far as the international law justification for the U.S. and British invasion is concerned, just a few quick words. As is well known, the official justification put forward by the U.S. and the U.K. was not based on the legitimate toppling of a heinous regime or a certain form of preventive

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². The following pages are based on a paper presented in June 2004 at a conference held under the auspices of the International Peace Research Institute, Oslo (PRIO) and organized by the European Research Training Network Applied Global Justice. See generally Right of Intervention Workshop, Applied Global Justice, at http://www.worldrepublic.org (last visited Sep. 13, 2004).
self-defense. Bureaucracies are much more refined than that. The argument is as follows: Resolution 678 of November 1990 authorized the use of force to implement Resolution 660 condemning the invasion of Kuwait and the other following resolutions. Resolution 687 of 1991 had set the conditions for the return to peace, including the disarmament obligations of Iraq. By Resolution 1441, paragraph 1, of November 2002, the Security Council unanimously found Iraq in violation of Resolution 687. Hence, says the U.S., the conditions for the return to peace were not respected, and the authorization to use force contained in resolution 678 could be relied upon.

Many things can be said about this argument. Among the elements contradicting the official U.S. argument is the fact that Resolution 687 itself provided for a peaceful enforcement mechanism, by maintaining the economic embargo as long as Iraq did not fully comply with its disarmament obligations. In a system where war is in principle outlawed, any authorization to use force must be strictly construed; hence, it is wrong to imply an authorization from a breach of cease-fire conditions. What few people realize is that France, widely viewed as an opponent of the U.S. administration on the Iraq issue, was actually not so much in legal disagreement with the general line of the U.S. argument. Both in Geneva and in Paris, I have heard Ronny Abraham, director of the legal service of the Quai d'Orsay, say that France did agree with the basic idea that a violation of Resolution 687 opens the way for a revival of the authorization to use force contained in resolution 678. The only requirement, according to France, is that this violation has to be officially pronounced by the Security Council, either in a resolution or in a presidential statement, as was done in 1993 when France took part in aerial bombings of Iraq for failure to cooperate with the arms inspectors. France recognizes that Resolution 1441, in its first paragraph, officially finds Iraq in breach of its disarmament obligations. So far, so good: there is no difference between the State Department and the Quai d'Orsay. The difference—the only difference in legal terms—in the posi-

tion of the two governments is that France considers that paragraph 12 of Resolution 1441 closed the door that was opened by paragraph 1. By paragraph 12, the Security Council “Decides to convene immediately upon receipt of a report [by Hans Blix], in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.” By using “secure” instead of “restore” as was written in the first U.S. draft, France considers the Security Council to have resolved that peace existed between Iraq and the Coalition, despite the breach of Resolution 687 officially pronounced by paragraph 1, and that therefore it was up to the Security Council, after having “conven[e] immedi-
ately,” to decide on an eventual resort to force, and not for individual member States to rely on the thirteen year old authorization.

Both arguments are worth what they are worth: comprised of legal niceties, they are too subtle, too artificial, and too legalistic to be really convincing. Only men in grey suits and elegant ties, reconsidering the world on Friday afternoons with a bottle of whisky and some decent cigars, have time, education, and wit to think that way, and to think they make real sense. It therefore comes as no surprise that the public was fed other justifications for the war. From a purely legal point of view, however, one has to recognize that the difference is very thin between the opposing sides, whatever their political opposition. One has also to understand that this difference could have been legally bridged by a procedure. There is, in other words, nothing substantive in the requirements of the Charter as far as the Security Council action is concerned—not to speak about *jus cogens* limitations upon the Security Council, which are really just hypothesis for the books. Had it wished to write “restore” instead of “secure,” the Security Council could have done so, and, according to the *Quai d’Orsay*, thereby would have “legalized” the war. And to do so, only a procedure has to be followed—nine positive votes on 15, with no negative vote of one of the permanent mem-
bers—, nothing else but a procedure.

I believe, and this paper will assume, that the Iraq War of 2003 was illegal. But even if one has to hold the war to be illegal, in breach of the Charter (and I say nothing on how the war was waged nor about the way the occupation took place), one has to recognize that this is far from ending the
matter satisfactorily, especially when one knows precisely where, technically, this illegality lies. The war was illegal. Yes. And, so what? Is the illegality to be taken that seriously when one knows what it is made of? To be serious, to oppose the war for such a legal reason is not really sufficient nor perfectly credible. Better reasons than this formal legal reason exist to oppose the war. And had the war been authorized, to be in favour of it just for legal reasons is a bit irresponsible, since it would have been waged probably along very similar lines and have created the same political turmoil. Soldiers and civilians would also have been killed, Al-Qaeda would also be rampant, and Saddam would also be in custody, the crimes of his reign revealed.

This said, of course, procedure does matter. It is all too easy to maintain that the war is the same with or without explicit Security Council approval. After all, even an abolitionist can make the difference between stoning someone to death and putting a convicted person on the electric chair after a due process of law, even if in both cases a person dies. If procedure does matter, however, it is not because procedural rules matter for their own sake. It is because the end product of following the rules is—for a range of various reasons—not really the same thing as what results if the procedure is ignored, despite the physical similarities that can exist in both cases. Had the war been duly authorized by the U.N. Security Council after the reported failure of the weapons inspections, the aftermath of the war might have been somewhat different. But with "if," you can put Paris in a bottle, as we say in French. Hence, let us leave aside the question of the legality or illegality of the resort to force in March 2003 by the U.S. and the U.K. Instead, I wish to address the way that (illegal) intervention has been "digested" by the international system. In other words, I would like to identify which legal principles serve to rationalize the end of that crisis. By doing so, one hopes to find legal principles limiting and preconditioning the "law" produced "through war."

The first thing to notice is that this war has not been treated as an illegal act, as an act of aggression by the U.S. and the U.K. Maybe this is because two (rich and powerful) permanent members of the Security Council, being more equal than many others, are concerned. Moreover, this is, after the Cold War, a non-polarized world. Such political and legal realities must not be ignored, since they are
intrinsically part of the system of today and there is no reason to think as if it were not the case. Regardless of the questions of sovereign equality raised by international acquiescence in this war, the fact of the matter is that the classical consequences of aggression have not arisen—and these are fundamental:

- Iraq has not been seriously considered in (collective) self-defense, and nobody came to help it at its request;
- Saddam's regime has not been considered as a government in exile that should regain its lost power—on the contrary, Resolution 1483 of 22 May 2003 appeals to States to deny safe haven "to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice." (§3) Their functions have ceased following a situation that in former times would have qualified as debellatio, so did their immunities;
- The duty not to recognize the consequences of the aggression has not implemented. Indeed, the Security Council has called the international community to recognize the new Iraqi government that will be put in place after the transitional period;
- The U.S. and U.K. forces have not been considered as illegal occupying powers that had to get out of Iraq immediately—on the contrary, the Coalition Provisional Authority has been recognized by Resolution 1483 and the coalition forces have been authorized to stay in Iraq and use force by Resolution 1511 of 16 October 2003 (§13);
- The U.S. and the U.K. are not considered to have to pay war reparations, even apparently by the new Iraqi authorities;
- No State—except Switzerland—has declared itself to be neutral in the conflict and for that reason has stopped to trade in goods that might be of military use;

Most States have not forbidden the U.S. or U.K. using their sea harbors or flying over their territories—sometimes with some political subtleties, like allowing bombers to fly on the way back from Iraq, after having dropped their bombs, but not on the way in to Iraq...; and,

States have not sanctioned the U.S. nor the U.K. and have not taken counter-measures against them for invading another state, an act that many international lawyers like to call an *erga omnes* breach of a *jus cogens* rule...

It is true that States have condemned the war, sometimes with very harsh words having legal connotation, and that some have even used the infamous word “aggression.” This is probably important as far as the survival of the rule prohibiting the resort to force is concerned, since it testifies to an *opinio iuris* that the violation of the rule is treated as such and not as the rise of a new rule—to use the logic of the International Court of Justice in the *Nicaragua* case. My point, however, is not to demonstrate that the war has not changed article 2, paragraph 4 of the U.N. Charter. Some have said that article 2, paragraph 4, died or has been killed long ago. I simply do not agree. Resort to force is still, as a matter of principle, prohibited, and the Charter still is a binding treaty, for that matter, reflecting peremptory customary rules. Many international lawyers have put much effort into proving that the illegal war of 2003 has not changed the rules on the use of force. I could not agree more, but I do not feel the need to agree with such a basic statement, one that even the U.S. would not dispute. The fact is that such a statement of general principles, like the official condemnations on which it relies, does not explain much—nor does the opposite contention.

So, be it as it may, what is to be explained? In order to explain, one has to observe. What is for sure, is that the war has not been “digested” by the international legal system as an act of aggression. This does not mean that the U.S. led invasion was not an act of aggression. The legal description of the war is, however, of little importance when that description does not trigger the application of the usual consequences that go with it. So, what happened? I believe

that two principles have emerged as founding commitments of the settlement of the crisis, two legal principles have been used to "digest" the illegal forcible intervention. Those two principles of international law are:

1. Respect for the territorial integrity of Iraq: no annexation, no division of the country, no acquisition or deprivation of natural resources; and

2. Respect for the right of the Iraqi people to some form of self-determination and respect for its identity as a nation, including its cultural heritage.

Those two principles can easily be traced in the preambles and in the operative parts of the various U.N. Security Council Resolutions adopted since May 2003. They are sometimes interwoven and linked in the same sentence of a paragraph of a resolution.\(^6\) Maybe it is not surprising that those two legal principles are fundamental to the resolution of the crisis—after all, it would be politically unimaginable to ignore them. That said, my point is considerably stronger: those two principles that are at the basis of the settlement, and hence have been left untouched by the (illegal) war, are the very two principles protected by the prohibition on using force.

War is illegal because territorial integrity is to be preserved. It is not a coincidence that war has been outlawed just after all the territories on Earth were conquered. The

\(^6\) On the respect for territorial integrity and natural resources, see:


On the right of the Iraqi people to some form of self-determination and national identity, see:

outlawry of war is a way to freeze conquests. War is illegal because national identities, some form of self-determination of peoples, must exist. The outlawry of war is a way to allow peoples on a territory to organize themselves as they wish, to be what they are, to enjoy self-governance. All taken together, war is illegal because sovereignty is what it is: a free people on a territory.

This view resolves the seeming paradox presented above—namely, that for all the claims that the war in Iraq was illegal ab initio, the world has not treated the war’s outcomes as illegal. The two principles that are the rationale for the prohibition of the use of force have not been set aside by the recent war, but instead are at the centre of the settlement. Some will say that bombs do not respect territorial integrity and that toppling Saddam’s regime is not very much respectful of the principle of self-determination. Whereas there is some truth in the first argument, the second is pure sophism, as it absurdly affirms that the former Iraqi regime represented the will of the people and was freely chosen by it. Regarding the first argument, it actually confuses affecting a territory with seizing a territory, even if it is true that the prohibition to use of force is not limited to a ban on annexations. To go back to my point: the use of force in Iraq—even if procedurally illegal—does not contradict, nor does it endanger, the very reasons why war has been outlawed. Hard to admit, but maybe, in some fairly remote but nevertheless real ways, the illegal use of force actually promotes, or makes way for, the legal principles that are the rationale, the raison d’être, of the rule prohibiting the use of force.

To put it in another way, I think what we are witnessing compels us to put under pressure, and to question, what we have held for more than half a century to be the cornerstone of international law. Maybe the fundamental rule is not the one we thought it was. Maybe the rule on the use of force has been hiding the real law. We have thought of international law as an order where violence had to be outlawed. We have very often reduced (international) law to that (negative) rule. Doing so, we have built an empty system, knowing what we cannot do but ignoring what we must do. Now that we can observe that the use of force, even when illegal, does not necessarily endanger the very substantive reasons for its prohibition, we do not have to abandon that prohibition, we just have to see that law lies
elsewhere than in that behavioral rule and does not necessarily depend on its (dis)respect. In other words, this is not the end of international law as some have feared. This could be the beginning of the maturity of its substantive principles.

**ORDER AND LEGITIMATE VIOLENCE**

Thus behind, or perhaps within, the dichotomy civilization/barbarism lie legal principles that explain not just why we are willing to go to war, but the social order that moderns seek to establish through the use of force. Perhaps surprisingly, one has to recognize that this social order is not very distant from the classical image connoted by “Westphalia” of sovereign States living side-by-side. That image has, of course, been redefined, and sovereignty today is not what it used to be. Much has been said about sovereignty as an outdated concept. Yet peoples are still struggling for independence and national interest is at the centre of the political discourse of the ones who, while not taking sovereignty abroad seriously, do not need to rely on any formal claim of sovereignty to protect themselves. The two principles identified—self-determination and territorial integrity—nevertheless suggest that the current wars do not disrupt that very liberal way of organizing social ties. Failed or abusive governments may call for military interventions, as a last resort. Insofar as such interventions create modern law, they do so not by suppressing, but by reestablishing sovereignty, i.e., by allowing a people to be able to regain control over its collective destiny on a certain territory. This is very different from the wars that were waged when international law came to outlaw aggression in the first place, than the use of force in general. It is because wars were not simply duels anymore—ways to settle disputes between kings—but were very potentially destructive of sovereignty, that a legal change in the status of war emerged: what was previously a freedom became a wrongful act. The prohibition on the use of force was not only a way to freeze conquest, it became a *sine qua non* legal requirement for the liberal Westphalian model of sovereign States living side-by-side to survive. Now, we are witnessing wars that are procedurally illegal but that do not substantively endanger that model and its legal principles. The “law through war” could be the law originally protected by the
prohibition of war, and the politics resulting from the current wars are most probably the modern politics of Westphalian descent.

All this, no doubt, compels us to think again about the place of violence within the international legal order. Lawyers, especially international lawyers, too often think that violence and law are contradictory and they forget that no social order can be upheld without some form of legitimate violence. By being obsessed with the suppression of violence, international lawyers have equated violence with the absence, or destruction, of social order—and social order with the absence of any violence, which is nonsense. No doubt war is evil and even the best prepared and best intentioned (humanitarian) intervention, be it U.N. approved or not, kills innocents and brings suffering. To recall the obvious, war, however legally justified, raises very serious moral concerns. This does not mean, however, that war is outside the law. Indeed, the paradox that I have described, and which also exists in cases of humanitarian interventions, requires us to reconsider the legal character of the use of force. To be sure, this question can be phrased in legal terms, around a legal rule. But arguing around the rule does not inform us at all about the deeper law, the law structuring the social order, that the rule is supposed to uphold and protect. When, as in Iraq, violation of the prohibition on war does not negate the fundamental legal principles of the social order that are supposed to be protected by the prohibition, one has to think of the real sense in which the breach of the prohibition was essentially formal.

Despite formal illegality—i.e. the absence of a U.N. authorization—, could a forceful intervention be legitimate because its end product respects, or even promotes, self-determination of peoples and territorial integrity as understood above? The legitimacy of the resort to force does not only depend on its results. The goal does not always justify the means. So, what does produce legitimacy? It would be foolish to pretend to answer that question, which has haunted jurisprudence since its foundations. When asked in relation to the use of force within the discourse of public international law, however, any answer to that impossible question must take into account the fact that the outlawry of war, first understood as a contractual undertaking not to resolve "private" disputes between States through violence, has received a new institutional and social meaning with
the U.N. Charter. Hence, it seems difficult to sever completely the question of the legitimacy of using force from the institutional framework which has legally transformed war. Are we back to procedural considerations? Perhaps inevitably. Not just because procedure is what comes to the lawyers’ mind when (s)he thinks (s)he has exhausted all other avenues. But because, according to the time and place, upholding the substantive principles of the fragile liberal order can often be done in many different ways. To choose the right one, procedures allow for debate and, so, for the collective identification of common good. At least, it is so hoped.